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THE
New York Supplement.
VOLUME VII.

LITTMAN v. COULTER.

(City Court of New York, Special Term. May, 1889.)

SET-OFF AND COUNTER-CLAIM—WHAT CONSTITUTES.

In an action for rent defendant may set up a counter-claim for conversion of certain articles alleged to have been taken from the premises by plaintiff and wrongfully applied on the rent claimed, as the two causes arise out of the same transaction, within the meaning of Code of Civil Proc. N. Y. § 501, defining counter-claims.

On demurrer to answer.

Action by Morris Littman against Mary M. Coulter, administratrix of Thomas Coulter, for rent. Defendant set up in her answer a counter-claim for conversion of property by plaintiff. Plaintiff demurs to said counter-claim.

Adolph L. Sanger, for plaintiff. *William L. Flagg*, for defendant.

HOLME, J. A cause of action for conversion may be set up as a counter-claim to a cause of action on contract, provided the two causes arose out of or were connected with the same transaction. *Weston v. Turver*, 1 N. Y. Supp. 807; *Farrell v. Krone*, 24 Wkly. Dig. 89; *Morris v. Emmons*, 4 N. Y. St. Rep. 882; *Cass v. Higenbotam*, 100 N. Y. 248, 3 N. E. Rep. 189. The old cases to the contrary have been repeatedly overruled. No other construction of section 501 of the Code¹ seems to me reasonable. The difficulty in cases like the one before me arises from the diverse views that may be entertained as to whether the facts constituting the counter-claim arose out of the transaction referred to in the complaint. In this case the plaintiff sues for rent of certain premises. The defendant sets up, as a counter-claim, damages for conversion by plaintiff of certain articles which were on the same premises, and which plaintiff is alleged to have taken, appropriated, and applied on account of the rent claimed. The defendant, in effect, alleges that the plaintiff claims a lien for the rent on the property alleged to have been converted. It is difficult for me to see how a cause of action thus arising is not connected with the occupation of the premises and the claim for rent which constitutes this transaction, out of which plaintiff's cause of action

¹This section provides that one subject of a counter-claim shall be "a cause of action arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action."

arose. It cannot, of course, be said to be connected with the original hiring, (except perhaps very remotely,) which took place a year before the alleged conversion, but the action is for rent for the last month of the occupation of the premises, at the end of which plaintiff is alleged to have taken possession and assumed a lien on the property of the defendant for the rent due. If the rent was due, the plaintiff may have had a lien, and if there was no rent due, as defendant claims, the taking and detention of the property were wrongful, and I do not see why the purpose contemplated by section 501 will not be effected by disposing of these two questions in the same action; it seems to me that they arise out of the same transaction. Demurrer overruled, with leave to plaintiff to reply within six days, on payment of costs.

FLANERY v. EMIGRANT INDUSTRIAL SAV. BANK.

(Common Pleas of New York City and County, Special Term. May 15, 1889.)

INTERPLEADER—BANK DEPOSITS.

In an action against a bank for certain moneys of which plaintiff claims to have been the actual depositor, where such deposits were made by and in the name of a third person, in whose name the bank-book was also issued, and whose personal representative claims the fund, and plaintiff ostensibly appears to be a stranger to the contract between such depositor and the bank, defendant's motion for interpleader will be granted, though plaintiff will be thereby precluded from introducing evidence which she might have used in the action against the bank.

At chambers.

Action by Mary Ann Flanery against the Emigrant Industrial Savings Bank to recover moneys deposited by one Margaret Kilfoyle, deceased, and now claimed by Patrick Kilfoyle, her administrator. Defendant moves for an interpleader.

Hart & Price, for plaintiff. *Richard O'Gorman, Jr.*, for defendant.

DALY, J. The application of the bank to interplead the administrator of Margaret Kilfoyle, deceased, as defendant, should be granted. The deposit was made in the name of the deceased, and the bank-book was issued in that name. The plaintiff, ostensibly a stranger to the contract between the depositor and the bank, has brought this action, claiming to be the actual depositor. In such a case the bank should be relieved and the rival claimants compelled to litigate the title to the deposit between themselves.

The fact that the plaintiff in an action against the bank could give evidence of personal transactions with the deceased, which she would not be permitted to testify to as against the administrator, is no ground for refusing the interpleader. The hardship would be suffered by the bank if the motion were denied, and it were sued by the administrator, and as between the bank and this plaintiff the former is the innocent party and should not suffer. Motion granted.

In re LASAK'S ESTATE.

(Surrogate's Court, Westchester County. April, 1889.)

WILLS—PROBATE—PARTIES—EXECUTORS.

Though under Code Civil Proc. N. Y. § 2614, *et seq.*, providing that an executor, devisee, or any other person interested in the estate of the alleged testator, may present a petition for probate of a will, and providing also for the citing of husband, wife, and other persons, but not an executor, the executor is not a necessary party to the probate of a will, yet where the parties are cited and appear, on a petition filed by the executor, he cannot discontinue the proceedings without the consent of all, especially after he has appeared and examined witnesses.

Motion by John G. Wendel, as executor of the will of Francis W. Lasak, to dismiss the probate proceedings of said will.

S. B. Brownell, for executor. *George G. Reynolds*, for Victoria A. McKenzie, in support of the will. *Mr. Johnson*, for Ophelia J. Cuthbert, on the same side. *Mr. Cardozo*, for Cordelia D. Chauvet, contestant. *Aaron Kahn* and *Robert Sewall*, for Antoinette L. Schermerhorn, contestant. *Chas. F. MacLean*, for Margaret S. Ives, contestant.

COFFIN, S. It is provided by section 2614 of the Code of Civil Procedure that an executor, devisee, legatee, or any other person interested in the estate of an alleged testator, may present a petition to the surrogate with a view to its probate. The next section provides for the citing of husband, wife, heirs at law, and next of kin, but not the executor. Hence, if any person other than an executor applies for probate, the executor need not be cited or made a party to the proceeding. So, too, all the parties in interest, without the executor, may appear before the surrogate and ask for immediate probate, which will ordinarily be granted. The executor, as such, is not, therefore, a necessary party to the proceeding. He is simply permitted to make himself such party by petitioning for a citation to be served on the proper persons. After all the parties have been cited, and some of them appear, a part of whom are desirous that the will should be sustained, and others that it should be rejected, and they enter upon a contest in regard to it, the executor, if he so elect, may sit by as an idle spectator of the controversy, or absent himself, at his option. There is no power possessed by the court to compel him to take an active part, and no order permitting him to withdraw is necessary. He has no beneficial interest under the will, and, if he even declines to examine the subscribing witnesses, the surrogate, in the discharge of his duty, would be compelled to do it. For he "must cause the witnesses to be examined before him," (Code, § 2618,) and any court may propound questions to witnesses. Indeed, surrogates in former times personally examined witnesses, and, where there is no contest, they constantly and habitually do so now.

Where, however, the parties appear on the return-day of a citation in a probate case, it seems to me that the executor has no power to discontinue or withdraw the proceeding without the consent of all. He is the mere instrument by which they are brought into court in order that they may assert their rights, and contend for what they may deem to be their interests. He, by the facts stated in his petition, has conferred jurisdiction of the subject-matter, and, by proof of proper service of the citation, of the persons, upon the surrogate, and he cannot divest it of such jurisdiction by any act of his, more especially after appearing in court and duly examining the subscribing witnesses to the alleged will. The motion is denied.

PROGRESSIVE HANDLARGER UNION v. GERMAN SAV. BANK.

(Superior Court of New York City, Special Term. May 13, 1889.)

INTERPLEADER—ACTION FOR DEPOSITS.

LAWS N. Y. 1882, c. 409, § 259, providing that in all actions against any savings bank to recover a deposit any persons claiming the same fund, and strangers to the action, may be made parties thereto upon defendant's petition, and that, upon payment of such money into court, such bank shall be stricken out as a party to the action, and be relieved of responsibility for such fund, applies to an action against a savings bank for a deposit which had been previously demanded by a third person, whether such third person claims the whole of such deposit or not.

At chambers. On motion for interpleader.

Action by the Progressive Handlarger Union No. 1 against the German Savings Bank, to recover certain deposits made with defendant. The Laborers' Union Protective Society No. 12, prior to the commencement of this action, had made a demand upon defendant for such funds. LAWS N. Y. 1882, c. 409, § 259, provides that "in all actions against any savings bank to recover for moneys on deposit therewith, if there be any person or persons

* * * claiming the same fund, who are not parties to the action, the court in which such action is pending may, on the petition of such savings bank, and upon eight days' notice to the plaintiff and such claimants, make an order amending the proceedings in such action, by making such claimants parties defendant thereto; * * * the deposits which are the subject of said action may remain with such savings bank * * * or be paid into court to await the final determination of the action, and, when so paid into court, the corporation shall be stricken out as a party to such action, and its liability for such deposit shall cease." Defendant moves to substitute the Laborers' Union Protective Society No. 12 as defendant.

Goodhart, Phillips & Rosenberg, for plaintiff. *S. Kaufman*, for defendant.

SEDGWICK, C. J. The application should be granted, under section 259, c. 409, Laws 1882. That section contemplates that, as in the present case, an action at law may be brought by a person in whose name the account with the bank is, and then, that a third person may claim the deposits as a fund equitably belonging to the third person, and that in such a case the section should be applied. I have a little doubt as to whether the claimant actually claims the whole of the deposit. If this be so, I am of the opinion that the section will still apply. Motion granted.

PRYOR v. FOSTER.

(*Superior Court of Buffalo, General Term. July 12, 1889.*)

APPEAL—WEIGHT AND SUFFICIENCY OF EVIDENCE.

It cannot be said as a matter of law that a finding of fact against the defendant in an action for fraudulent representations is erroneous, where the evidence introduced by him fails to establish a preponderance in his favor to overcome the inference of fraud arising from the plaintiff's evidence, to the admission of which he assigned no error.

Appeal from municipal court.

Action by John L. Pryor against Hubbard A. Foster, for damages for false representations made by him in regard to the heating capacity of a furnace in a house leased from him by plaintiff. Judgment for plaintiff, and defendant appeals. For opinion on former appeal, see 1 N. Y. Supp. 774.

Argued before **BECKWITH, C. J.**, and **TITUS and HATCH, JJ.**

E. J. Plumley, for appellant. *Fullerton, Becker & Hazel*, for respondent.

TITUS, J. This case, when last before this court on an appeal from a judgment of nonsuit from the municipal court, was reversed on the ground that there was evidence from which the judge below or a jury could find that the defendant had been guilty of fraudulent representation, in making the lease of the premises to the plaintiff, as to the capacity of the furnace in the house to supply a sufficient quantity of heat to properly warm the dwelling-house on the premises. The evidence, taken on behalf of the plaintiff on the former trial, was read and considered in evidence by stipulation on the trial from which this appeal is taken. Evidence was given by the defendant for the purpose of overcoming the plaintiff's proof of fraud, and the court below found in favor of the plaintiff on this disputed question of fact. No error is claimed to have been committed in the admission of evidence. We are of the opinion that our former decision (1 N. Y. Supp. 774) is decisive of the questions here raised. It cannot be said that there is such a preponderance of evidence on the part of the defendant as to entirely overcome the inference of fraud raised by the plaintiff's testimony and his witnesses. The court below had all of the witnesses before it, and we cannot say, as a question of law, that an error was committed in finding the fact against the defendant. The judgment must be affirmed, with costs. All concur.

BOASBURG v. CRONAN *et al.*

(Superior Court of Buffalo, Trial Term. June 12, 1889.)

MUTUAL BENEFIT INSURANCE—TRUST TO PAY DEBTS.

Money due on a beneficiary certificate, made payable to a third person for the purpose and with the understanding that it shall be applied in payment of the debts and funeral expenses of the assured, is impressed with a trust to that effect, which equity will enforce.

Ullman & Ullman, for plaintiff. *Andrus & Joyce*, for defendants.

TITUS, J. This action, in form, is against Timothy J. Cronan and Neptune Lodge No. 57, Empire Order of Mutual Aid, but is, in fact, against Timothy J. Cronan, the beneficiary named in the certificate. The defendant Empire Order of Mutual Aid does not defend or claim exemption from the payment of the money, \$1,000, to the person designated in the certificate, but comes into court, and by its treasurer disavows any claim to the fund, and is ready and willing to pay to whomsoever the court determines is entitled to it.

The claim of the plaintiff is that the fund in the hands of the defendant Cronan is impressed with a trust to pay the plaintiff, and other creditors of Daniel Cronan; that the money was made payable to Timothy J. Cronan by the deceased for the express purpose and with the understanding of the defendant Cronan that it should be applied by him in the payment of his debts and funeral expenses. From the evidence in the case, I am satisfied that such was the agreement and intent with which Timothy J. Cronan was made the payee in the beneficiary certificate. Such being the case, equity will enforce the trust, and charge the fund in the hands of the defendant Cronan with the payment of the debts and funeral expenses of the deceased. The authorities cited by the defendant do not militate against this proposition, as the facts in this case take it out of the rule invoked by the defendant. They, in substance, lay down the rule that moneys received by a beneficiary in a certificate are not assets of the deceased, and not subject to the payment of his debts as against the beneficiary. In this case, the deceased has, by agreement, made the fund payable to the defendant Cronan for the express purpose of paying creditors; the defendant, therefore, is a mere trustee to effectuate that purpose, and has no claim on the fund as against the plaintiff and those creditors who were mentioned, and for whose benefit the fund was created.

The facts, although meager, are sufficient to establish the plaintiff's right to recover. Judgment is ordered for the amount claimed by the plaintiff, with interest and costs, and the Empire Order of Mutual Aid is directed to pay the plaintiff that amount, and the balance to the defendant Cronan, to pay debts and funeral expenses.

SCHWARTZ *et al.* v. ALLEN *et al.*

(Superior Court of Buffalo, Trial Term. July 12, 1889.)

1. PAYMENT—PROOF OF PAYMENT.

In an action to foreclose a mechanic's lien after the death of the owner of the house, defendants alleged payment of the debt by decedent in his life-time, but failed to produce any receipt for payment, though it appeared to have been decedent's habit to take receipts. *Held* that, the defense being an affirmative one, with the burden of proof on defendants, the failure to produce a receipt, or reasonably account for its absence, was sufficient to defeat the defense.

2. EVIDENCE—BOOK ENTRIES.

An entry made by a debtor in his own favor is inadmissible to prove payment of the debt, though offered in evidence after his death.

3. SAME—DECLARATIONS.

Nor is the testimony of one who heard him say that he had paid the debt admissible for that purpose.

4. MECHANICS' LIENS—FOR WHAT OBTAINED.

Laws N. Y. 1885, c. 342, § 1, provides that any person who shall perform any labor or service or furnish any materials used in the erection of any house may have a lien for the price and value thereof. *Held*, that a furnace set within a brick structure, and the connecting pipes and appurtenances, are part of the house, and entitle the person furnishing them to a lien for their price.

5. SAME—PROCEDURE—VERIFICATION.

Section 4 provides for a verification of the notice of lien "to the effect that the statements therein contained are true." Section 25 declares that the lien law is to be liberally construed, and that a substantial compliance with its provisions shall be sufficient. Claimant's verification to the notice of lien was that he knew the contents thereof, and that the same were true, but he did not swear that the "statements" were true. *Held*, that the verification, though not in statutory language, was a substantial compliance with the law.

Action by Leopold Schwartz and others against Eliza E. Allen and others, to foreclose a mechanic's lien for a furnace put in a building while it was being constructed. Defendants denied the right of lien for that class of work or materials, objected to the verification of notice of lien as insufficient, and alleged payment of the debt.

Lyman M. Baker, for plaintiffs. *F. R. March* and *Alvin Burt*, for defendants.

BECKWITH, C. J. The action is brought for the foreclosure of a mechanic's lien. Ethan Allen, late of the city of Buffalo, on or about the 1st day of November, 1887, entered into a contract with the plaintiffs by which the plaintiffs undertook to furnish the said Allen, for his residence then in process of erection, a "No. 140 Boynton latest improved Crusader furnace, and to set the same in the best masonry work, with four runs of the best heating pipe to the first floor, and four runs of tin heating pipe in the second floor, with all the necessary register boxes and hot-air pipes, made of tin, to supply heat to the registers, and all the tin flashings requisite to render the same safe and secure from fire," in consideration of which furnace and appurtenances the said Ethan Allen agreed to pay the plaintiffs \$176. The plaintiffs performed their undertaking. On the 26th day of December, 1887, said Ethan Allen died intestate, and the defendant Eliza E. Allen is his widow, and the defendant Francis Julia Allen his daughter and heir.

The defendants contest the plaintiffs' claim mainly upon these grounds: *First*, that "the lien law does not cover a furnace;" *second*, that Ethan Allen, in his life-time, paid the plaintiffs; *third*, that the notice of lien is invalid for want of a sufficient verification.

First. The statute, (chapter 342 of the Laws of 1885,) entitled An act for the better security of mechanics, etc., who perform labor or furnish material for buildings, etc., provides (section 1) that any person who shall perform any labor or service or furnish any materials used in the erection of any house may, upon filing the notice of lien prescribed in the fourth section of the act, have a lien for the principal and interest of the price, and value of such labor and material. It seems too plain to require any discussion that the furnace set within the brick structure, and the connecting pipes and appurtenances, were a part of the house, and that the same passed to the heir as a part of the realty, and that the contribution the plaintiffs so made to the construction of the house entitled them to a lien under the statute. It seems clear that the furnace and its connections, constructed by the plaintiffs, were in fact, and by the parties to the contract, deemed to be a part of the house.

Secondly, as to payment. The defendants claim, and are very sincere in their belief, that the intestate in his life-time paid the plaintiffs. They found their belief on the circumstances that on a certain occasion he took money and went down town with the apparent purpose of paying bills; that the same day he made an entry of payment in his account-book, on a page where he entered all the payments he made on the construction of the house; that

the witness Creagham saw him, on the same day that his entry was dated, coming up Seneca street, the street where the plaintiffs' place of business is located, and from the direction of the plaintiffs' office; afterwards met him on the corner of Main street, and was there told by the deceased that he had got his furnace in, and had just been down and paid for it; and the defendants, for further grounds of assurance that Mr. Allen paid the plaintiffs, and that he would not have made the entry in his book of payment unless he had in fact paid the bill, show that he was a man of marked integrity, and of very exact business habits. The place where the deceased made the entry was on a page which contained only the payments made on the construction of the house and purchase of the lot, headed "Cost of House and Lot." The entries were 15 in number, and this was the eleventh, and the defendants produced receipts showing the actual payment by Mr. Allen, on the day of the date of the entry, of every sum entered on the page, excepting the one in suit; but the defendants are unable to produce any receipt for this item in question. It is claimed by the defendants that, considering the character of Mr. Allen for care and accuracy in his business, his acknowledged integrity, his taking money and leaving his home on the day of the date of the entry with the apparent object of settling his bills, his statement to the witness Creagham, the same day, that he had just been down to the defendants' place and paid the bill, his entry on or soon after returning home, on the said page of his book, of the charge of the payment, the court ought, Mr. Allen being dead, to infer and find the fact that the payment was made.

There are several difficulties in the way of making such an inference of fact. In the first place, the inference would be entirely uncertain whether he paid to one entitled to receive the money. The testimony of Creagham is of a kind recognized as not very satisfactory, for the reason that a witness is very likely to misunderstand a casual remark made in a merely friendly conversation upon an accidental meeting. While the production of receipts showing that the deceased did actually pay all the other 14 charges made by him at the dates of their entry tends to convince the mind that the intestate intended that the entries should be true statements, still, the inability of the defendants to produce a receipt for the item in question operates, perhaps, quite as forcibly to establish this entry as an exception. The testimony shows that Mr. Allen was very particular about taking receipts, which is evidenced by the production of receipts for all those items of entry except the one in suit; and the testimony of Mr. Gieb, of whom the deceased rented a house before he built the house in question for himself. Mr. Gieb says that when Mr. Allen came to him to pay his monthly rent he always came with a receipt for the payment prepared, which he brought with the money. So, therefore, assuming that the court might, from all the circumstances, lawfully deduce a finding of fact as to payment, it would be very difficult to infer satisfactorily, from the offered testimony and circumstances, the fact of such payment. If he paid, the uncertainty as to when he paid; why, contrary to his exacting habit, he omitted to take a receipt for this considerable sum; no circumstances raising a probability of a loss of the receipt; the claim of non-payment by the plaintiffs, against whose business integrity nothing is said,—all these circumstances would leave the truth of the matter so uncertain that the court could not rest satisfactorily on a finding that the intestate actually made the payment.

The defendants have the affirmative, and must satisfy the court of the fact of payment; but, if the evidence offered by the defendants would, properly received, and without objection, justify a finding of payment, there are still the insuperable difficulties in the way of the defendants that the declarations made by Mr. Allen to the witness Creagham, and the entries made by himself in his book, were objected to by the plaintiffs' counsel, and without the aid of such declaration and entry the defendants' evidence would be plainly

insufficient. It is perfectly settled by the courts, in a long series of decisions, that entries of that kind, made by Mr. Allen on a page of his book, being entries in his own favor, are not admissible as evidence. They cannot be admitted under the head of shop-keeper's charges; they were not entries against his own interests; they were not "*res gesta*;" and this court cannot make any new law. That the testimony of the witness Creagham, and that the entries made by Mr. Allen of his payments, are not admissible evidence in favor of the defendants is elementary, and hardly needs the citation of authorities. I will only refer to *Redfield v. Stilt*, 10 N. Y. St. Rep. 366; *Vaughn v. Strong*, 4 N. Y. Supp. 686; *Tilson v. Terwilliger*, 56 N. Y. 273; *Lowery v. Erskine*, 20 N. E. Rep. 588. The statement of Mr. Allen to the witness Creagham, and his entries, are not rendered admissible evidence by reason of his decease. *Romig v. Romig*, 2 Rawle, 241; *Scully v. Wallace*, 15 Serg. & R. 231; *Hess' Appeal*, 112 Pa. St. 168, 4 Atl. Rep. 340.

Third. The defendants further object that the notice of lien is invalid for want of a proper verification, and a great many cases have been cited, and supposed analogies argued, in support of the position. A verification is necessary simply because it is required by the statute, and the particular statute which demands a verification furnishes the measure of what is required. The statute of 1885, c. 342, § 4, provides that the notice of lien must be verified, "to the effect that the statements therein contained are true to the knowledge or information and belief of the person making the same." Section 25 of the statute declares: "This act is hereby declared to be a remedial statute, and is to be construed liberally to secure the beneficial interests and purposes thereof; and a substantial compliance with its several provisions shall be sufficient for the validity of the lien or liens hereinbefore provided for, and to give jurisdiction to the courts to enforce the same." The verification appended to the notice of lien is in these words: "Leopold Schwartz, being duly sworn, says: I am one of the claimants mentioned in the foregoing notice of lien. I have read the said notice, and I know the contents thereof. The same is true of my own knowledge or information and belief." The statute says the notice shall be verified, to the effect that the "statements" therein contained are true. The affidavit does not state that the "statements" contained in the notice are true, but that he has read the notice, and knows the contents thereof, and the same is true. This language is that in professional use in the verification of pleadings, and signifies that the statements of the notice are true. When the affiant declares that the notice is true, he must be deemed to speak of the notice as the instrument in writing, and to verify its statements. The remainder of the verification is that the notice is true of affiant's own knowledge or information and belief, and, as it seems to me, is a substantial compliance with the statute. Mr. Wait says that it is clearly allowable to frame the verification to all pleadings indiscriminately in the exact words of the statute. 2 Wait, Pr. 399. It is sufficient if the substance of the statute, without evasion, is contained in the affidavit. *In re Macaulay*, 94 N. Y. 578; *Waggoner v. Brown*, 8 How. Pr. 212; *Kingsland v. Cowman*, 5 Hill, 610.

Justice BRONSON, speaking of the form of an affidavit required by statute, says: "He may obtain an order for that purpose on an affidavit that 'he believes he has a defense' under the statute. Such an affidavit is sufficient, because the statute so provides. This statute not only fails to prove anything for the defendants, but it proves something against them. We are to suppose that where the legislature uses different words different things are intended." So it may be noticed with respect to the different lien laws that different forms of verification have been required by different statutes; but where in the statute in question it is finally provided that the verification shall be to the effect that the statements are true to "the knowledge or information and belief" of the deponent, we may conclude that that general form was deemed

sufficient, and that it was not intended to require the affidavit to be distributive in form, so as to designate what particular statements are sworn to upon knowledge, and what upon information and belief. Plainly the statute was intended to be construed liberally as a remedy, and not strictly as a departure from the common law. The lien being valid, the plaintiffs had their right of action against the defendants. The defendants have contested the suit, as it would seem, on the faith that Mr. Allen would not have made the entry of payment in his book unless such payment had been actually made. Of course it is possible the payment was made; that it might have been made to some representative of the plaintiffs' firm, who did not account to the plaintiffs for it; but there is no proof that such representatives are not entitled to the same respect for integrity that is claimed for the intestate. If the debt was really paid it is unfortunate for the defendants that the laws of evidence exclude the proofs upon which they relied, but it is clear that the law excludes proof of entries, and declarations of the character of those made by the deceased. The defendants having put the plaintiffs to the expenses of the action without the means of establishing a defense on the merits, the judgment must go against them, with costs.

TIGUE v. ANNOWSKI.

(*Superior Court of Buffalo, Trial Term. June, 1889.*)

NEW TRIAL—SURPRISE—NEWLY-DISCOVERED EVIDENCE.

In an action to recover money loaned, defendant claimed that it was given to her as a present by her son, who, as a witness, denied that in proceedings supplementary to execution against him he testified that he borrowed the money for his mother as her agent. Plaintiff and two other witnesses testified that he did so testify in the supplementary proceedings. Defendant was then granted leave to call a witness to sustain the son's testimony, but neglected to subpoena him, and on his failure to appear the case went to the jury, who rendered a verdict for plaintiff, to which no objection was made as to the principles on which it was found. *Held*, that a new trial on the ground of surprise and newly-discovered evidence could not be granted.

On motion for a new trial.

Assumpsit by Thomas Tigue against Caroline Annowski to recover \$200 loaned to her through her son, John R. Annowski, as her agent. Judgment for plaintiff, and defendant moves for a new trial.

John T. Gardner, for plaintiff. *Roberts, Alexander & Messer*, for defendant.

TITUS, J. This action was brought to recover \$200 claimed to have been loaned to the defendant by the plaintiff in 1882. The answer is a general denial. On the trial the plaintiff gave evidence to establish his cause of action, and the defendant's proof tended to disprove the plaintiff's claim. The theory of the plaintiff's case is that the plaintiff loaned the money to the defendant at the request of John R. Annowski, a son of the defendant, as her agent. While the defendant admits that she received the money from her son, it was not as a loan from the plaintiff or anybody else, but a Christmas present to her, from her son, John R.; that she did not borrow the money or authorize her son to borrow it for her. On the trial, John R. Annowski was called as a witness for defendant, and testified, in substance, that in 1883 he had a lawsuit with one Guerdin I. Ingersoll, in which a judgment was obtained against him, and that proceedings supplementary to execution were instituted on that judgment, and he was examined in reference to his property before Mr. Le Clear, as referee. He says he did not, in that proceeding, testify that he borrowed \$200 from the plaintiff for his mother, or as her agent, and give it to her. After defendant had rested her case witnesses were called by the plaintiff for the purpose of contradicting the statement of John R. Annowski as to the testimony he gave in that proceeding. Ingersoll and Gard-

ner both testified that Annowski was sworn as a witness in that proceeding, and testified that he borrowed the money from Tigue for his mother, and gave it to her. The plaintiff was called and testified that he had a conversation with Annowski about the \$200 at the time the supplementary proceedings were pending, and the witness says he told him that he got the money for his mother, and he said that was what he had sworn to. The case was submitted to the jury, and they returned a verdict in favor of the plaintiff for the amount claimed.

The defendant now moves for a new trial, on the ground of surprise and newly-discovered evidence. The defendant's counsel claimed that he was taken by surprise, and did not know, and had no reason to expect, that any such evidence would be given, or was in existence. He also claims that Mr. Calkins and Mr. Emery were the attorneys having charge of Annowski's case in the supplementary proceedings, and, after consultation and after refreshing their memories, recalled the fact that said Calkins was present at the examination of Annowski, and would testify on another trial that Annowski testified in that proceeding that he obtained \$200 from Tigue, and gave it to his mother as a Christmas present; that he did not borrow the money as the agent of his mother. It appears from the papers in the case that after the plaintiff had given his proof contradicting the statement made by the witness, John R. Annowski, on his cross-examination, that the defendant's counsel asked for time to make an investigation about the matter testified to; that the court took a recess to enable the counsel to present such evidence as he should discover to sustain the testimony of Annowski upon this point. On the reassembling of the court, the counsel announced that Mr. Emery was expected as a witness upon that point, but that he had not yet appeared. After waiting some further time for Mr. Emery, the case was presented to the jury by the counsel. It appears that Mr. Emery was not subpoenaed, but had agreed to come into court and give his testimony. These are substantially all the facts bearing upon this question.

I have made a careful examination of the authorities submitted by the respective counsel, and have examined such other cases as have been brought to my attention. To entitle a party to a new trial on the ground of newly-discovered evidence, it must appear (1) that the evidence has come to his knowledge since the trial; (2) that there was no want of diligence on his part, that he did not sooner discover it; (3) that it is not accumulative; (4) that it is so material and important that it would probably produce a different result if a new trial were had. *Bank v. Heaton*, 6 Thomp. & C. 37; *Railroad Co. v. Sage*, 35 Hun, 95. It cannot fairly be said that the proposed evidence of Mr. Calkins would cause the jury to come to a different conclusion. It would simply present more fully the defendant's side of a collateral issue, and the jury might properly find the same verdict with the new evidence as it did before. It presents no new question, and is of the same nature as the testimony given on the former trial. It is simply additional testimony of like character to that given by the witnesses Tigue, Gardner, and Ingersoll, although it disputes their evidence. *Schultz v. Railroad Co.*, 47 N. Y. Super. Ct. 285. It is not claimed that the jury made a mistake as to the principles on which their verdict was made up. *Sargent v. —*, 5 Cow. 106. The most that can be said for it is that it would present to the jury the evidence of one additional witness upon a disputed fact. In disposing of this motion, as I understand the rule, the testimony of Mr. Emery cannot be considered, for the reason that all of the facts which are within knowledge of Mr. Emery were known to the defendant's counsel at the time. He omitted to subpoena him, and he cannot now claim anything from his testimony. *Messenger v. Bank*, 6 Daly, 190; *Gawthrop v. Leary*, 9 Daly, 353. If the defendant was surprised by the unexpected absence of his witness, or his inability by reason of the occurrence of some unexpected circumstance in the case to meet the evi-

dence, he should have asked for the suspension of the trial, or for leave to withdraw a juror, and not wait to see whether the jury might not, after all, give him a verdict. It is only evidence that is discovered after the trial for which the party can ask a new trial, and not for evidence of which the defendant knew of its existence, but was unable to get it. *Seaman v. Koehler*, 12 N. Y. St. Rep. 582; *Shattuck v. Bascom*, 15 N. Y. St. Rep. 1013; *Hurlbert v. Parker*, 5 N. Y. St. Rep. 454; *Soula v. Oosterhoudt*, 20 Wkly. Dig. 67; *Peck v. Hiler*, 80 Barb. 655; *Messenger v. Bank*, 6 Daly, 190. This evidence partakes of the character of impeaching testimony, and it is for the purpose of sustaining the evidence of the witness Annowski, which has, to some extent at least, been impeached; and it is a well-established rule that a new trial will not be granted on newly-discovered evidence which tends merely to impeach the credit of a witness. This evidence which defendant claims he can produce, while it might tend to establish the main issue, is clearly on a collateral issue raised by the impeaching testimony. On such evidence new trials have uniformly been denied. *Shumway v. Fowler*, 4 Johns. 425; *Durjee v. Denison*, 5 Johns. 249; *Beach v. Tooker*, 10 How. Pr. 297; *Carpenter v. Coe*, 67 Barb. 411. I am therefore of the opinion that the motion for a new trial should be denied.

DEXTER v. BEARD.

(Supreme Court, General Term, Fourth Department. July 20, 1899.)

1. DEED—CONSTRUCTION—RIGHT OF WAY.

A deed made in 1846 had the following clause: "Also a right of way" between the "south line and a line drawn parallel with the north side" of a certain store; "said lane not to be occupied or built upon by either party." The store referred to was built in 1841, and owned by grantor, and bounded the lane, which from its north line to the side of the store was 16 feet wide. There was a hatchway projecting about 5 feet into the lane, leading into the cellar of the store. Held, that the expression "north side of the store" did not mean the north side of the hatchway, and one building where the store stood into the lane 5 feet north of the side of the store to the line of the hatchway will be enjoined.

2. COVENANTS—RUNNING WITH THE LAND.

The expression, "said lane not to be incumbered or built upon by either party," was a covenant with both parties, running with the land, and passed to a subsequent grantee without special assignment.

3. SAME—BREACH.

The fact that the predecessors of defendant had violated the covenants by erection of temporary obstructions does not relieve defendant of his obligations under them.

4. SAME—DAMAGES—INJUNCTION.

Whether plaintiff could obtain full damages at law for the obstruction of the right of way not being made clear at the trial, the injunction was discretionary with the trial court, and will not be disturbed.

Appeal from special term, Cortland county.

The action was brought by Margaret Dexter, to restrain Randolph Beard, defendant, from encroaching upon, incumbering, or building upon a certain right of way appurtenant to the plaintiff's premises in the village of Cortland; and the decision at special term orders an abatement or removal of the encroachment or obstruction placed in the lane. The principal question in the case turns upon the construction of the clause found in a deed bearing date the 5th day of May, 1846, executed by Parker Crosby and wife to William O. Barnard. In that deed a certain village lot was conveyed, and, following the description of the premises thus conveyed, is the following language, viz.: "Also a right of way the whole length of the south line of the above-described lot between the said south line and a line drawn parallel with the north side of the store now occupied by James Van Valen on the grantor's village lot, this day mortgaged to said grantee, to be used by the grantee in common with the grantor, said lane not to be incumbered or built upon by either party, together with all and singular the rights, members, privileges, hereditaments,

and appurtenances whatsoever unto the said above mentioned and described premises in any wise appertaining or belonging." It was found at the special term that "the plaintiff and her grantors were owners of the right of way mentioned and described in the complaint. * * * *Second.* That said right of way is of the width of sixteen feet, and extends in length from Main street, or easterly, to a distance of more than ninety feet; the same being defined in the deeds. *Third.* That this action was commenced on the 13th day of October, 1884, at which time the defendant had commenced to build, and has since built, on his premises, bounding said right of way on the south, a brick building of the height of four stories, and extending from Main street, in Cortland village, east a distance of ninety feet; and said structure or building extends into said lane and right of way four and four-tenths feet in width from north to south, and ninety feet in length from west to east, and obstructs said right of way over said whole distance to the extent of four and four-tenths feet in width and ninety feet in length, and is an unlawful structure and obstruction to plaintiff's said right of way, and to that extent is a breach of the covenant contained in the deeds, to the effect that said right of way is 'to be used by the parties in common, and said lane not to be incumbered or built upon by either party' mentioned in the complaint; and both parties derived their titles under or according to the deeds or conveyances specified in the complaint in this action." The following is the opinion of Judge MERRWIN, at special term:

"On and prior to the 5th of May, 1846, Parker Crosby was the owner of certain real estate in Cortland village. At that date he conveyed a portion of it to William O. Barnard, the south line being bounded 'by a fence on the north line of the village lot this day mortgaged to the grantees.' The deed also had the following clause: 'Also a right of way the whole length of the south line of the above-described lot, between the said south line and a line drawn parallel with the north side of the store now occupied by James Van Valen, on the grantor's village lot, this day mortgaged to said grantees, to be used by the grantee in common with the grantor; said lane not to be incumbered or built upon by either party.' This property conveyed to Barnard fronted on the west upon Main street, and the south line extended back from that street about 150 feet. A portion of the premises, fronting on Main street, and running back on the south line from sixty to seventy feet, was in 1866 conveyed by Barnard to Lucien Dexter, who on February 9, 1874, conveyed to John D. Schemerhorn, who at same date conveyed to the plaintiff and Lucien Dexter. On February 1, 1882, Barnard conveyed to plaintiff the balance of the property on the south line, together with his rights in the right of way and lane. On the 12th day of August, 1846, Crosby conveyed to Van Valen the property south of Barnard, and referred to in the deed to Barnard, except the right of way between the store and Barnard's south line, to be used mutually by Barnard and Van Valen, or their heirs or assigns, respectively. This property, through divers intermediate conveyances, came to the defendant on January 23, 1882; reference to the right of way being made to the deed from Crosby to Barnard in 1846. This action was commenced on the 13th day of October, 1884. The defendant was then commencing to build, and has since built, on his property a large brick building, which on its north side reached to within eleven and six-tenths feet (according to the measurement of defendant's surveyor) of the building on plaintiff's property on the road. The plaintiff claims that she is entitled to have there a space of about sixteen feet in width, that being the distance between the plaintiff's building and the clapboards on the north side of the Van Valen store, as it was in 1846. This store had been erected in 1841 from an old building removed to that site. Under a part of it there was a cellar, in the wall of which, on the north side, about twenty feet from the street, there was an opening from top to bottom about four and one-half feet wide, and a hatchway built out north-

erly about five feet. This was walled up on three sides, the passage-way into the cellar being left open. The wall on the outer or north side was built about to the level of the ground, and at the sides on the east and west the walls were built slanting from the ground up, to about the top of the cellar-wall. There were no stairs in the hatchway. A framework was placed on the top of the three sides, and on this were doors opening each way. Over this hatchway, and projecting about two feet from the upper story of the store, there was a beam covered with a hood, to which a pulley and rope was or might be attached and worked in conveying or raising heavy packages in the hatchway. This hatchway was undoubtedly placed there at the time the store was built on that locality for the purpose of being used in connection with the said store and cellar. The eaves of the store projected on the same side. This hatchway was, in 1866, laid over by Mr. Bradford, the then owner of the store, and a portion of the cellar-wall was also relaid. It is claimed by plaintiff that the north wall of the hatchway was then pushed north about two feet further than it was before. Upon this subject there is a conflict of evidence, but I think the weight of evidence is to the effect that the hatchway was, in 1846, substantially the same size that it was in 1882, when defendant took his deed. Upon the evidence, I should say that there was not enough variation in its size to affect the question in this case. The defendant, in building his present building, did not go beyond the north side or wall of the hatchway. His claim is that he had a right to go so far, and that the plaintiff, holding under the deed from Crosby to Barnard in 1846, had no right south of the line of the north side of the hatchway. The claim of the defendant is, as I understand it, in substance, that the expression in the deed referred to, 'the north side of the store,' means the north side of the hatchway,—the hatchway, for that purpose, being a part of the store; that the right of way there referred to has been by user located north of the north line of the hatchway extended in either direction; that the width between such north line and plaintiff's south line is reasonably sufficient for the right of way contemplated by the parties, and that should control, as the width is not named in the deed; that the expression or agreement about the lane not being incumbered or built upon is not a matter running with the title, and therefore not available to the plaintiff. On the part of the plaintiff the claim is that the right of way as well as the lane is bounded on the south by a line running along the upright clapboarded north side of the store, extended as far east as the south line of the plaintiff extends; that this space constitutes the lane; that up to 1868 or 1869 this entire space was open and used in its whole width as a way, teams whenever necessary passing over the doors of the hatchway, and such full width being reasonably necessary for the uses contemplated by the parties; that the words in the deed in effect constituted a covenant, running with the land, not to build or incumber; that the defendant took title with notice of this covenant, and that plaintiff can enforce it.

"The situation at the time of the giving of the deed in 1846 is to be borne in mind. The south line of Barnard was about 150 feet, on which was a fence the entire distance. If the hatchway then projected out five feet, that left a space between it and the fence of ten to eleven feet. The Van Valen store extended back from the street about forty feet. In its rear was an open space where there was apparently, on the south, no monumental boundary for the right of way or lane. The rear part of the store had been and was used by Van Valen largely for receiving and storing butter and other produce. In the operation of this, teams were accustomed to pass in and out of the lane, and I have no doubt that in so doing they sometimes passed each other in the lane along the store, and sometimes drove over, partially, the hatchway doors. This being the situation, did the parties, when they used in the deed the expression 'the north side of the store,' etc., mean the north side of the hatchway? I think not. It is true that in one sense the hatch-

way was a part of the cellar, and in that way a part of the structure as a whole. Still the side of the store is here referred to as a visible monument,—a basis for a parallel; and that idea should be given to it which would be intended in its ordinary use. It would not refer to the outer edge of the eaves, (*Proprietors v. Hotel Co.*, 51 Me. 413,) or to the side of the cellar-wall, or of a projection in it, but would refer to the surface having a definite and regular form, and which would be meant in the common use of the term. Coming from the street there was apparently a lane, having on the one side the fence on the south line, and on the other the store. The hatchway was at most an obstruction in the lane. The deed, after describing the space over which the right of way was, used the expression 'said lane.' The word 'lane' had not been used before, so that it may be said that the lane then referred to was the space defined by the previous description; and the fact that there was part of the way then, in that particular locality, a lane with definite boundaries, gives force to the idea that by the use of the word 'lane' in connection with the other description the parties by the deed meant to extend the visible lane to the full length of the south line of plaintiff's lot. This would also carry the idea that by the expression 'a line drawn parallel,' etc., the parties meant a line in extension of the north line of the store. Very evidently the parties supposed they had defined a lane; and not only was a right of way provided for, but there was provision for not building on or incumbering a space apparently additional to what might be necessary for a simple right of way. It seems to me that by the deed the lane on the south side is defined by a line in continuation or extension, not of the north side of the hatchway, but of the north side of the store proper; thus making a lane there practically of sixteen feet in width. I don't think it was the intention of the parties to have a lane then only ten to eleven feet wide, especially in view of the use at the time.

"But it may be said that, as the hatchway was there when the deed was given in 1846, there was no intention to give the right to pass over it, and therefore the right of way was intended to be located north of it; still, with the hatchway as it was, the space over it could to a certain extent be utilized in the use of the right of way without injuring the doors or walls, and the fact that it was there would give point to the agreement that the lane, as distinguished from the right of way, should not be built upon or incumbered. The hatchway as it was did not materially interfere with the use of the way or lane, and was not deemed an incumbrance, but its existence gave occasion to parties' definitely providing for a clear space. The expression, 'said lane not to be incumbered or built upon by either party,' was, in substance, a covenant with and by both parties. No particular form of words was necessary. 1 Add. Cont. § 227; *Hallett v. Wylie*, 8 Johns. 44; *Bull v. Follett*, 5 Cow. 170; 2 Wait, Act. & Def. 366; *Lovering v. Lovering*, 13 N. H. 513. It is a question of intent. *Booth v. Mill Co.*, 74 N. Y. 21. This covenant ran with the land, and passed to a subsequent grantee without any special assignment. *Trustees v. Cowen*, 4 Paige, 510. It was of such a nature that it must have been designed to accompany the title on either side. The omission of the word 'assigns' would not change the result. *Denman v. Prince*, 40 Barb. 213.

"The cases cited by the counsel for the defendant on the point that this was only a personal covenant do not, I think, reach the present case. In *Harsha v. Reid*, 45 N. Y. 415, the covenantees did not derive their title from the covenantors, but the covenant was an independent and personal contract, in no way connected with the title, (ALLEN, J., pp. 418, 419;) and the same may be said of *Keppell v. Bailey*, 2 Mylne & K. 517. *Cole v. Hughes*, 54 N. Y. 444, was an action to recover one-half the expense of a party-wall upon a covenant by a grantor of the defendant with the assignor of the plaintiff to pay one-half of the expense of a party-wall when used. No

title passed when the covenant was made. It was held there was no privity of estate; that the covenant did not run with the land, and did not bind the defendant. This case was followed in *Scott v. McMillan*, 76 N. Y. 141, which was substantially like it, as was also the case of *Hart v. Lyon*, 90 N. Y. 668. *Dunlop v. Avery*, 89 N. Y. 592, was about a covenant in a mortgage to keep the buildings on the premises insured. The case of *Insurance Co. v. Insurance Co.*, 87 N. Y. 400, was more like the present. There the grantee in a deed covenanted for himself and his assigns not to build on a certain portion of the premises conveyed, which were adjacent to the remaining land of the grantor. It was held that a subsequent grantee of the remaining land could enforce the covenant against a subsequent grantee of the covenantor with notice of the covenant. It was also said (page 408) that, if necessary to decide it, it would probably be found that there was such a privity of estate that both in respect to the burden and the benefit the covenant adhered to and followed the respective parcels through all the devolutions of the title.

"But it is claimed by the defendant that this covenant not to build, if it was such a covenant, was broken before the title came to the defendant or to plaintiff, and that any right of action which plaintiff's predecessor had against defendant's predecessor did not pass to plaintiff, and that therefore the plaintiff has no remedy on the covenant. Assume the premises, does the conclusion follow? The defendant took title in January, 1882; the plaintiff in February, 1882. Bradford owned the defendant's property from April, 1865, to April, 1881. In the spring of 1869 Bradford built an open stairway, about four feet wide, out into the lane on the north side of the store near the street. This was then, apparently, of a temporary character. It was covered, as I infer, not long before the defendant purchased. In 1873 Bradford built an office, so called, in the rear of the hatchway, that projected out into the lane about as far as the hatchway,—about four and one-half feet, one witness says,—and it was back about twelve feet. This was not a very permanent structure, and it is shown that Bradford, when it was put up, told the carpenter to fix it up to the building, and mar it (the building) as little as he could, because, if Mr. Barnard made a disturbance about it, he thought he should have to take it down. Prior to this, in 1871, Bradford claimed to one negotiating to purchase that he had a right to build out as far as the hatchway extended, but that Barnard claimed otherwise. The defendant, after he bought, made the structure more permanent, and it so remained until it was torn down preparatory to the erection of a new building, just prior to the commencement of this suit. From 1846 up to at least 1869 the parties on both sides seem to have recognized the existence of the lane over the entire space between the buildings on either side. A temporary stairway had been built on the north side of the lane on the building now owned by plaintiff, but, after two or three years, and before 1866, this was taken down. In 1856 the predecessor in title of defendant, in giving a lease for part of the Van Valen store, provided that 'said parties hereto are to have equal uninterrupted right of way through and use of the lane on the north side of said store.' There is no doubt that to a certain extent there was a breach of the covenant before the conveyance to plaintiff and to defendant. The cases cited on this subject by defendant's counsel relate to the consequences upon a breach of the covenant of seisin. Such a covenant is entirely different from the present one. The covenant not to build gives a right in the nature of an easement. It is continuous in its character. It gives the right to have the property in a certain condition, and the benefit of this right is attached to the ownership of the dominant tenement, and the remedy goes with the ownership, not for past damages, but for restoration to the condition that the party is entitled to have. Of such a covenant in regard to a public square it is said in *Stuyvesant v. Mayor, etc.*, 11 Paige, 428, that 'it is a continuing one, upon which actions may be sustained from time to time, as often as the defendants appro-

prate the property, or suffer it to be appropriated, to any purpose other than that of a public square.' See, also, *Beach v. Crain*, 2 N. Y. 86; *Dock Co. v. Leavitt*, 54 N. Y. 35. It is somewhat like the case of a nuisance. Every continuance of that which was originally a nuisance the law considers a new nuisance, and therefore, though the party complaining cannot in an action on the case recover upon the original cause of action after the expiration of six years, he may for its continuance any time before the right of entry is barred by adverse possession. Ang. Lim. § 300. It therefore looks to me quite clear that the defendant and the property were not relieved of the burden of this covenant by the fact that defendant's predecessors did not fully perform the obligations on them. The defendant, by the reference in the deed to him, and from Crosby to Barnard, is chargeable with notice of the covenant, and I have no doubt his predecessor knew of it. Here has been no acquiescence on the part of plaintiff or his grantors that would affect his rights. I see, therefore, no way of avoiding the conclusion that the plaintiff is entitled to have the entire width of the lane kept open and clear from any building or incumbrance, except the hatchway, if that be called an incumbrance; that at the time of the commencement of this action the plaintiff was entitled to an injunction restraining the defendant from placing any of his building on this space; and that, as the defendant has since the commencement of this suit gone on with the erection, the plaintiff is entitled to the decree of the court compelling him to remove so much thereof as encroaches upon the lane. The width of the lane I should, on the evidence, fix as sixteen feet from the south side of plaintiff's building."

Defendant appeals.

Argued before HARDIN, P. J., and MARTIN, J.

Duel & Benedict, for appellant. *Eggleston & Smith*, for respondent.

HARDIN, P. J. After an examination of the case presented us by the appeal papers, we have come to the conclusion that the decision made at special term should be sustained. We are satisfied with the opinion delivered by the trial judge at the special term, and therefore we follow it in disposing of the case before us. In addition to the questions discussed in that opinion, it is now insisted in behalf of the appellant that the covenant not to build upon the lane should not be enforced in equity "where the plaintiff can have full indemnity in damages." Whether she could obtain full damages by an action or actions at law was not made clear at the trial. How could the depreciation of the plaintiff's property, and the effect thereto of the encroachments and obstructions in the future, be determined and recovered in an action at law. *Uline v. Railroad Co.*, 101 N. Y. 98, 4 N. E. Rep. 536. Whether an injunction should issue or not in a case like this is a question calling for the discretion of an equity court. The discretion is not an arbitrary one, but is such a judicial discretion as follows well-regulated equity principles and precedents. We think the discretion was exercised in the right direction by the special term, and in accordance with the principles and precedents adopted and approved by the court of last resort. *Wheelock v. Noonan*, 108 N. Y. 179, 15 N. E. Rep. 67, and cases referred to in the opinion of FINCH, J.; *Story v. Railroad Co.*, 90 N. Y. 122; *Davis v. Lambertson*, 56 Barb. 480; *De Witt v. Van Schoyk*, 35 Hun, 103, and cases referred to in the opinion of HARDIN, P. J., affirmed 110 N. Y. 7, 17 N. E. Rep. 425, and the opinion delivered in this court approved. It is quite apparent that the object of the covenant in respect to the open space was to secure the space from incumbrances and buildings, and therefore "the injunction of a court of equity to enforce the covenant was proper." *Insurance Co. v. Insurance Co.*, 87 N. Y. 401. The change in the neighborhood and circumstances surrounding the subject of the covenant in the case reported as *Trustees v. Thacher*, 87 N. Y. 311, were exceptional, and the court in its decision did not intend to dis-

turb the rule stated in the cases to which we have alluded. These views lead us to sustain the decision made at special term. Judgment affirmed, with costs.

MARTIN, J., concurred. MERWIN, J., not sitting.

FOX v. ONONDAGA COUNTY SAV. BANK.

(*Supreme Court, General Term, Fourth Department. July 20, 1889.*)

1. SAVINGS BANKS—ERRONEOUS PAYMENTS.

In an action to recover money on deposit a witness for defendant testified that plaintiff's pass-book was presented at the bank when the regular teller was absent, and the money was drawn out in each case a day or two after being deposited, and in about the same amounts, and paid by him to the person presenting the pass-book, whom he believed to be plaintiff, whom he did not know. Plaintiff denied having presented the pass-book or received or authorized the several payments. *Held*, that the questions whether she did or not, or whether the pass-book was stolen from her and clandestinely presented to the bank, and the money obtained by a third person, were for the jury.

2. SAME.

Laws N. Y. 1875, c. 871, § 82, as amended by Laws N. Y. 1878, c. 347, in respect to savings banks, provides that the deposits shall be paid to a depositor or his legal representative, after demand and previous notice, under regulations prescribed by the board of trustees, which are to be conspicuously posted in the place of business, and printed in the pass-book furnished by the bank, and which shall be evidence between it and depositors of the terms on which deposits are made; but that no payments will be made unless the pass-book be produced, and the proper entry made therein at the time of the transaction. Defendant adopted a by-law providing that "the treasurer will endeavor to prevent frauds, but all payments made to persons producing the pass-book shall be deemed valid payments, and discharge the bank from any further liability." *Held*, that the question whether or not, under such agreement, the bank was negligent in making advances on the pass-book was for the jury.

Appeal from circuit court, Onondaga county.

Action by Mary Fox against the Onondaga County Savings Bank, to recover \$1,613.10 and interest, deposited with defendant, a savings bank doing business at Syracuse, N. Y., and as the plaintiff alleges never repaid to her by defendant, or drawn out upon her order, or by her authority. The amount of the deposit is admitted by defendant, who alleges that "upon the presentation of said pass-book, and demand therefor by said depositor, or other person lawfully entitled to receive the same, payments were made by the defendant, and duly entered upon said pass-book at the respective dates of such payments," amounting in the aggregate to \$1,642. The answer also sets up that at the time the account was opened "it was understood and agreed by and between said depositors and the defendant that the defendant might and should from time to time pay, to any person presenting the pass-book, the whole or any part of any sum remaining to the credit of said account, as the same might be demanded, in accordance with the rules and regulations of said defendant for the conduct of its business, which said rules and regulations were also well known and assented to by said depositor, and were published and contained in the pass-book issued as aforesaid at the opening of said account, and were also at all of said times duly and conspicuously posted in the business office of the defendant. That upon the occasion of each and every of such payments made said defendant exercised due care and diligence to ascertain that the person demanding such payment has the right and authority to receive the same. Defendant further alleges that if any of such payments were in fact made to any person not entitled to receive the same, that such fact is due solely to the negligence and wrong-doing of the plaintiff;" thus claiming by way of defense that it paid the amount of the deposit directly to plaintiff, and that, if the money was not paid to the plaintiff, but was paid to a stranger, then that it was paid upon the production of the plaintiff's pass-book, and

such payment legally discharges the bank. It was undisputed that defendant paid out the money, except a small balance of \$1.20 left standing on its books to the plaintiff's credit. Plaintiff testified that she never drew or received any of the money so deposited to her credit, except the sum of \$30, the first amount drawn upon the account, and that she never authorized any other person to draw any of the money. That her bank-book was stolen, and that she first discovered that fact July 25th, after the last deposit, and that she immediately, upon discovering the loss, went to the bank to notify the teller not to pay out any money of hers; that her book had been stolen; and then first learned that the money had been withdrawn. The testimony further shows that the plaintiff, although able to write her name, cannot read writing, nor write more than her name; that she had before this time had a small deposit with the defendant; that she reposed great confidence in the officers of the bank; that she kept her bank-book at her rooms in her trunk. It further appeared that she had had some trouble with her husband, and they had separated; that she lived in the house with one Mrs. McGovern, in whom she had confidence, and who was accustomed to make deposits for the plaintiff in this bank, and who had knowledge of the place where her bank-book was kept, and the state of this, her account; that at about the time of the discovery of the loss of this book Mrs. McGovern disappeared, and her whereabouts have not been discovered; that the plaintiff was ignorant of the fact that any money had been charged to her on her bank-book, although there appears to have been many drafts upon this account. It further appeared that the money was usually drawn out in about the amount deposited, and generally within a day or two thereafter, and always at the noon hour, between 12 and 1 o'clock, when the regular teller, Mr. Greenwood, who went to dinner at that hour, was absent. The witness Rose, who acted as teller in Greenwood's absence, testified that he paid this money out on the production of plaintiff's pass-book, and he believes he paid it to the plaintiff herself, although he says he did not know her. The defendant attempted to show also that the plaintiff drew the money, by proving by Rose and others that in their opinion the signatures of Mary Fox to the receipts signed at the time the money was drawn were hers, and were genuine; but one of defendant's witnesses, Mr. Truesdell, a very skillful expert on the genuineness of handwriting, swore that the signatures were not genuine, and so plainly a forgery as to require only casual observation to detect it, and the plaintiff swore positively that the signatures were not hers. At the close of the plaintiff's case defendant moved to nonsuit the plaintiff, on the ground that it appeared that the plaintiff was guilty of negligence "in such manner as to discharge the bank from liability." The court denied the motion, but at the close of the evidence the motion was renewed upon the grounds "(1) that the proofs indicate that the loss, if any, was caused by the plaintiff's negligence, and not by that of the defendant; (2) that the plaintiff's negligence contributed to the loss, and her damage, if any, sustained in this case; (3) that no negligence or bad faith on the part of the bank or any of its employes in the payment of this money has been proved, which entitles the plaintiff to recover herein; (4) no sufficient proof of demand before action brought,"—and was granted. In disposing of the motion the trial judge, among other things, observed, viz.: "It would be requiring too much credulity on the part of intelligent men, it seems to me, to say that she did not know that this money was being drawn, from time to time, as it was drawn; and a finding against any such presumption as that, it seems to me, would challenge the opposition of the court. Then the evidence is, upon the part of the bank, that the money was paid to her. She denies that. If it was paid to her, there is no question in reference to the matter. If it was not paid to her it was paid upon her pass-book; and paid, so far as this evidence is concerned, by the savings bank in good faith, and without any evidence being presented that would in any manner have challenged their attention in

any particular way, on the presentation of a pass-book, and the asking and demanding of a payment, the payment upon it, and the entering upon the pass-book in the ordinary way. Therefore, both upon the question of the payment as relieving the bank of its liability under its by-laws, and the question of knowledge on the part of the plaintiff, evidenced by the pass-book in her possession, that these payments were being made from time to time against her deposits, I think I am compelled to say that, so far as these amounts are concerned, she is not in a position where she can recover." Plaintiff duly excepted to the ruling, and appeals from the judgment entered against her on February 29, 1888, and also from the order dismissing her complaint with costs.

Argued before HARDIN, P. J., and MARTIN and MERWIN, JJ.

Baldwin, Lewis & Kennedy, for appellant. *Stone, Gannon & Pettit*, for respondent.

HARDIN, P. J. Upon considering the propriety of a nonsuit the plaintiff is entitled to have the most favorable view taken of the evidence. She testifies positively that she did not withdraw the money from the bank, which is the subject of the controversy. What credit should be given to her as a witness was a question which ought to have been submitted to the jury. While there are many circumstances detailed by her in the course of her testimony in the direct and cross examination which call for close attention and careful scrutiny, and while the defendant has produced a witness who testifies that he believes the payments that were made by the bank were made to the plaintiff in person, yet the question as to whether the plaintiff in fact received the moneys from the defendant was one of the facts which ought to have been determined by the jury.

In *Merritt v. Lyon*, 8 Barb. 112, the court, in speaking of a witness who had testified upon an important subject, observed, viz.: "Whether, under the circumstances, he was a credible witness or not, was solely a question for the consideration of the jury. A nonsuit cannot be granted on the assumption by the judge that the plaintiff's witness is not to be believed." We think the trial judge disregarded this principle, and the comments which we find he made in granting the motion are indicative that for the moment he became unmindful of the rule just quoted.

In the general statute in respect to powers, rights, and liabilities of savings banks, (chapter 371, Laws 1875,) is found a provision proper to have in mind in the further consideration of this case. In section 23 of that statute it is provided as follows: "The sums so deposited, together with any dividends or interests credited thereto, shall be repaid to such depositors respectively, or to their legal representatives, after demand, in such manner, and at such times, and after such previous notice, and under such regulations as the board of trustees shall prescribe, which regulations shall be put up in some conspicuous place in the room where the business of such corporation shall be transacted, and shall be printed in the pass-books, or other evidence of deposit furnished by the corporation, and shall be evidence between the corporation and the depositors holding the same of the terms upon which the deposits therein acknowledged are made." The defendant complied with this provision of the statute, and its board of trustees prescribed regulations which were put up in a conspicuous place in the bank, and which were printed in the pass-books. As this is a controversy between the depositor and the corporation, we may turn to those regulations for the purpose of ascertaining "the terms upon which the deposits therein acknowledged are made." See section 23, Laws 1875, p. 408. In chapter 347 of the Laws of 1878 we find an amendment of section 32 of the general act of 1875, providing that such banks will not pay a deposit, or any portion thereof, "unless the pass-book of the depositor be produced, and the proper entry be made therein at the time of the transac-

tion." See Laws 1878, p. 435. Upon the evidence it must be assumed that the plaintiff's pass-book was produced at the bank to its officers when they advanced the several sums delivered by them to the party who produced the pass-book as and towards payments upon the account of the plaintiff. Whether the plaintiff was present herself when the pass-book was presented and the several sums advanced by the defendant, or whether the pass-book was obtained surreptitiously from her possession, and clandestinely presented to the officers of the defendant, and the several entries made thereof at the time of the several advances made by the defendant, were questions of fact which ought to have been submitted to the jury. The evidence was conflicting. If the plaintiff is believed as a witness, she did not present the pass-book; she did not receive the sums of money advanced by the defendant; she did not authorize any person to use the pass-book for the purpose of obtaining the money from the defendant. If she is believed, a fraud was practiced upon her by procuring the pass-book, carrying it to the defendant bank, soliciting the money upon the account, receiving the money from the defendant, and allowing the defendant to make the entries in the pass-book. The degree of intelligence or understanding which the plaintiff possessed; the extent of her ability to read the writing; to read figures; to comprehend accounts; to understand the different sides of the account, and the significance of entries therein,—were questions appropriate for the consideration of the jury in determining what credence should be given to her testimony. So, too, the testimony of the defendant's officer, who, in effect, testifies that he paid the moneys to her, is to be considered, and the light of the circumstances disclosed by him as to the time of day when the payments were made, as to the extent of his knowledge and acquaintance with the plaintiff, as to the extent of his confidence in his supposed identification of the plaintiff as the party who produced the pass-book, together with all other circumstances bearing upon the inquiry as to whether the money was received by the plaintiff, or by another person who fraudulently produced the pass-book. We think the evidence called for the submission of such questions to the jury for their determination.

Again, it appears by one of the regulations or by-laws adopted by the defendant, under the statute authorizing such regulations or by-laws, it was provided, among other things, viz.: "The treasurer will endeavor to prevent frauds, but all payments made to persons producing the pass-book shall be deemed valid payments, and shall discharge the bank from any further liability. No depositor shall be entitled to draw any principal or interest without producing the original pass-book, and having the amount entered therein." According to the provision found in section 23 of the act of 1875, to which we have already referred, this regulation is "evidence * * * of the terms upon which the deposits therein are made." It was therefore a part of the defendant's agreement with the plaintiff that it should "endeavor to prevent frauds." It was the duty of the defendant to make proper investigations to obtain proper information and proper knowledge of the identity of the party who presented the pass-book, in order to carry out that part of its contract mentioned in the regulation or by-law from which we have quoted. *Appleby v. Bank*, 62 N. Y. 12. Whether or not the bank exercised proper care in making the advances upon the pass-book, under the circumstances disclosed by the evidence, is, and we think was, a question of fact which ought to have been submitted to the jury. Such is the rule laid down in *Cornell v. Bank*, 9 N. Y. St. Rep. 72. In *Smith v. Bank*, 101 N. Y. 58, 4 N. E. Rep. 123, it was held that "possession by a stranger of the pass-book of a depositor in a savings bank constitutes no evidence of a right to draw money thereon." It was further held in that case, "that to make payments to one having no other evidence of authority than possession of the book a protection to the bank, it is necessary for it to show some special contract with the depositor, authorizing such a mode of payment." In the case to which we have just referred, in clos-

ing the opinion Judge RUGER says: "The court below erred in refusing to submit the question to the jury as to whether, upon the evidence in the case, the defendant exercised reasonable care and prudence in making the alleged payments." It was said in *Boone v. Bank*, 84 N. Y. 88, that where the bank "has agreed to use its best endeavors to prevent fraud it must exercise diligence, and is put on inquiry by circumstances of suspicion." There is some evidence in the case in hand, which, if credited, would warrant the conclusion that there was not the fullest care and highest caution, and perhaps would uphold a finding that there was not an exercise of ordinary care and diligence. We refrain from commenting on the evidence, as the views we have already expressed lead to a new trial, where the questions of fact must be determined by a jury. Judgment and order reversed on the exceptions, and a new trial ordered, with costs to abide the event.

MARTIN, J., concurs. MERWIN, J., concurs in the result.

VAN EPPS v. CLOCK *et al.*

(*Supreme Court, General Term, Fourth Department. July 20, 1889.*)

1. SPECIFIC PERFORMANCE—PAROL CONTRACT TO CONVEY LAND.

In an action for specific performance of a parol contract for sale of land one S., who had been agent for defendant C. for 20 years, wrote to him in March that he had seen the land in question, as directed, and paid the tax on it; that plaintiff wished to buy it, and desired to know the price. Defendant replied: "My price is \$250. Please tend that business for me." S. testified that three days later he took the letter to plaintiff's house, who agreed to take the land, and he so wrote defendant C., but got no reply. Plaintiff took immediate possession of the land, built and repaired fences, grubbed, cut, and burned underbrush, etc., up to May, when defendant W., who had subsequently got a deed of the land, forcibly ousted her, and retained possession. Defendant C. said he had refused to sell to W.'s agent, as plaintiff was going to have the land. *Held*, that the evidence sustained a finding that plaintiff took possession from defendant's lawful agent, and exercised sufficient acts of ownership and performance under the contract to take it out of the statute of frauds.

2. VENDOR AND VENDEE—BONA FIDE PURCHASER.

Defendant W., who purchased the land in May, testified that he was plowing on land adjoining that in dispute after plaintiff took possession, and saw what was done there; that he saw brush fires there; that plaintiff's husband told him she was negotiating to buy the land, and had written to C. S. also testified that he told one M., the agent of W., who was trying to buy the land for W., about the negotiation between plaintiff and himself, and that he had written to C. about it. *Held*, that W. had sufficient notice of plaintiff's possession, and of the agreement with S., to put him upon inquiry as to her rights, and was not a *bona fide* purchaser.

3. SAME—RIGHTS OF PURCHASER.

The rights of a person in possession of land under a parol contract for a sale thereof are not prejudiced or diminished by a compulsory surrender of possession to a subsequent purchaser with notice of the contract and claim of ownership.

Appeal from special term, Madison county; SMITH, Judge.

Action brought by Hannah M. Van Epps against Simon Clock and John Wells, to compel the specific performance of a verbal contract made by defendant Simon Clock to sell a certain parcel of real estate to plaintiff, upon the ground that she entered into possession under the contract, and partly performed the same. The case was tried at special term, before SMITH, J., who found as conclusions of fact:

"(1) That the defendant Simon Clock, was on the 20th day of April, 1887, the owner in fee of the parcel of land described in the complaint, and was desirous of selling the same, and that said Simon Clock, at the town of Sullivan, Madison county, N. Y., then made a verbal agreement with said plaintiff to sell said land and premises to her for the sum of \$250, to be paid upon

receiving a deed of conveyance of said premises in the month of June following, and that in the mean time said plaintiff should have possession of said land.

"(2) That under and in pursuance of said contract, with the knowledge and consent of said defendant Clock, who delivered possession of said premises to her, said plaintiff entered into possession of the same, and retained possession thereof until shortly before the commencement of this action, when she was dispossessed in part by said defendant John Wells.

"(3) That while said plaintiff was in possession of said premises, and on or about the 10th day of May, 1887, said defendant Wells procured said defendant Clock to execute to him a warranty deed of conveyance of said premises, and the same was then executed and delivered to said Wells, and said Wells paid said defendant Clock \$250 in cash for said land.

"(4) That said lands were worth the sum of about \$400, and that by reason of the breach of said contract by said defendant Clock said plaintiff has sustained damages, if said lands are not restored to her, to the amount of \$150.

"(5) That said defendant Wells, at the time he purchased said premises, knew that the plaintiff was in possession of the same, and had notice that there was a verbal contract existing between said defendant Clock and said plaintiff for the sale of the premises by said Clock to her; that, after having notice that plaintiff had such verbal contract for said premises, said defendant Wells purchased the same without making any inquiries of plaintiff; that, if such inquiries had been made, he would have learned the terms of such contract in full, and that said plaintiff had partly performed said contract, and was in possession of the premises thereunder; that said defendant Wells did not purchase said premises in good faith, but with knowledge and notice of plaintiff's rights, or sufficient notice to put him on inquiry in regard thereto.

"(6) That since the making of said contract with plaintiff said defendant Wells has cut off wood, etc., from said premises, to the value of about \$50, and has made improvements upon said premises to a greater amount.

"(7) That previous to the commencement of this action said plaintiff tendered to said defendants, and each of them, the sum of \$250, and requested them to execute a deed of conveyance of said premises, and they refused so to do; that at the time said Clock was requested to execute said deed a warranty deed of conveyance of said premises to said plaintiff was tendered to him ready for execution; that said Clock then told plaintiff that he had conveyed the land once, and could not sell it again, and did not examine or look into the deed presented to him, and did not know what kind of a deed it was, or that it contained any covenants of warranty; that said deed in fact did contain the usual covenants of a warranty deed, but that said Clock did not refuse to execute the same upon that ground; that at the time said defendant Wells was tendered said sum of \$250 and requested to execute a deed of said premises to said plaintiff a quitclaim deed of conveyance of said premises from said Wells to said plaintiff was tendered to him, ready for execution, and that said Wells refused to execute the same.

"(8) That the value of the labor performed by the plaintiff in fencing and grubbing, burning roots and brush upon said premises, while in possession thereof, was about fifteen or twenty dollars, and did not exceed twenty dollars.

"(9) That defendant Wells was a young man, unmarried, and lived with his father, and owned the farm adjoining the premises belonging to the plaintiff and occupied by her, upon one side and in the rear; that the eight acres in question surrounded the plaintiff upon the third side, and came up to the highway, and within fourteen feet of her front door.

"(10) That some time in the month of April, 1887, one Sheldon Smith, being informed by plaintiff that she would like to purchase the said land, at her

request addressed a letter to the defendant Clock, which he received, of which the following is a copy:

"CICERO CENTRE, April 6.

"DEAR SIR: I received your letter the 3d. I went and seen to that wood lot, and paid the taxes on it; it was dollars 31. Mr. Van Epfs would like to buy it this Spring; he wanted me to ask you how much you want for it. I have seen to the Snyder business for you. I have paid 82 dollars and 20 cents of my own; I had to get 70 dollars of Steve. We have lots of snow round yet; roads are very bad. The reason why I did not write before was because I did not get my hay drawn; the roads was so bad nobody could draw; I thought I was going to draw as soon as it was pressed, but it got so bad I could not. This leaves me as usual; hope this will find you and your family well.

Yours truly,

"SHELDON SMITH."

"(11) That in answer to said letter said defendant Clock, through his daughter Elizabeth, sent a letter to said Smith, which was received by him, of which the following is a copy:

"MINDEN, April the 15th, 1887.

"Sheldon Smith, Esq.—DEAR SIR: I received your letter the 9th. I was glad to hear from you, and that you had the matter all settled again. Now, about the wood lot; my price is Two Hundred and Fifty dollars; that is what it cost me, and I will sell it for that sum. Please attend that business for me. I want you to let me know in time so that I know how it is. We have lots of snow yet. Fort Plain bridge has gone to Canajoharie with the high water and ice last Monday night.

Yours truly,

"SIMON CLOCK."

"(12) That on or about April 20, 1887, said Smith showed said plaintiff said letter from defendant Clock so received, and she told said Smith, among other things, that she would take the land at the price of \$250; that she wanted possession of said land at once, and other things; that said Smith told said plaintiff that she could have said land at that price, and have possession of same at once, and that it was a bargain; that defendant Clock would be up about the 1st of June, when she could pay the money and receive the deed, and that he, said Smith, would write Clock to that effect; that immediately after said conversation said plaintiff took possession of said land, and commenced preparing said ground for buckwheat on the very day that said bargain was made.

"(13) That thereafter, and on or about May 1, 1887, said Smith wrote to defendant Clock a letter, received by him, of which the following is a copy:

"CICERO CENTRE.

"DEAR SIR: I now take the opportunity to answer your letter. I have told Steve that you wanted all the money, and I went over and see the man about that wood lot; he said he would get the money for you; he said he would give you price, \$250, for it. Now I will tell you of myself; I cannot get enny for you; I have not got enny to get enny out of; I have had bad luck with my lambs; I am sorry that I cannot; I have not done any spring work yet; it has rained three days rite A long now; this leaves us usual; hope this will find you the same.

Yours truly,

"SHELDON SMITH.

"Mr. Van Epfs will take the wood lot when you come up."

"(14) That the defendant Clock made no reply to the last-mentioned letter, and had no further communication or correspondence with said Smith about the sale of the land, and did not inform him that he would sell the land to the plaintiff, or give her a deed thereof.

"(15) That the defendant Clock had no communication with the plaintiff about the land in question, and did not know her, and did not know that said Smith had assumed to sell the land to her, or had made any agreement with

her in respect to it, and had no knowledge or information of anything being said or done between the plaintiff and said Smith, other than what appears in the letters of said Smith to him, said Clock, above mentioned and referred to.

"(16) That there was nothing said between said plaintiff and said Smith about a warranty deed of said land from said Clock.

"(17) That, for several years before the interview between said Smith and said plaintiff, she caused fences to be made on said land, and used the same more or less for pasturing stock thereon. Said fence remained, and was upon the land at the time of said interview, and was made without the consent or knowledge of the defendant Clock, but he did not own the land at the time said fence was made.

"(18) That this action was commenced by the service of the summons and complaint herein upon the defendant John Wells upon the 9th day of July, 1887, and upon the defendant Clock on the 15th day of July, 1887.

"(19) That plaintiff's husband was her agent with reference to the land described in the complaint, and everything which the evidence shows to have been said or done by him in any manner relating to said land or the purchase thereof was said and done as her agent.

"(20) That prior to April 20, 1887, plaintiff requested Sheldon Smith to write defendant Clock with reference to said land, to the end that she might purchase the same; that, before the alleged contract between plaintiff and said Smith was made, Smith had shown plaintiff the letter from defendant Clock to him, which was given in evidence; that plaintiff read it, and knew the contents thereof.

"(21) That said plaintiff was forcibly dispossessed in part of said premises before this action was begun, and was in part possession of same at the time of the commencement of this action.

"(22) That before this action was commenced said defendant Wells made some improvements in fencing, and grubbing out brush to fit the ground for buckwheat, and that said improvements were of about the value of \$100, and that when this action was commenced said premises, in consequence of said improvements, were worth a considerable sum more than when said defendant Wells bought the same; that all said work was done and improvements made by defendant Wells with knowledge of plaintiff, and his part possession was with her knowledge; that while he was in part possession and making said improvements said plaintiff had notice that he, said Wells, claimed to own said premises."

From the judgment entered thereon defendants appeal.

Argued before HARDIN, P. J., and MARTIN and MERWIN, JJ.

S. Earl and M. E. Driscoll, for appellants. *W. G. Tracy*, for respondent.

HARDIN, P. J. In *Lobdell v. Lobdell*, 36 N. Y. 330, it was said, viz.: "The rule which courts of equity have adopted in suits for the specific performance of contracts requires that the contract be established by competent and satisfactory proof, to be clear, definite, and certain, for the reason, as Judge Story expresses it, that a court of equity 'ought not to act upon conjectures,' and if the proof should end in leaving the contract uncertain, so that the court cannot say what its precise import and limitations are, a decree for a specific performance will be withheld. 2 Story, Eq. Jur. §§ 764, 767. All this depends upon the evidence; and, if evidence is given in the court below tending to the establishment of such a contract, the sufficiency of the proof to satisfy the mind of the court as to the existence of the contract with the requisite degree of clearness and certainty is not a matter for this court to consider." Findings have been made by the trial judge upon evidence which to his mind was satisfactory, and, although there was some conflict in the evidence, the conclusions reached by him, seem to us, from an examination of the appeal-

book, to accord with the weight of the testimony. Sheldon Smith had for several years been intrusted with business transactions for the defendant Clock. However, in April, 1887, as he testifies, he "had no other business for him, Clock, except this." On April 6th Smith addressed a letter to Clock, in response to a letter which he had theretofore received from Clock, in which Smith said, viz.: "I went and seen to that wood lot, and paid the tax on it; it was dollars 81. Mr. Van Epps would like to buy it this spring; he wanted me to ask you how much you want for it." That letter was received by defendant Clock, and on the 15th of April, 1887, in response to Smith's letter, he says: "Now, about the wood lot; my price is two hundred and fifty dollars; that is what it cost me, and I will sell it for that sum. Please tend that business for me. I want you to let me know in time, so that I know how it is." Reading the language just quoted in connection with the circumstances surrounding Clock and Smith, and considering the relations existing between them, we are inclined to the opinion that the expression, "Please tend that business for me," was used for the intention of soliciting Smith to attend to the business of selling the wood lot for Clock for the sum of \$250. Smith evidently so understood the letter, and evidently so informed the plaintiff and her husband, for, after receiving it, he held an interview with the husband, in behalf of the plaintiff, and, according to his testimony, he left his home in Cicero and went to see the husband of the plaintiff. He expressed it in his testimony as follows: "Not long after receiving this letter I went to Mr. Van Epps, and took the letter with me. * * * I was down there, and they wanted to buy it at that price, and wanted me to write to Mr. Clock, and I did so. Then they said they would take it at that price, and then wanted me to write to Mr. Clock that they would take it at that price, and I done so; and I never got any answer to that letter, whether he would or would not at all. * * * They claim it was a bargain. They said they would take the place. I showed them the letter. * * * They said they would pay the money the 1st of June, when Mr. Clock came up. I told him he had to come up about the 1st of June, and would be up if nothing happened more than we knew of. He said if he had it he wanted to clear up some, and put it to buckwheat or something. * * * I might have said it would not make any difference or something. * * * I don't know whether I did or not. I then went home, and wrote to Mr. Clock. * * * How soon after I got home I can't tell; it might have been a day or two, or three or four. I never received any reply to the letter I wrote him. I directed my letter to defendant Clock at Minden, Montgomery county. That is his post-office address. * * * The last letter I wrote to Mr. Clock, and the one to which I received no reply, stated, as near as I can tell, that Van Epps would take the lot at that price, and would have his money for him when he came up the 1st of June." The testimony of the plaintiff and of her husband in respect to the details of the conversation held with Smith in the negotiation for the land is more full and complete, and the circumstance of the letter which he (Smith) had received from Clock was brought out more distinctly, and the circumstances attending the conversation more fully discussed, and the treaty held with Smith as the supposed agent with apparent authority to act for Clock in the sale of the wood lot was given. Their testimony also indicates that they were to be permitted to take immediate possession of the premises, and that they did so, and commenced labor thereon, and continued to exercise acts of ownership and acts indicative of possession, and to make alterations in the fences and the surface of the land in cutting away the brush and underbrush; continued such acts of ownership from the day following the purchase up to the 14th of May, which was the occasion of their receiving their first intimation that their contract made with Smith was not to be carried out, was doubted or disputed, and that Wells had interfered and procured a deed from Clock of the premises. We think the evidence was sufficient to

sustain the findings of the trial judge to the effect (1) that Smith appeared to have authority to make a sale of the premises to the plaintiff on the occasion when the negotiation was had; (2) that the plaintiff acted upon the apparent authority of Smith, and was warranted in doing so; (3) that she took possession in virtue of the negotiation and arrangement made with Smith in respect to the premises; (4) that the several acts of ownership, and the possession, were in virtue of and under the agreement made with him, and they were "sufficient performance to bring it within the well-settled rule that partial performance takes a parol agreement out of the statute of frauds." *Beardsley v. Duntley*, 69 N. Y. 584. While the improvements were slight, while the expenditures of the plaintiff and her agent upon the land were not great, while the money value of the improvements made by her was moderate in amount, it must be borne in mind that the purchase price or value of the land was moderate. The purchase price was \$250. There is some evidence, and there is a finding, that the value of the land was \$400. Apparently the expenditures in repairing the fences and cutting up the brush and underbrush and improving the lands, expenditures and improvements prior to the 14th of May, 1887, may not have exceeded 10 per cent. of the purchase price of the land, yet, under all the circumstances disclosed by the evidence given at the trial, we are constrained to say that the conclusion of the trial judge must be allowed to stand.

We are not able to say, after giving such influence to his findings as they might legitimately receive in a case of this character, that his conclusion upon the facts is against the weight of the evidence found in the appeal-book. We therefore accept his findings of fact in respect to the circumstances of the negotiation and the contract made with Smith as the avowed agent of Clock, and having the apparent authority from Clock to consummate a sale of the property to the plaintiff. Significance must be given to the circumstance that appears beyond cavil that about the 1st of May, 1887, Smith wrote a letter to the defendant Clock, which apprised him of the negotiation and sale of the premises. In that letter Smith said: "I went over and see the man about this wood lot. He said he would get the money for you. He said he would give your price, \$250, for it. * * * Mr. Van Epps will take the lot when you come up." The defendant, after receiving that letter, made no reply. He in no manner refused to be bound by the arrangement which was thus communicated to him. Apparently he acquiesced in the sale of the property, of which he was thus apprised. It seems from the testimony that when the agent of the defendant Wells applied to Clock for the purchase of the land he seemed to understand that an arrangement had been made by which the plaintiff was to have the same, or that she had become the purchaser thereof. In one of the interviews held with him the defendant said, viz.: "He refused three different times to Mr. Marsh; that we were going to have the place; that is what Mr. Clock told me himself; that Van Epps' folks were going to have the place." Considering this evidence with the other we have referred to, we are of the opinion that the defendant Clock became bound by the arrangement which was made between the plaintiff and Smith in respect to the lands. *Lawrence v. Taylor*, 5 Hill, 107.

We have no doubt the learned counsel for the appellant Clock is correct when he states, viz., "that the plaintiff and the defendant Wells had been for some time vieing with each other in their attempts to buy these eight acres, and considerable feeling had arisen between them on the subject;" and we are also of the opinion that the facts and circumstances disclosed by the evidence in respect to the occupation of the premises under the arrangement made with Smith for the purchase of the same by plaintiff were sufficient to put the defendant Wells upon inquiry in respect to the rights of the plaintiff in virtue of the arrangement made with Smith. If inquiry had been prosecuted with diligence it must be presumed Wells would have ascertained the precise state

of the arrangement between Smith as the agent for Clock with the plaintiff. Wells must be dealt with in the same manner as though he had prosecuted the matter with diligence, and ascertained the actual situation. According to *Williamson v. Brown*, 15 N. Y. 354, it may be said, the negligence of Wells in not prosecuting the inquiry is "fatal to his claims to be considered a *bona fide* purchaser." As we said in *Brumfield v. Boutall*, 24 Hun, 456, the rule requires "clear and strong circumstances" upon which the notice is found. We think the evidence in this case sufficiently comes within the rule which we laid down in that case, and we may add from the language used in the case from which we have just quoted, viz.: "We think it was just such a notice as would have awakened the diligence of a prudent man." We think there was such notice as, under the authorities, warranted the court in saying that the defendant Wells had actual notice of the relations which the plaintiff sustained to the property at the time he negotiated with Clock, and parted with his money, and took a deed of the premises. *Ellis v. Horrman*, 90 N. Y. 473. The plaintiff was in possession, exercising acts of ownership, within the sight of and within the knowledge of the defendant Wells before he (Wells) sought to conclude an arrangement with the defendant Clock. If he did not make adequate inquiry it was his own fault. It was said by Judge STORY in *Flagg v. Mann*, 2 Sumn. 554: "If he does not inquire he is bound in the same manner as if he had inquired, and had positive notice of the title of the party in possession." In *Tuttle v. Jackson*, 6 Wend. 213, the chancellor said: "Whatever is sufficient to make it his duty to inquire as to the rights of others is considered legal notice to him of those rights." These cases were cited and followed in the opinion of the court in *Ellis v. Horrman*, *supra*. See page 474.

Plaintiff resisted the efforts of Wells to obtain possession of the premises for some time. He persisted, however, in a resolute way, by forcible means. He expelled her from the possession, and obtained possession himself, after he acquired the deed from Clock. Such possession, under such circumstances, however, gives him no added rights. He stands in the same relation to the property in equity that he would have occupied had she continued to assert her possession down to the day the action was commenced, or down to the day of the trial thereof. We find nothing in *Haight v. Child*, 34 Barb. 186, or *Morrill v. Cooper*, 65 Barb. 519, which warrants us in saying that plaintiff's rights are any the less by reason of the compulsory surrender of possession after the purchase or deed taken by the defendant Wells. We recognize the rule pressed upon our attention by the learned counsel for the appellant Clock, that, "where a vendee of real estate under a parol contract relies upon his entry into possession to take it out of the statute of frauds, his entry must be connected with and referable to the contract, and it must clearly appear that he took possession by the known permission of the vendor. If possession be taken without such permission, express or implied, it is no foundation for relief in equity according to any of the authorities." And, as was held in *Morrill v. Cooper*, the possession must refer to agreement of which performance is sought. But, as we have already said, the trial judge has found upon adequate evidence that the possession of the plaintiff was in virtue of the contract; and her acts of ownership, her improvements to the land, to the fences, were made in virtue of the permission to take possession, given to her by Smith at the time he consummated the arrangement that she might have the land upon paying \$250 therefor to Clock, when he came up in June, and that she might have immediate possession thereof.

We are of the opinion that the court committed no error in allowing the witness Smith to state what arrangement was made with the plaintiff; nor in stating the price for which she might have the land; nor in making the ruling allowing the circumstances of that arrangement to be given in detail by the plaintiff; nor allowing the witness to state what was done upon the property after possession was taken in pursuance of the contract; nor in giving "gen-

eral description" of the land. Nor do we think it was error to receive the evidence in respect to the struggle between plaintiff and Wells over the possession of the property after she received notice from Wells that he claimed to have purchased the same. Nor do we think the defendants were prejudiced by admission of testimony tending to show that the value of the land was \$400. We have found nothing in the course of the trial which warrants us in disturbing the disposition made of the case upon the merits. Judgment affirmed, with costs. All concur.

CLEVELAND v. NEW JERSEY STEAM-BOAT CO.

(*Supreme Court, General Term, Fourth Department. July 20, 1889.*)

1. TRIAL—QUESTIONS FOR JURY.

On issues of fact, where the testimony is conflicting, it is not error for the court to refuse to take the case from the jury because witnesses on one side largely outnumber those giving contradictory testimony on the other; nor is it error to refuse to instruct the jury that credit should not be given to plaintiff's testimony because it in some respects contradicts testimony given by him at a former trial,—these being circumstances affecting the weight of evidence and credibility of witnesses, and proper matters for the consideration of the jury.

2. NEGLIGENCE—CONTRIBUTORY—DAMAGES.

The questions of the negligence of defendant and of the contributory negligence of plaintiff being in issue, and the subject of contradictory testimony, were also properly submitted to the jury, as was the question of the character and extent of plaintiff's injuries, and the amount of damages therefor.

3. DAMAGES—PLEADING—EVIDENCE.

The testimony of plaintiff as to the difference between the wages earned by him before and after the injury was admissible, under the averments of the complaint, that "in consequence of the injury he had been unable to labor, and subject to great expense, and otherwise injured, to his damage in the sum of \$5,000."

Appeal from circuit court, Oneida county.

Action by Charles Cleveland to recover for the alleged negligence of defendant, the New Jersey Steam-Boat Company, a common carrier of passengers, which occurred on the 8th of September, 1873, causing injuries to the plaintiff after he had become a passenger on one of the boats of defendant at the harbor in New York city, just as the boat was about to leave for the city of Albany. Verdict for plaintiff for \$3,000. The case has been much litigated, and the same is reported in 5 Hun, 523, 68 N. Y. 306, 89 N. Y. 627, and 7 N. Y. St. Rep. 529. This appeal is from the judgment entered on the verdict and from the order denying a motion for a new trial on the minutes.

Argued before HARDIN, P. J., and MARTIN and MERWIN, JJ.

R. K. & W. P. Prentice, for appellant. *Edwin H. Risley*, for respondent.

HARDIN, P. J. When the last appeal was before us, (7 N. Y. St. Rep. 598,) in the course of our opinion we said: "We are therefore of the opinion that it was a question of fact for the jury to determine whether the gangway gate had actually been placed within its sockets before the person referred to escaped from the boat, and before the rush of the passengers to the side in response to the exclamation, 'Man overboard!' and the difficulty which a person would encounter in lifting the gate out of its place. * * * The fact that it was taken out of the water unbroken bore quite significantly upon the question of whether the position of the plaintiff taken upon the trial—that the gate had not been placed in its proper position—was true and reliable. To solve that question the principal question of fact, we think, was the province of the jury. If the defendant's boat started without the gangway gate being set, the defendant omitted to provide in time against one of the dangers to be guarded against by the use of such a gate." Upon the trial now under review there was a conflict in the evidence upon the question stated in the foregoing extract from our former opinion. The trial judge carefully and cautiously submitted the question of fact to the jury. The counsel for the de-

fendant seems to be of the opinion that because there were some contradictions in the testimony of the plaintiff as a witness, found in comparing his testimony on the present trial with that given on the former trial, the court ought to have ruled as a matter of law that the jury might not give credit to the plaintiff as a witness. We think his position is unsound. We think the trial judge properly confined the question to the jury, with proper instructions, allowing them to determine, from all the circumstances before them, upon the evidence tending to corroborate the plaintiff, whether or no the position taken by him on this trial was in accordance with the truth.

Several witnesses were called in behalf of the defendant to prove that the gate was in position. According to well-recognized precedents the circumstances that the defendant's witnesses on that subject outnumbered the witnesses of the plaintiff upon the same subject does not furnish an occasion to disturb the verdict. In *Wright v. Saunders*, 65 Barb. 214, it was said, viz.: "Four witnesses against one is a very great preponderance. Yet it was the right of the referee to believe the one and disbelieve the four. He saw and heard them, and he is much better able to determine the amount of credit to which they were respectively entitled than we can be." That case was affirmed by the court of appeals, and is reported in 42 N. Y. 323, and 36 How. Pr. 136. Besides, several of the witnesses who were called for the defendant were in its employ, and more or less interested in the question involved. What credence should be given to them was for the jury to determine. In *Elwood v. Telegraph Co.*, 45 N. Y. 554, in referring to witnesses somewhat similarly situated, RAPALLO, J., said: "The witnesses, though unimpeached, may have such an interest in the question at issue as to affect their credibility. * * * Each of them, if guilty of the negligent act, would have the strongest motive to deny it, as the admission would subject him or her to severe responsibility for the consequences. This is a controlling consideration in determining whether the statements of these witnesses should be taken as conclusive. Without imputing a want of truthfulness to these witnesses, we think that their relation to the subject-matter in controversy was of itself sufficient to take from the court the right to dispose of the case upon their evidence, and to require that the jury should pass upon the weight to be given to their statements." See, also, *Cushman v. Insurance Co.*, 70 N. Y. 77; *Gilderleeve v. Landon*, 73 N. Y. 609; *Koehler v. Adler*, 78 N. Y. 287; *Longyear v. Insurance Co.*, 20 Wkly. Dig. 165; *Carbon Works v. Schad*, 38 Hun, 71.

We think the trial judge was justified in submitting the questions of fact to the jury, viz.: (1) Whether the defendant was guilty of negligence causing the injuries complained of; and (2) whether the plaintiff was free from contributory negligence on the occasion of receiving the injuries. (3) The question of damages was fairly submitted to the jury. The plaintiff testified quite freely as to the circumstances attending his injuries, and the extent of suffering caused thereby. Several physicians were called in respect to his physical condition, and their testimony raised the question as to the extent and nature and permanency of the injuries he had received. Dr. Hunt prescribed for him shortly after the injuries were received, and he states that he found "that the disease was of a nervous character, and he was troubled with rheumatism at that time. He had a rheumatic affection of the intercostal muscles, and also in the limbs and in the ankle joints. I prescribed for him about two months. * * * I attributed his condition, which I have described, to a cold caught in some way or another. I questioned him as to the manner in which he was liable to take cold, and he told me of the accident that occurred, and I told him that I did not know of any other way it would take place except it was from that. I attributed it to that. It is a pretty hard matter to state what are his chances of recovery from this trouble that he has been afflicted with. I don't think he will entirely recover from it.

Possibly he might. The pricking sensation in the leg and arm, and the pain about the region of the heart, indicate the want of a good, free circulation. It might indicate a disease of the nerves of a nervous character." Dr. Hopkins, in describing the difficulty says, viz.: "It was an irritation of the nervous centers, as I diagnosed his case, from this sciatica, extending down through the nerves of the lower limbs, the full extent. At times he must have suffered, I should think, severely. * * * I cannot say he is any better from the time I first saw him. He could not get any benefit from the treatment." His wife was called as a witness, and she testified to his having fainting spells, and being nervous, and adds, viz.: "He would jump out of bed, and cry out, 'I am drowning.' He would walk the floor at night complaining of pain. Prior to the injury he was healthy." Considerable other evidence was given in respect to the injuries and the effects thereof upon the physical constitution of the plaintiff. What was a suitable sum to compensate the plaintiff for such injuries was cautiously submitted to the jury, and was a question of fact, and we see nothing in the evidence which warrants us in disturbing the verdict on the question of damages. *Hickinbottom v. Railroad Co.*, 15 N. Y. St. Rep. 13, and cases cited; *Leeds v. Gas-Light Co.*, 90 N. Y. 26; *Staal v. Railroad Co.*, 107 N. Y. 625, 13 N. E. Rep. 624.

In the course of the plaintiff's examination he testified what wages he was able to earn before he received the injuries, and he added, viz.: "My physical condition has not been such since this accident that I could resume my chosen occupation. I have not worked at it since I left it." The defendant took an exception to the admission of the testimony which we have just quoted. We think the same was permissible.

Our attention is called to *Butler v. Kent*, 19 Johns. 223. That was an action against an officer for misbehavior in his office, and it was held in that case that recovery could only be had for special damages, and they must be "particularly stated in the declaration." We see nothing in that case which warrants the contention of the defendant that the admission of the evidence which we have referred to was improper.

In the complaint the plaintiff avers that since the injuries received he "has been, and for a long time to come will be, unable to labor, and has been subjected to great expense in consequence of the premises, and otherwise injured to his damage in the sum of five thousand dollars." We think under that averment the amount of wages he was earning at the time of his injuries, and the fact that he had not been able to labor thereafter, were properly received, and that there is no force in the exceptions taken to that evidence.

These views, as well as those expressed by us when the case was last before us, in the opinion reported in 7 N. Y. St. Rep. 598, lead us to sustain the order and verdict. Judgment and order affirmed, with costs.

MARTIN and MERWIN, JJ., concur.

GREENE v. GREENE *et al.*

(*Supreme Court, Special Term, Erie County. February 6, 1889.*)

1. WILLS—CONSTRUCTION.

A testator, after making various bequests, appointed three of his sons executors of his will and trustees of his estate, and declared that "I direct that my said trustees shall take and hold my said property and estate, and the whole thereof, except said Ohio tracts, for a period of six years from and after my decease;" and "at the expiration of the said six years the rest and residue of my estate, real and personal, * * * shall belong to my said sons, * * * share and share alike." There was also a clause forbidding partition of the estate "so devised and bequeathed to my three sons in trust, as aforesaid, until the expiration of six years;" and "that, in case either of said three sons" shall attempt to partition or divide the land, he shall forfeit all claim to the estate. In authorizing the sale of other land besides that in controversy the authority was given to "my trustees," but in the last clause of the

will authority to mortgage the land in controversy was given to "my three sons," who are not referred to as trustees. The contingency of the death of either of the three sons, before the expiration of six years, was not provided for. *Held*, that it was not the intention of testator to attempt to suspend the power of alienation, in violation of the law against perpetuities, but that it was his intention that the title to the lands should immediately vest in the three sons named, subject to the payment of specific legacies.

2. SAME.

A will should be construed as a whole, and so as to prevent intestacy; and all of its provisions should be upheld, unless by so doing violence is done to the reasonable intention of the testator; and where that intention is clear, though some of the expressions are inaccurate and apparently inconsistent, it is the duty of the court to subordinate the language to the plain purpose of the testator.

3. PARTITION—BY WHOM MAINTAINABLE.

Code Civil Proc. N. Y. § 1537, provides that one claiming as a joint tenant or tenant in common, by being heir of one who died, holding and in possession of land, may sue for partition thereof, though not in possession, and notwithstanding an apparent devise to another. *Held*, that as plaintiff claims as heir of his mother, and not of his father, who died in possession of the land in controversy, he is not relieved from the common-law rule that, to maintain partition, plaintiff must be in actual or constructive possession of the land.

On action for partition.

Action by William B. Greene against John B. Greene and others, heirs of William H. Greene, deceased, for partition of two pieces of land, plaintiff claiming the undivided one-fifth of one piece as heir of decedent, his father, and one-fifth of the other piece by virtue of an antenuptial agreement executed by his father to trustees, for the use of plaintiff's mother during her life, and the remainder in fee to the heirs of her body. The will of William H. Greene was executed in 1881. He had been twice married. By his first wife he left five children, William B., John B., Keturah B., Harry B., and Samuel B. There were no children of the second marriage, and his second wife survived him. His will contained 16 clauses, some of which appeared to be contradictory, or of doubtful meaning.

T. M. Tyng, George Wing, and Daniel G. Rollins, for plaintiff. *James C. Beecher and Sherman S. Rogers*, for defendants.

LEWIS, J. The importance of this case demands that I should state the reasons for my conclusions. My time has been so occupied with other engagements since the submission of the case to me that I shall be compelled to state them briefly. In reaching the conclusion that the will of Mr. Greene is valid, I have been obliged to make very free use of the doctrine laid down in the opinion of Judge FINCH in *Phillips v. Davies*, 92 N. Y. 204, to-wit: If the plain and definite purposes of a will are endangered by inapt or inaccurate modes of expression, and we are sure that we know what the testator means, we have the right, and it is our duty, to subordinate the language to the intention. We may reject words and limitations, supply them, or transpose them, to get at the correct meaning. This will should be construed so as to uphold all of its provisions, unless in doing so violence is done to the natural and proper meaning of its provisions. It is clear that it was the testator's wish that the land in controversy should ultimately go to his three sons, John B., Harry B., and Samuel B. This is not controverted by the plaintiff. His contention is that the lands devised to the three sons was a future estate, limited to come into their possession at the expiration of six years from and after the death of the testator, and that during this period of six years the title was in them as trustees. If this is a correct construction of the will, then it is unquestionably void, so far as the land in controversy is concerned, as violative of the laws against perpetuities. The testator was a lawyer of long and large experience, and it would be quite remarkable if he was not familiar with the statute relating to the suspension of the power of alienation. I think I must assume that a lawyer of 40 years' standing could not have been ignorant of this law, although it is quite surprising, if he had the stat-

ute in mind when he was preparing his will, that he should have couched it in the language he did. It would seem, in reading that portion of the will which declares "it to be my will, and I direct, that my trustees shall take and hold my said property and estate, and the whole thereof, except said Ohio tracts, for the period of six years from and after my decease," and again, in the fifteenth clause, "at the expiration of said period of six years the rest and residue of my said estate, real and personal, remaining after the payment of said legacies and debts, shall belong to my said three sons, John B. Greene, Harry B. Greene, and Samuel B. Greene, share and share alike, their heirs and assigns, forever," that it was his intention to vest the title during that period in his trustees, and suspend the power of alienation for that time. But, when read in connection with the balance of the will, I think that such was not his intention, but that he intended that the three sons named should enjoy the rents, issues, and profits of the property during the six years, subject to the payment of the specific bequests. He had provided for the payment of legacies amounting to some \$115,000. His personal estate, he believed, was sufficient, with prudent management, to pay the legacies, without resorting to the real estate. But, for fear that it might not be sufficient, he required that, if necessary, the rents and profits of the land should be applied to the payment of the specific legacies. He provided in his will for the care and support of his widow and daughter, by specific bequests. His three sons were then young. Two of them were living with him; and, while they were lawyers, they were dependent for their support, partially, at least, upon the estate of their father. And, unless he intended that the rents and profits of the real estate devised to them should, after the payment of the specific legacies, be used for their support, he made in his will no provision for them for the six years after his decease, and at the time in their life when he must have known they would need the use of his property for their support. He provided in the fourteenth clause that, "after the payment of said legacies, the said property and estate shall be managed for the joint benefit of my said three sons, John, Harry, and Samuel, who shall annually render to each other a just and full statement of the rents, issues, and profits, and all transactions relating to said property and estate;" indicating, it would seem, that he expected that after the payment of the legacies they were entitled to the rents and issues of the property for their support.

The real estate consisted of a valuable lot upon Main and Washington streets, covered by valuable buildings, producing large revenue in the way of rents. It was evidently a desire of the testator that this property should be retained by the three sons, without any division thereof. He gave them, as trustees, power to sell, convey, and dispose of any of the real estate not specifically devised, on condition that the proceeds of such sale should be retained by them, unless it became necessary to use the same for the purpose of paying off the legacies. It would not seem that a lawyer of his experience would have provided so serious a penalty for an attempt to partition the property in question during the six years mentioned in his will, if he understood the title was for that period in trustees. If, however, it was his intention that the title should immediately vest in them, subject to the payment of the specific legacies, it was natural for him to wish to restrain a partition thereof for the period named. Again, no provision is made in the will for the contingency of the death of the three sons, or either of them, during the six years. If he intended that the title should not vest in them until the end of the six years, and he had given the situation any reflection, he would have made provision for the contingency of the death of either or all of the sons; and it is very improbable that he would purposely leave any portion of his property thus undisposed of. Mr. Greene states in his explanatory and qualifying clause that he did not think it would become necessary to mortgage the lands in question in order to carry out the provisions of his will, but he provides that, should

it become necessary, his three sons should have power to mortgage the real estate. He does not give them, as trustees, power to mortgage it, but as sons. In providing for the sale of other real estate besides that in controversy, he empowered them as trustees to sell. Had he intended that this property should vest in them as trustees during the six years, he would have authorized them as trustees to mortgage it for the purpose of obtaining money to pay the bequests. By the unfortunate use of words in this will, serious doubts arise as to its true construction, but I think, taking it as a whole, such a construction can be given to it as will uphold it, and prevent intestacy as to the land in question.

I am not satisfied from the evidence that the plaintiff was sufficiently aware of his rights and interests in the premises under the will, so that the doctrine of election should be applied to him. There is no question as to the execution of the antenuptial agreement. The only question is as to its delivery. I think the presumption of its delivery, arising from the record thereof, is not disposed of by defendants. Mr. Greene was residing upon the lot secondly described in the complaint after the delivery of the antenuptial agreement with his wife and children, and I do not think his possession can be held to be adverse to the plaintiff. Certainly, from the evidence, not for such a length of time to bar the plaintiff from maintaining an action. The antenuptial agreement was executed and delivered in the year 1845. The deceased married his first wife soon thereafter, and resided upon the property described in the antenuptial agreement down to the year 1874. All of his children were born there, and two years after the death of his first wife he married again, and resided upon this property with his second wife and his infant children, the youngest of them arriving at maturity in the year 1876. But, as to the lot described in the antenuptial agreement, the plaintiff was not, at the time of the commencement of this action, in a situation to maintain partition. He had not resided upon the property for many years. His father assumed by his will to devise it to his three younger sons, and they, upon the death of the father, entered into possession of it, claiming to own it; denied and repudiated any claim of the plaintiff thereto; and there cannot be any question but at the time of the commencement of his action it was held by them adversely to the plaintiff.

The plaintiff rests his right to maintain this action upon section 1537 of the Code of Civil Procedure, which reads as follows: "A person claiming to be entitled, as a joint tenant or a tenant in common, by reason of his being an heir of a person who died holding and in possession of real property, may maintain an action for the partition thereof, whether he is in or out of possession, notwithstanding an apparent devise thereof to another by the decedent, and possession under such a devise. But in such an action the plaintiff must allege and establish that the apparent devise is void." This section does not afford the plaintiff relief from the common-law rule that, to maintain partition, the plaintiff must be actually or constructively in possession. His interest in this lot came to him upon the death of his mother by virtue of this antenuptial agreement. He did not inherit it from his father. The Code so far changes the common law as to permit partition in a case where the plaintiff claims to be an heir of a person who died holding and in possession of real property, even if out of possession, notwithstanding an apparent devise by the person whose heir plaintiff claims to be, provided he can establish the devise to be void. The decedent mentioned in this section is the person who died holding and in possession of real property. The mother of the plaintiff, and not his father, was the person who died holding possession of the real property. The plaintiff cannot try the question of his title in this form of action, except in a case provided for by this section of the Code. The rule of the common law was first changed by the act of 1853, which provided that "any heir or heirs claiming lands, tenements, or hereditaments by descent

from an ancestor, who died holding and being in possession of the same, (whether such heir or heirs be in possession or not,) may prosecute for the partition thereof, notwithstanding any apparent devise by such ancestor, and any possession held under the same devise, provided that such heir or heirs shall allege and establish in the same suit, * * * that such apparent devise is void." The provision of the Code which superseded this act is, in effect, the same, although its meaning is not as clear, as the act of 1853.

My conclusion is that this provision of the Code does not reach the plaintiff's case. Not being actually or constructively in possession of the land at the time of the commencement of this action, he cannot maintain partition. The plaintiff's complaint must be dismissed, but, in view of the uncertainty and ambiguity of the will, it should be dismissed, without costs.

KENYON *et al.* v. COVERT *et al.*

(*Supreme Court, General Term, Fourth Department. July 20, 1889.*)

1. MARITIME LIENS—CONSTRUCTION OF VESSEL—BUILDERS.

One engaged in repairing a vessel under contract with the owner, by which the repairer agrees to furnish all the material and labor required for such repairs, is a builder of the vessel, within the meaning of Laws N. Y. 1862, c. 482, § 1, making any debt "contracted by the master, owner, charterer, builder," etc., of a vessel, "on account of work done or materials * * * furnished * * * towards the building, repairing," etc., of such vessel, a lien thereon.

2. SAME—EVIDENCE.

In an action to enforce such a lien for material and labor furnished such builder, evidence by plaintiffs that they furnished such labor and materials at the builder's request is admissible.

3. SAME.

After the admission of such evidence, the reception of evidence that the builder said that plaintiffs' bill was correct, and that the owner would pay it, is not prejudicial to defendants.

Appeal from judgment on report of referee.

Action on attachment bond, given to secure the release of a vessel which had been attached under a lien for labor and materials furnished for repairing it, by Henry R. Kenyon and George J. Kenyon against Enoch Covert and Thomas G. Miller. Covert was the owner of a steam-yacht. Miller was a surety for Kenyon on the attachment bond. Judgment for plaintiffs, and defendants appeal. Laws N. Y. 1862, c. 482, § 1, cited in opinion, provides that any debt "contracted by the master, owner, charterer, builder, or consignee of any ship or vessel, * * * on account of work done or materials or other articles furnished * * * for or towards the building, repairing," etc., of such ship or vessel, shall be a lien thereon.

Argued before HARDIN, P. J., and MARTIN and MERWIN, JJ.
Almy & Bouton, for appellants. *J. A. Elston*, for respondents.

HARDIN, P. J. Walter Burling was a boat-builder in June, 1887, at the time he was doing the repairs on the yacht *Cygnus*. Upon the evidence that fact was so found by the referee in the following words: "Walter Burling was a boat-builder, and had a place of business at Ithaca, N. Y., and that the defendant Enoch Covert was the owner of the yacht *Cygnus*. * * *" It was found by the referee that the contract was made and entered into between Burling and the defendant Covert, the owner, "by the terms and conditions of which Burling was to furnish all the material and labor required for said repairs, for an agreed gross price for the whole, to be paid him by the defendant Covert." The evidence and the finding of the referee bring Burling within the term "builder," as mentioned in section 1, c. 482, Laws 1862; and the "materials furnished" were "on account of * * * repairing," and they

therefore fall within the classification found in the first subdivision of the section just referred to.

We think the question insisted upon by the appellants, in respect to whether Burling was a builder or not, is conclusively resolved against the appellants by the case of *King v. Greenway*, 71 N. Y. 413. See, also, Smith, Chat. Mortg. 99. When the case of *Hubbell v. Denison*, 20 Wend. 181, was decided, the statute gave a lien in favor of a party contracting with "the master, owner, agent, or consignee of any ship or vessel within this state;" and it was there resolved that the builder is neither one of the persons enumerated in that statute. When the case of *Fralick v. Betts*, 18 Hun, 634, was decided, the case of *King v. Greenway*, decided in 1877, had not been reported, and the learned judge who delivered the opinion in *Fralick v. Betts* does not allude to, and probably had no knowledge of, the doctrine laid down in *King v. Greenway* when he prepared his opinion in the early part of 1878; and his limitation of the act of 1862, intimated in the opinion, was based solely upon authorities in cases which arose before the passage of the act of 1862. We are of the opinion that it is the duty of this court to follow the interpretation of the act of 1862, and the amendments thereof by chapter 422, Laws 1863, as laid down in *King v. Greenway*, *supra*.

When the plaintiff Henry R. Kenyon was upon the stand as a witness he gave evidence tending to show that Burling requested the plaintiffs to furnish the lumber and materials, and he was asked during his examination the following question: "Question. Did you after this conversation furnish the lumber and do the work on this boat to the amount of \$73.06?" This was objected to as incompetent and immaterial. The objection was overruled, and the defendant excepted. The witness answered: "Yes, sir." We think the testimony was competent and material to the issue, and that the answer was properly received. Thereafter the witness was asked a question, to which he replied: "We had no further conversation excepting when I made out the bill." Then he was asked to state what that conversation was. The same objections were renewed, and there was an exception taken by defendant. The witness answered: "When I presented the bill to him, [Burling,] I asked him if it was correct, and he O. K.'d the bill, and signed his name to it, and gave it back to me with the remark that the owner would be here on Friday, and would pay the bill." It is to be observed that the objection taken was not that the declarations of Burling were incompetent, but rather that the evidence generally was incompetent. However, in dealing with the answer given by the witness, it is obvious that it was not improper that evidence should be received tending to show that the bill had been presented to Burling; and if it be conceded that the fact that Burling admitted the correctness of the bill by signing his name to it was inadmissible, still, as the principal fact had been shown previous to such declaration, to-wit, that the work and materials had been furnished, and the amount thereof, we are not at liberty to say the ruling or the reception of the evidence was prejudicial to the defendants. In the case of *Happy v. Mosher*, 48 N. Y. 320, the question whether all the lumber was used in the construction of the vessel, which the party sought to recover for, was "seriously controverted upon the trial;" and hence the declarations and admissions of Kahler and his agent were presented, and their admission, under the circumstances, was held to be error. We think that case does not warrant us in disturbing the judgment before us. Here the witness stated, viz.: "I can state that all this lumber we furnished was in the boat after it was repaired." These views lead to an affirmance. Judgment affirmed, with costs. All concur.

BARRY v. COVILLE *et al.*

(Supreme Court, General Term, Fourth Department. July 20, 1889.)

1. ASSIGNMENT—CONSTRUCTION—CHATTEL MORTGAGE.

Plaintiff, being indebted to defendants, assigned all his interest in certain patents to them, by an instrument in which defendants agreed to furnish funds and pay a certain debt. Defendants reserved the right to "terminate" the agreement, and it was provided that they should "retain their interest and claims herein till they shall be fully paid their said indebtedness up to such time as they shall terminate this agreement, but they shall, upon payment to them of their said indebtedness, reassign their said interest in said inventions" to plaintiff. *Held*, that the assignment was intended as collateral security for plaintiff's indebtedness.

2. TRIAL—FINDINGS.

A finding that no fraud was practiced by defendants towards plaintiff in regard to such assignment, is not inconsistent with a finding that defendants held it as collateral security.

3. SAME—ACCOUNTING.

On defendants' electing to terminate the agreement, plaintiff is entitled to an accounting; and upon paying or tendering the amount due to defendants, they should reassign to plaintiff.

4. WITNESS—ATTORNEY AND CLIENT.

The testimony of an attorney that he drew a deed in controversy, and counseled plaintiff in regard to the subject-matter thereof, is inadmissible, except so far as it relates to the fact that he drew the deed.

Appeal from special term, Onondaga county.

Action by William Barry against Orson Coville and Gabriel A. Morris, impleaded with the Syracuse Bolt Company, for an accounting and reassignment of certain patented inventions alleged to have been assigned by plaintiff to defendants Coville and Morris. By the instrument of October 2, 1884, referred to in the opinion, plaintiff assigned all his interest in certain patented inventions. From an interlocutory judgment directing a reconveyance of such inventions to plaintiff on payment of his indebtedness to defendants, the latter appeal.

Argued before HARDIN, P. J., and MARTIN and MERWIN, JJ.

B. N. Bailey and *I. D. Garfield*, for appellants. *Baldwin, Lewis & Kennedy*, for respondent.

HARDIN, P. J. Before the Code allowing legal and equitable remedies to be had in the same action, it was held that parol evidence was admissible, independent of proof of fraud or mistake, to show that a deed, although absolute on its face, was in fact intended by the parties as a mortgage. *Strong v. Stewart*, 4 Johns. Ch. 167; *Whittick v. Kane*, 1 Paige, 202; *Van Buren v. Olmstead*, 5 Paige, 9; *Lansing v. Russell*, 3 Barb. Ch. 325. Since the adoption of the Code of Procedure, it has been repeatedly held that parol evidence is admissible in all classes of actions, whether legal or equitable, to show that a deed absolute on its face was given as a security only. *Despard v. Walbridge*, 15 N. Y. 374; *Horn v. Keteltas*, 46 N. Y. 605. When the instrument of October 2, 1884, (Exhibit 1,) was executed by the parties to this action, the plaintiff was indebted to the defendants, and they also agreed to "furnish funds;" and it was stipulated in the agreement that the defendants "will pay the indebtedness for goods to September 16, 1884, to-wit, \$163.16; thirty-five dollars in cash heretofore paid to procure patent, etc., on the willow stripping machine herein mentioned; for all goods had since September 16, aforesaid, and all moneys hereafter paid or advanced, and goods and provisions had hereafter." In that agreement the defendants reserved "the right to terminate" the agreement, and following the reservation of that right were the words which were quite significant in determining the intention of the parties; they are as follows: "But shall retain their interest and claims herein till they shall be fully paid their said indebtedness, up to such time as they shall terminate this agreement; but they shall, upon payment to them of their

said indebtedness, reassign their said interest in said inventions herein to said Barry." The right to terminate the agreement was extended by a stipulation of the parties to July 1, 1885.

1. It is apparent that the parties executing the agreement of October 2, 1884, treated the assignment of the plaintiff's interest in the several patents as collateral security for his indebtedness to the defendants.

2. It is obvious from reading the testimony found in the appeal book that such was the intention of the parties, and the finding of the learned trial judge to that effect must therefore be sustained.

3. The finding of the learned trial judge "that there is no evidence of any fraud or deceit attempted or practiced towards the plaintiff by defendants, either in regard to Exhibit No. 1 or Exhibit No. 4," and also his finding "that plaintiff knew the contents of both Exhibit No. 1 and Exhibit No. 4 when he signed them," are not inconsistent with or at war with his conclusion that the defendants held the several transfers which they received from the plaintiff as collateral security for any indebtedness or advances.

4. We are of the opinion that the evidence warranted the finding that the several assignments were held by the defendants as security for any indebtedness; and when they elected to terminate their relations to the defendants, existing in virtue of said assignments, we think the plaintiff is entitled to an accounting; and upon that accounting, the amount found due to the defendants being paid or tendered, the defendants ought to assign to the plaintiff the several inventions which they took under the circumstances disclosed by the findings of the trial judge.

5. When Cornelius W. Smith was upon the stand as a witness, it appeared that he drew the deed known as "Exhibit No. 4," and that he was an attorney at law, and that the plaintiff applied to him to draw the deed, and also for counsel in regard to matters relating to the subject-matter of the deed. While his testimony was being given, and subsequently, on a motion to strike the same out, the question of the admissibility of his evidence was raised, and the court intimated an opinion that his testimony was inadmissible because he was not at liberty to violate the privilege existing between attorney and client in respect to confidential communications. The court finally struck out his testimony, except so far as it related to the fact that he drew the deed. The defendants took an exception. We are inclined to the opinion that the learned trial judge kept within the rule laid down in *Root v. Wright*, 84 N. Y. 72, where it said the "rule prohibits him from testifying to such communications in an action between his client and a third person." It is also said in that case that the rule "extends to communications in reference to all matters which are the proper subject of professional employment. Citing *Williams v. Pitch*, 18 N. Y. 550; *Yates v. Olmsted*, 56 N. Y. 632."

6. As the trial judge found that there was no evidence of fraud or deceit practiced, and that the plaintiff knew the contents of both Exhibits No. 1 and No. 4 when he signed them, the ruling was not prejudicial to the defendants, and we ought to disregard their criticism in respect to the same. Code Civil Proc. § 1008. We see no occasion to interfere with the interlocutory judgment. Judgment affirmed, with costs. All concur.

ROBINSON v. SMITH *et al.**(Supreme Court, General Term, Fourth Department. July 20, 1889.)*

1. NUISANCE—WHAT CONSTITUTES.

A livery stable, which is erected so near to plaintiff's dwelling-house, and is so carried on as to cause an offensive odor to permeate such house, the odor being so intense as to compel plaintiff to keep all his windows closed on the side of his house nearest the stable, and to render the use of his premises disagreeable and unwholesome, is a nuisance.

2. SAME—REMEDY—DAMAGES—INJUNCTION.

Under Code Civil Proc. N. Y. §§ 1660-1662, providing that "an action for a nuisance may be maintained in any case where such action might have been maintained under the laws in force immediately before this act takes effect," that the person who erected the nuisance and the owner of the realty may be joined as defendants, and that the judgment may award plaintiff damages or direct the removal of the nuisance or both, plaintiff may in the same action recover damages sustained by such nuisance and obtain an injunction requiring its abatement.

3. SAME—PARTIES.

Where it appears that the stable was erected and carried on by a tenant with the knowledge and consent of his landlord, and that the latter was informed of the nuisance, and requested to abate it, both are proper parties defendant to the action for damages and injunction.

4. SAME—EVIDENCE—DAMAGES.

Evidence of the condition of the atmosphere in plaintiff's house down to the time of the trial is admissible.

5. SAME.

Evidence is admissible that after the erection of the stable there were innumerable flies about the premises.

6. SAME.

Evidence as to the rental value of plaintiff's house before and after the erection of the stable is admissible.

7. SAME—WITNESS—EXAMINATION.

Where defendant has testified that when he was about to erect the stable plaintiff said it was "all right," plaintiff may be allowed to answer a direct question, and state that he did not say it.

8. TRIAL—FINDINGS BY REFEREE.

Refusal of a referee to make findings asked for is not error where it appears that the evidence bearing on such findings was conflicting, or that they were not material, or would not have benefited the party asking for them.

Appeal from judgment on report of referee.

Action for damages and for an injunction, by Francis M. Robinson against Charles W. Smith and Hiram Ellsworth. Plaintiff is the owner of a house and lot situated on Leatherstocking street, in the village of Cooperstown, and defendant Smith is the owner of premises fronting on Chestnut street, adjacent to the premises of the plaintiff on the east. The defendant Ellsworth, on the 1st day of April, 1887, took possession of the premises of Smith, and has ever since remained in the possession of the same as a tenant of the defendant Smith; and Ellsworth, with the knowledge and consent of Smith, erected upon the said premises of the defendant Smith a barn 26 feet wide and 46 feet long, which has since been used and occupied for livery stable purposes, with the knowledge and consent of the defendant Smith. The barn was so constructed that the rear or westerly end thereof was distant four feet and seven and three-fourths inches from plaintiff's dwelling-house. There were six stalls placed across the entire west end of the barn, and that portion thereof nearest the plaintiff's parlor, living and sleeping rooms in said house; and there was a wooden box for storing manure, about three feet wide and deep, and ten feet long; and a drive-way which extended along in front of the plaintiff's parlor, and distant therefrom about fifteen feet. About the 1st of May, 1887, defendant Ellsworth commenced to carry on the livery business, keeping several livery horses in said barn, and continued the same down to the day of the trial of this action; and he deposited manure from the horses in the box, and drew the same out once in five or six days until in the month of June, 1887,

when he was ordered by the trustees and board of health of the village of Cooperstown not to put or keep any more manure in the box. After that date, and until some time in November, 1887, the manure was drawn away in barrels; and from November, 1887, until the latter part of March, 1888, the manure was again put in said box, and was drawn away as it had been in the beginning; and after the latter part of March, 1888, down to the trial of this action the manure has been thrown into a wagon, and drawn away from the drive-way over Leatherstocking street. The referee finds as a matter of fact, viz.: "That in consequence of the said barn having been used as a livery stable, as aforesaid, ever since on or about the 1st day of May, 1887, an offensive smell or odor has been emitted from said barn and from the manure so kept and stored as aforesaid to and upon the plaintiff's premises, and into and about the plaintiff's said dwelling-house, and the several rooms therein, and has rendered the air over the plaintiff's premises and in his said dwelling-house disagreeable, unpleasant, and offensive, and has been so intense, disagreeable, and offensive that ever since about the 1st day of May, 1887, the plaintiff has been compelled to, and has, kept all the windows on the side of his said dwelling-house nearest to said livery barn closed, and has rendered the use of the plaintiff's premises and dwelling-house disagreeable, uncomfortable, and unwholesome." This action was commenced on the 25th day of January, 1888. On the 13th of December, 1887, the plaintiff caused a notice to be given to the defendant Smith to the effect that the livery stable and business carried on therein was a nuisance to the plaintiff, and greatly injured him in the comfort and enjoyment of his dwelling-house and premises, and Smith was requested to abate the nuisance, but neglected wholly so to do. The referee found that the plaintiff since the 1st day of May, 1887, until the day of the trial of this action, to-wit, the 10th day of July, 1888, "has sustained damages in consequence of said stable, and of the disagreeable, foul, and offensive odors emitted therefrom over his said premises, and in the rooms of the dwelling-house situated thereon, in the difference of the fair rental value of his said premises free from and subject thereto, in the sum of one hundred and seven dollars and fifty cents." The referee found as a conclusion of law, viz.: "That the use of said barn as and for a livery stable, and the keeping of horses therein, and the carrying on of said livery business at said barn, and the disagreeable, offensive, foul, and unwholesome odors arising therefrom over said plaintiff's premises, and in the rooms of his said dwelling-house situated thereon, is a private nuisance to him, and is specially injurious to him and his said premises, and his enjoyment thereof." He also found that the plaintiff is "entitled to judgment in this action against the defendants, requiring them to abate the said nuisance, and perpetually enjoining them and each of them from carrying on said livery business at said barn in such manner that it will be a nuisance to said plaintiff and his premises."

From a judgment for plaintiff on the referee's report, defendants appeal.

Argued before HARDIN, P. J., and MARTIN and MERWIN, JJ.

E. M. Harris, for appellant Smith. *O. F. Matterson*, for appellant Ellsworth. *A. C. Tennant*, for respondent.

HARDIN, P. J. After a careful perusal of the evidence found in the appeal-book, we are of the opinion that the findings of fact made by the referee are in accordance with the weight of the evidence; and, while we find some conflict in the evidence, we think we should accept the findings of fact made by the learned referee. In accepting such findings we follow well-recognized authorities. *Rossa v. Smith*, 17 Hun, 138; *Sinclair v. Tallmadge*, 35 Barb. 602; *Titus v. Perry*, 13 N. Y. St. Rep. 237.

1. In *Hay v. Cohoes Co.*, 2 N. Y. 162, GARDINER, J., in speaking of the rights of adjacent owners, said: "They could not pollute the air upon the plaintiff's premises." In *Fish v. Dodge*, 4 Denio, 316, BRONSON, C. J., said:

"It is a rule of the common law that a man should so use his own as not to hurt another; and therefore, if one carry on a lawful trade or business in such a manner as to prove a nuisance to his neighbor, he must answer in damages. * * * It is not necessary to a right of action that the owner should have been driven from his dwelling; it is enough that the enjoyment of life and property has been rendered uncomfortable." In *Hutchins v. Smith*, 63 Barb. 252, the doctrine of the cases just referred to was stated, and many cases illustrative thereof collated and commented upon. We think the referee, in his findings of fact and conclusions of law, has kept within the doctrine of the cases to which we have adverted.

2. We are also of the opinion that the plaintiff was entitled to maintain an action wherein he should recover the damages sustained, and have an injunction requiring the abatement of the nuisance. In the case last cited it was said, viz.: "There is ample authority to establish the right of a plaintiff to maintain a suit in which he may both recover damages for a nuisance and remove it by the aid of the law;" citing *Harrouer v. Ritson*, 37 Barb. 301; *Howard v. Lee*, 3 Sandf. 282; *Griffith v. McCullum*, 46 Barb. 568; *Davis v. Lambertson*, 56 Barb. 480. In section 1660 of the Code of Civil Procedure it is provided, viz.: "An action for a nuisance may be maintained in any case where such an action might have been maintained under the laws in force immediately before this act takes effect." And in *Adams v. Popham*, 76 N. Y. 410, it was held that "a person erecting or maintaining a common nuisance is liable to an action at the suit of another who has sustained special damage therefrom." In section 1661 of the Code of Civil Procedure it is provided, viz.: "A person by whom the nuisance has been erected, and a person to whom the real property has been transferred, may be joined as defendants in such an action." And in section 1662 it is provided, viz.: "A final judgment in favor of the plaintiff may award him damages, or direct the removal of the nuisance, or both." Before the adoption of the sections we have just quoted, such actions were maintainable, and there are numerous cases arising since the adoption of the provisions of the Code which we have just cited sustaining actions for a double purpose. *Harrison v. Peck*, 56 Barb. 252; *Hutchins v. Smith*, 63 Barb. 252; *Beir v. Cooke*, 37 Hun, 38; *Horton v. Brownley*, 10 N. Y. St. Rep. 800.

3. We think the action was maintainable against both of the defendants, and that the facts found establish a liability of both the defendants for the continuance of the nuisance, and that they were both proper parties for the purpose of awarding damages, and ordering an abatement of the nuisance. In *Rosewell v. Prior*, 2 Salk. 460, the action was for a continuance of the nuisance. It was held that the landlord and tenant were both liable, and in speaking of the liability of the landlord the court said: "He hath also rent as a consideration for the continuance, and therefore ought to answer the damage it occasions, [citing *Smith's Case*, Jones W., 272.] Receipt of rent is upholding." In *Fish v. Dodge*, 4 Denio, 318, we find nothing inconsistent with what has already been said. It was there remarked that a defendant could not be liable for a wrong which was actually committed by others who were not in his employment, "unless he knew or had reason to believe that he was letting the property for a use which must prove injurious to the plaintiff." In the case in hand, the defendant Smith knew of the purpose for which the barn was erected, and the purpose for which it was to be used, and the manner in which it was used. Although he was a resident of the city of Brooklyn, he had a summer residence near the village of Cooperstown, which he frequented summers. In his answer served in this action he admitted and stated "that on or about the 1st of April, 1887, the defendant Ellsworth took possession of said premises of this defendant, and has ever since remained in the possession thereof, and now is in the possession of the same, as the tenant of this defendant; that in or about the

month of April, 1887, the defendant Ellsworth, with the knowledge and consent of this defendant, erected upon said premises a barn, and has used and occupied the same for livery purposes, with the knowledge and consent of this defendant, which barn so erected by said defendant Ellsworth this defendant alleges was so erected at his, said Ellsworth's, own expense and risk, with the right to remove it from said premises at any time he might wish, or when this defendant should make other disposition of said premises." Before this action was commenced he was informed of the nuisance, and requested to abate the same, but neglected so to do. Besides, it is apparent from the authorities that where a barn is built in a certain way, and to be used in that way, and would necessarily, under ordinary circumstances, be a nuisance if let to a tenant to use in that way, and such use proves noxious or injurious to adjoining occupants, the owner subjects himself to liability for such injury. It is the duty of the owner to see to it that his premises are not used so as to injure his neighbor. *Pickard v. Collins*, 23 Barb. 445; *Fish v. Dodge*, *supra*; *Stone Co. v. Railroad Co.*, 52 Barb. 390; *Irvin v. Wood*, 4 Rob. (N. Y.) 188, affirmed 51 N. Y. 224; *Hanse v. Cowing*, 1 Lans. 288; *Beckwith v. Griswold*, 29 Barb. 291. The learned counsel for the appellant supposes that *Pickard v. Collins* aids his position that the defendant Smith was not liable. We think otherwise. In delivering the opinion in that case the court observed: "If the use in that way would necessarily, under ordinary circumstances, be a nuisance, the proposition is correct; but if it proved a nuisance by reason of water in the cellar, and that was a special, unusual circumstance, the defendant was not liable for the nuisance, unless he knew, or had reason to believe, when he let the barn, that the use of it in the ordinary mode would prove a nuisance." We see nothing in the case inconsistent with the views already stated.

4. Nor do we think the testimony of Dr. Lathrop, when read in connection with the other evidence found in the appeal-book, required the referee to find otherwise than appears by his report. Nor do we think *Flanagan v. Hollingsworth*, 2 How. Pr. (N. S.) 391, affirmed 108 N. Y. 621, 15 N. E. Rep. 74, aids the appellants. That case differed very widely from the one now in hand in its facts. It turned upon the construction of a covenant "not to erect any building for, or to carry on upon certain premises, certain enumerated trades, cow-stables, or hog-pens, or any other dangerous, noxious, unwholesome, or offensive establishment, trade, or calling, or business whatsoever;" and it was held that under the exact language of the covenant a livery stable was not included, and hence the plaintiff was not entitled to an injunction.

5. We have looked at the several requests made to the referee to find certain enumerated facts, and his refusals. In many instances there was a conflict in the evidence bearing upon the requests which were submitted to the referee. In such cases the refusal of the referee to find furnishes no ground for a valid exception. *Porter v. Smith*, 7 Civ. Proc. R. 195. In other instances it is quite apparent that the findings asked for were not material to the decision of the case, or would not have been beneficial to the defendants. The refusals and exceptions taken thereto furnish no ground for alleging error. *Callanan v. Gilman*, 107 N. Y. 360, 14 N. E. Rep. 264; *Stewart v. Morse*, 79 N. Y. 629.

6. We think no error was committed in allowing the plaintiff to read a portion of the defendant Smith's answer, and refusal to require the plaintiff to read the whole thereof as a condition of reading part in evidence. *Parmenter v. Railroad Co.*, 37 Hun, 354, and cases there cited. However, as at a latter stage of the case the defendant Smith read the whole of his answer in evidence, no further attention need be given to the ruling made by the referee allowing the plaintiff to read a portion of the answer. *Transportation Co. v. Hurd*, 44 Hun, 17.

7. An objection was taken to evidence offered to show the condition of the atmosphere in the plaintiff's dwelling from the time of the erection of the barn down to the time of the trial, and an especial objection was taken to the evidence as to its condition subsequent to the commencement of the action. The referee overruled the objection, and the defendant excepted. We think no error was committed. In *Barrick v. Schifferdicker*, 1 N. Y. Supp. 21, it was held that, where an action was for both legal and equitable relief, "it was proper for the court to allow a recovery for damages down to the day of the trial." See, also, *Beir v. Cooke*, 37 Hun, 38.

8. We think no error was committed in allowing the witness to describe that, after the erection of the barn, there had been a great "congregation of flies about the premises." It was a legitimate fact to be considered by the referee in connection with the other evidence.

9. Defendant took objections to evidence of the rental value of the premises before the barn was erected, and the rental value after the livery barn was erected. We think the evidence was legitimate, and that the referee committed no error in receiving the same. In *Barrick v. Schifferdicker*, 1 N. Y. Supp. 21, it was held "that the measure of damages to the rental value of the house was the difference between the rental value when the house was free from the effects of the nuisance and with it during the period of its continuance;" following the case of *Francis v. Schoellkopf*, 53 N. Y. 152.

10. The plaintiff was allowed to answer a direct question and state that he never said to the defendant Ellsworth, when he was about putting up the barn, "that it was all right." The defendant Ellsworth had given testimony to that effect in substance. We think it was allowable to put a direct question to the plaintiff to negative what had been testified to by the defendant Ellsworth.

Several other exceptions are referred to by folio in the appellants' points, but no argument is made in respect to the same. We perhaps would be right in assuming that, as there is no argument or authority produced in regard to such exceptions, they are frivolous. However, we have carefully examined all the exceptions thus loosely and summarily referred to, and are of the opinion that they furnish no ground for interference with the report of the referee. Section 1002, Code Civil Proc. Whether an injunction should be allowed or not in such a case rests in the sound discretion of the court of equity; and in *Davis v. Lambertson*, 56 Barb. 484, the late Judge FOSTER observed: "The discretion to be exercised in such cases is not, however, an unregulated discretion, but is to be exercised according to the rules of law applicable to each particular case." He then proceeds to comment upon authorities relating to the exercise of such discretion, and to very clearly demonstrate that where the facts are like those found in the case before us the discretion should be exercised in favor of the party suffering by the nuisance. We are entirely satisfied with the direction in which the discretion was exercised, and approve of the conclusion of the learned referee in awarding an injunction to abate the nuisance. Judgment affirmed, with costs.

MARTIN, J., concurs.

MERWIN, J. I concur, except I doubt the liability of the defendant Smith for any damages accruing prior to December 13, 1887.

TIFFANY v. GIFFORD *et al.*

(*Supreme Court, Special Term, Chautauqua County. February, 1889.*)

HIGHWAYS—ESTABLISHMENT BY STATUTORY PROCEEDINGS—JURY.

Under Laws N. Y. 1881, c. 696, providing for a jury of 12 men to certify to the necessity of altering and laying out highways, and prescribing their qualifications and manner of selection, where the names of 12 men are drawn, but 1 is disqualified, the other 11 are not a qualified jury within the meaning of the statute, and their acts as such are void, though the statute also provides that it is sufficient if 9 or more of the jurors act.

Application for a peremptory writ of *mandamus* by Charlotte S. Tiffany to compel Thomas H. Gifford and others, commissioners of highways, to appraise damages on petitioner's land.

Sheldon, Green, Stevens & Benedict, for petitioner. *Woodbury & Butts*, for defendants.

CORLETT, J. In June, 1888, application was made for the drawing of a jury to certify to the necessity of a public highway in the town of Ellicott, Chautauqua county. The jury was attempted to be drawn on the 23d of June. The preliminary steps and notices were regular. Twelve names were drawn, 11 of whom afterwards acted and certified to the necessity of the highway. One of the men drawn, Alfred E. Moore, was not, at the time of the drawing, a resident of the town of Ellicott, but formerly had been. He was not notified to meet with the others; nor had he any notice of the drawing, and took no part in the proceedings. After the certificate of the 11, the commissioners of the town laid out the highway, and then such proceedings were had that commissioners were appointed to assess the damages. The highway was laid through improved lands. The defendants refused and neglected to proceed to cause the damages to be appraised. This application is made to compel them to proceed.

Various objections are raised; among others, want of jurisdiction on the ground that the jury was irregular. The Revised Statutes, as amended in chapter 696 of the Laws of 1881, provide for the alteration and laying out of new roads, and for a jury to certify to the necessity.

On the subject of drawing, the statute is as follows: "At the time and place mentioned, the town-clerk of such town having received such notice that such jury is to be drawn, shall, in the presence of a justice of the peace, or one of the commissioners of highways of the town, deposit in a box the names of all persons then residents of his town whose names are on the lists filed in said town-clerk's office, of those selected and returned as jurors, pursuant to article second, title 4, chapter 7, part third of the Revised Statutes, who are not interested in the lands through which said road is to pass or be located, nor of kin to the owner thereof, and shall publicly, in the presence of such justice of the peace, or commissioner, draw therefrom the names of twelve persons, and shall make a certificate of such names, and the purposes for which they were drawn; and shall deliver the same to the person asking for the jury, and the applicant for such jury shall pay to the said town-clerk one dollar for drawing such jury." 2 Rev. St. N. Y. 1874. After other provisions the statute proceeds to say that if nine or more of the persons who shall have been so drawn act, it is sufficient.

The statute further provides that such jury shall personally examine the route, etc.; shall hear reasons; and if nine or more shall be of the opinion that a highway is necessary, they shall so certify, etc. It will be observed that the statute defines a jury as 12 men; such is the ordinary number, all of whom must agree, in the absence of a statutory limitation. *Cruger v. Railroad Co.*, 12 N. Y. 190. That number must be drawn, but nine of them may act and determine in the absence of the rest. In some respects the position of the

jury is like that of highway commissioners, two of whom may act after notice, etc., to the third. It is a familiar rule that all orders signed by two commissioners must show on their face that all were notified, or the proceedings will be void. *Phillips v. Schumacher*, 10 Hun, 405; *People v. Hynds*, 30 N. Y. 470; *Miller v. Brown*, 56 N. Y. 383. The question here is whether a legal jury was ever drawn.

In *People v. Commissioners*, 27 Barb. 94, affirmed 30 N. Y. 470, it was held that if either of the jury signing a certificate was not a freeholder, the proceedings were without jurisdiction, and void.

In *People v. Potter*, 86 Hun, 181, the court held that an omission to put all the names in the box before drawing did not render the proceedings void. In that case all the jurors drawn were qualified. The defect was in omitting to put into the box all that should have been placed there. In the present case, there were never 12 jurymen drawn. One of them was a non-resident of the town. Eleven of those drawn were qualified to serve; but one was not. It would seem, therefore, that a jury was never obtained,—in other words, 12 qualified persons were never drawn.

It is undoubtedly true that those acting were competent men; but whether they were qualified to act as jurors in such a case depends whether they were drawn in pursuance of the statute. There is no provision for drawing a jury in such a proceeding of less than 12 men. The number less than 12 men authorized to act rests upon the assumption that they were a part of the 12 drawn. Suppose all those drawn had been non-residents of the town, it is obvious that the effort to obtain a jury would have been an entire failure. If 12 qualified persons must be drawn, a failure to obtain that number would seem to involve the proposition that no jury had been obtained.

In the *Potter Case*, the defect was not in the men drawn, or any of them, but in the omission to draw from a sufficient number. A majority of the court thought the omission was not jurisdictional; but here the defect is in the jury drawn. Only 11 qualified men were obtained; a twelfth was never drawn, so that a complete jury of 12 men was never obtained. It seems to follow that those who assumed to act were not a jury, or any part of one. If the statute provided for drawing a less number than 12, the learned counsel's argument for the applicant would seem to be complete. The list from which the drawing is directed to take place, is from that filed in the town-clerk's office, in pursuance of the Revised Statutes. It would have been necessary to look further, except for the express provision that those drawn should then be residents of the town. The statute is that the jury shall consist of 12 persons, then residents of the town, and qualified in other respects, as provided by statute. The difficulty here is that 12 residents were never drawn. No jury ever certified to the necessity of the highway. The application must be denied; the failure to obtain jurisdiction was the result of accident, and not bad faith. No costs are awarded on this application.

WELLS v. KNOX.

(*Supreme Court, Special Term, New York County. June 14, 1889.*)

ASSIGNMENT FOR BENEFIT OF CREDITORS—ACTION AGAINST ASSIGNEE—PARTIES.

An assignor, or his personal representatives, are necessary parties defendant to an action for settlement of an attorney's account against the assignee, under Code Civil Proc. N. Y. § 482, providing that "where a complete determination of a controversy cannot be had without the presence of other parties, the court must direct them to be brought in," as a judgment in such a case would be no bar to another action by the assignor, or his representatives, against the assignee for a subsequent accounting.

On demurrer.

Action by Judson G. Wells against Thomas R. Knox, as assignee, for the settlement of his account as attorney for the insolvent estate.

Hahls & Lindner, for plaintiff. *Benno Loewy*, for defendant.

INGRAHAM, J. There is no doubt but that the assignor, or his personal representatives, would be a proper party defendant to this action, but the question is presented whether he is a necessary party so that there is a defect of parties defendant. Section 488 of the Code, allows the defendant to demur where it appears on the face of the complaint that there is a defect of parties plaintiff or defendant; and the question must be determined by section 452 of the Code, which provides that "where a complete determination of the controversy cannot be had without the presence of other parties, the court must direct them to be brought in."

The controversy to be determined in this action is the settlement of the attorney's accounts. Before there can be a complete determination of that controversy, all the parties interested in such settlement must be before the court so as to be bound by the judgment; for it is well settled that a court of equity will not compel a trustee to account, until all the parties who can require him to account are before the court; otherwise he can be required to account a second time. See principle stated in *Cromer v. Pinckney*, 3 Barb. Ch. 474.

The assignor is entitled to a return of the property assigned after the payment of his debts. He is therefore entitled to demand from the assignee an accounting. If he is not a party to the action in which the assignee has accounted, it is clear that the judgment in such action would be no bar to his action for an accounting, and there could not, therefore, be a complete determination of the obligation of the assignee in regard to the assigned estate. This principle is recognized by the court of appeals in *Haines v. Hollister*, 64 N. Y. 1, where the court, in speaking of making the personal representatives of a deceased assignor a party defendant, say: "Without all of them there would be a want of proper parties." Section 448 of the Code does not apply, because the position of the assignor and creditors are different. The assignor stands by himself. Any one creditor may bring an action for an accounting, but there is no provision by which the provisions of a judgment for an accounting at the suit of a creditor can be extended so as to bind the assignor, where he is not a party to the action. The fact that the assignor is dead does not dispense with the necessity of having his estate represented. Where a representative of the estate is appointed, he will have a cause of action against the assignee to compel him to account, and the assignee should not be compelled to account at all until the representative of the assignor is properly before the court. The demurrer must therefore be sustained. Judgment ordered for the defendant, with costs, with leave to the plaintiff to amend within 20 days, on payment of costs.

ABEGG v. SCHWAB et al.*(Supreme Court, Special Term, New York County. June 19, 1889.)***ASSIGNMENT FOR BENEFIT OF CREDITORS—FRAUD.**

Evidence that a debtor owing \$90,000 confessed judgments in favor of five creditors, to "protect" them, and then made an assignment by agreement with the assignee and creditors, although none of the creditors were pressing him; that the estate was levied upon under two executions issued on the judgments before the assignee took possession, and, on refusal of all the creditors to accept a settlement of 50 per cent., was purchased by two of the judgment creditors and the clerk of another, for \$11,800, which was credited on the execution; that the goods were turned over to a firm composed of the assignor's brothers, and formed its entire capital, on the agreement of the firm to pay \$12,700 to the judgment creditors, the amount due from the assignor; that the firm thereupon appointed the assignor its general manager, leaving him in full control and possession, under power of attorney; and that the claims were paid to the judgment creditors a few days thereafter, —is sufficient to set aside the confessed judgments and the assignment as fraudulent and void.

Bill in equity, by Henry Abegg against Emanuel Schwab and one Lillenthal, to set aside certain judgments confessed by defendant Schwab to protect certain creditors, and also an assignment of all his property as fraudulent.

Blumenstiel & Hirsch, for plaintiff. *Leopold Wallach*, for defendant Lillenthal. *Luther W. Emerson*, for defendant Schwab.

INGRAHAM, J. By the evidence in this case it is established that the confessed judgment and the assignment were together one plan whereby all the property of the assignors was to be disposed of. The assignor testified that on the morning that the assignment was executed he told Mr. Wallach that "I had to make an assignment, owing to my father's death, and told him I wanted to protect these men, [the persons in whose favor the judgments were confessed,] and, at his suggestion, that was the mode in which it was done. Then the confessed judgments were made out first." The instructions given by the assignor to his attorney were that he had to make an assignment, and wished to protect certain of his creditors, and that to carry out that design the attorney suggested the plan of confessing judgments in favor of the persons that the assignor wished to "protect," and then making an assignment. The confession judgments being the means adopted to accomplish a definite scheme or plan, it is clear that, if the scheme which was attempted to be executed was prohibited by law, the means by which it was attempted to be carried out were illegal and void. The total amount of the assigned estate was as follows: Property sold by the sheriff, \$13,749.33; amount collected by assignee, \$23,000; making a total of \$36,749.33,—one third of which amounted to \$12,249.78. The total amount of the judgments confessed by the assignor, and which were, by the method adopted, preferred, was \$12,700.05.

By chapter 503, Laws 1887, it is provided that in assignments of the estate of debtors for the benefit of creditors any preferences created therein shall not be valid except to the amount of one-third in value of the assigned estate, after deducting the wages of employes and the costs and expenses of executing such trusts. This provision applies to all assignments for the benefit of creditors, and, where such assignment contains preferences which are in excess of the one-third of the estate which the law allows to be preferred, it is provided that one-third of the assets only shall be applied to the payment of preferred claims. But when the parties about to make an assignment attempt to evade this provision of law by means of confessed judgments, so that more than one-third of the debtor's estate is actually paid to preferred creditors, the only way that the law can be enforced is to declare the confessed judgments void, and set them aside. This is precisely the result of the scheme adopted by the assignors in this case. One-third of the gross amount of the assigned estate was \$12,249.78, without deducting the expenses of executing the trust, and yet the

assignor has, by the confession of judgment, preferred creditors to the amount of \$12,700.05. This is, of itself, sufficient to declare the judgments confessed unlawful and void. The same principle has been applied in other states where preferences are prohibited by law. I do not think, however, that this would justify the court in setting aside the assignment. By holding the confessions of judgment void, and setting them aside, the whole property of the assignor would vest in the assignee, and could then be applied, according to its provisions, to the payment of the assignor's debts; and, if the assignee was a party to the fraud, the court could appoint a substituted assignee to carry out the trusts. It is, however, unnecessary to determine this question, as a consideration of the testimony has convinced me that the assignment was not a *bona fide* transfer of the debtor's property for the benefit of his creditors, but the scheme was devised by the assignor for the purpose of preventing the application of his property to the payment of his debts.

The assignor was in business with his father, and in the five months preceding the assignment the firm purchased, on credit, about \$90,000 worth of merchandise. November 21st the father died. There is no evidence that any of the creditors were pressing the assignor, but two or three days after the father's death this assignment was contemplated, and, on the morning of the 25th of November, the proposed assignee, two of the persons who were to be preferred, and the assignor met at the office of Mr. Wallach, who subsequently appears to have acted as the attorney for the assignor, assignee, and the creditors who obtained the judgment. Confessions of judgment were prepared in favor of the five persons who were to be "protected," were executed by the assignor and sent to the county clerk's office to be entered, and executions were issued thereon; the assignor and assignee went to the county clerk's office, taking with them the proposed general assignment, meeting the clerk of the attorney for the assignee there, who took their acknowledgment of the execution of the instrument, and it was filed. The assignee proceeded to take possession of the assigned estate, when he found the property in charge of the sheriff under two executions on the confessed judgments. There was then a meeting of creditors called. The assignor offered to pay 50 cents on the dollar in settlement of his indebtedness. Some of the creditors accepted this offer, and it is in evidence that one of them was subsequently paid that percentage of his claim against the assignor by Schwab Bros. The offer was not accepted by all the creditors. In the mean time the stock of merchandise, including, so far as appears, all the property of the assignor which could be levied on, had been advertised for sale by the sheriff, under the executions issued on the confessed judgments, and, on the failure of the creditors to promptly accept the offer made by the assignor, the property was sold and substantially all of it purchased by four persons, Lillienthal and Gazen being two of the judgment creditors; Frank being the clerk of Guggenheimer & Sons, another of the judgment creditors. The amount purchased by these four persons was over \$11,800 out of a total of \$13,749. Not one cent was paid in cash by anybody for these goods, but the amount was credited on the execution. The goods themselves were never delivered to the purchasers, but were turned over to the firm of Schwab Bros., a copartnership then organized and composed of two younger brothers of the assignor. No money was contributed by the parties to form that copartnership, its entire capital being the goods of the assignor purchased at the sheriff's sale, and it immediately proceeded to appoint the assignor its general manager, giving him a power of attorney to transact all business, draw checks, etc.; whereupon, as it appears, the members of this new firm left the city, leaving the assignor in full possession and control of the property which but a short time before he had ostensibly applied to the payment of his debts.

But the terms on which the purchasers at this sale transferred the goods to this new firm are suggestive. They had purchased the goods to protect them-

selves as creditors, but they immediately transferred them to Schwab Bros., on the agreement of that firm that they would be paid, not the value of the goods, not the amount that the goods will realize on a sale, but the amount due to them from the assignor. Lillienthal says he was first promised notes for the amount due him from the assignor, indorsed, but as they said they would soon sell the goods he did not get the notes, but did shortly after get his money. He was the only one of the persons who purchased goods at the sale that was examined as a witness, but Mr. Guggenheimer, who was one of the judgment creditors, says he sent an employe of his, David Frank, with instructions to protect his interests, and that all he knows is that in a few days he got the amount the assignor owed him from the assignor's attorney; that he did not pay for any of the goods bought; did not get possession of any goods bought, and knew nothing about it, except that Mr. Frank said he had bought sufficient to cover his claim; that he got his money, and that was all he was interested in. We know, however, that Frank, to protect a claim of \$768.84, bought \$6,356.87 worth of goods, which were also turned over to the firm of Schwab Bros. without anybody paying one cent or incurring any obligation, except that Mr. Wallach, who, as attorney, had represented the assignor, the assignee, and the judgment creditors, said that if the goods were turned over to Schwab Bros. the judgment creditors would be paid. During the time that these proceedings took place, the assignee stood by, apparently with full knowledge of all that was going on, and without doing anything to prevent this disposition of the property of the assignor, which had been assigned to him for the benefit of his creditors.

It seems to me that this statement of the facts proved by the parties to the transaction is sufficient to satisfy the most skeptical that there was no sale, no transfer of the property, that it was never intended that there should be either a sale or a transfer of the property, but that the whole scheme was one devised to prevent the stock of merchandise from being appropriated to the payment of the assignor's debts, and that the assignor succeeded, by paying, or agreeing to pay, about \$12,700, of which \$4,800 was to his mother, in obtaining possession of a stock of goods for which he had agreed to pay, and for which he owed, about \$90,000. It is quite evident that any scheme which will accomplish such a result defrauds the creditors of the assignor. Plaintiff is therefore entitled to judgment setting aside the judgments entered on confession and the assignment as fraudulent and void, with costs.

DONNELLY v. CITY OF BROOKLYN.

(City Court of Brooklyn, General Term. September 19, 1889.)

1. CONFIRMATION OF AWARD—DECREE—LIMITATION OF ACTION.

A confirmation, by a court, of an award for damages for property taken to widen a street, is a decree, and, under Code Civil Proc. N. Y. § 876, an action may be brought on it at any time within 20 years.

2. MUNICIPAL CORPORATIONS—LIABILITIES—INTEREST.

Interest will begin to run on a claim against a municipal government only from the time of a demand for payment.

Appeal from special term.

Action by Owen Donnelly against the city of Brooklyn. Judgment was rendered for plaintiff, and defendant appeals.

Argued before VAN WYCK and OSBORNE, JJ.

Almet F. Jenks, for appellant. *J. M. & A. H. Van Cott*, for respondent.

VAN WYCK, J. This action is brought to recover the aggregate of two awards, amounting to \$2,800 damages, for land taken to widen North Second street, Brooklyn, under chapter 559, Laws 1871, and interest thereon from November 9, 1876, the date of the confirmation of such awards by the supreme court. The trial court gave plaintiff judgment for \$2,800,—the amount of said awards,—\$2,111.08 interest thereon from March 9, 1877, aggregating the sum of \$4,910.08, and granted an extra allowance of \$245.50, being 5 per cent. upon the amount of such recovery. The liability of the city for the principal of such awards is not longer an open question, having been conclusively settled, unless barred by the statute of limitations, in *McCormack v. City of Brooklyn*, 108 N. Y. 49, 14 N. E. Rep. 808.

Whether or not this cause of action, brought over 10 years after having accrued, is outlawed, presents a question not entirely free from doubt. There is no authority exactly in point, though the weight of the authorities upon kindred cases seems to favor the application to this case of the 20-years limitation provided for in Code Proc. § 90, and Code Civil Proc. § 376, in reference to a "judgment or decree." The tendency of the decisions of our state court seem to uphold the theory that the confirmation of an award by the court is a judicial act in the nature of a judgment or decree. Strictly speaking, it is not a "judgment," as defined by Code Proc. § 245, and Code Civil Proc. § 1200,— "the final determination of the rights of the parties in an action." But it will be observed that the word "decree" is also used in Code Proc. § 90, and Code Civil Proc. § 376. This term is certainly comprehensive enough, when not limited in its use therein by a statutory definition, to include a judicial determination of the rights of the parties in the legal proceedings for the condemnation of private lands for use of public streets under the right of eminent domain. This may seem to be a strained construction of these provisions, unless it is kept in mind that the judicial decisions of our courts, both before and since their enactment, have strongly inclined to hold the confirmation of such awards to be a judgment or decree. The statutory definition negatives the former, but not the latter, and a resort to the word "decree" relieves these decisions of conflict with positive legislative enactment. The confirmation of such award by the court is a judicial act directing the payment of same, and final and conclusive upon the parties. *Striker v. Kelly*, 7 Hill, 9, 19; *Embury v. Conner*, 3 N. Y. 512, 523; *Dolan v. Mayor, etc.*, 62 N. Y. 472; *Re Department of Parks*, 73 N. Y. 565; *Mayor v. Mayor*, 101 N. Y. 288, 4 N. E. Rep. 386; *Re Canal and Walker Sts.*, 12 N. Y. 411. Twenty years' limitation seems to apply to awards for taking of lands for public use, and to assessments confirmed by the court. Wood, Lim. p. 341, § 172, note 8; *Mayor, etc., v. Colgate*, 12 N. Y. 140; *Fisher v. Mayor, etc.*, 67 N. Y. 73. We have not overlooked section 223, 2 Rev. Laws, p. 443, which provides that

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street opening assessments in New York city shall be a lien, and "may be sued for and recovered" "in like manner as if said houses and lots were mortgaged to the mayor for the payment thereof." This may weaken somewhat the force of the authority of these two cases in the cause at bar, but still we think that an action on such award can be maintained at any time within 20 years.

The trial court allowed interest upon the awards from March 9, 1877, though no demand of payment was made till October 4, 1888. This brings us to the consideration of the only remaining question raised by this appeal. Is interest on a claim, without an agreement for the payment of interest, chargeable against a municipal corporation or government before a lawful demand of the principal has been made? There is a well-defined distinction running through the authorities, between the obligation of the private and that of the public debtor on such matured claims. The former must seek his creditor and tender payment at maturity, or become liable from that time for interest. The latter is presumed to be able, ready, and willing to meet the demands of its creditors as they become due, and is not chargeable with interest till the creditor has demanded payment thereof, and then only from the time of the demand. In daily practice this distinction is strictly observed. Whoever heard of the state or city comptroller, or the county treasurer, starting on his journey, in search of creditors, armed with check-book, or loaded with legal tender, for the purpose of tendering payment of the public debts? It would be thoroughly impracticable, and the contention that such duty rested upon the state or city would provoke the spirit of mirth in the most glum of the laity. The creditor and debtor of a government must seek its disbursing officer,—the former to receive his money, or start interest; the latter to pay his money, or stop interest. There is a long-established rule which relieves the national government from liability for interest on claims against it, unless there is an express agreement or legislative act providing for the payment of interest. 7 Op. Atty. Gen. 523; *Wightman v. U. S.*, 23 Ct. Cl. 145; *Harvey v. U. S.*, 18 Ct. Cl. 489, note; *Tillson v. Same*, 100 U. S. 48. This has been modified in its application to state, county, or city governments by making them liable for interest on such a claim from the time of a lawful demand of payment thereof. The courts of this state, after a careful consideration of the reasons therefor, have approved this rule so modified. *People v. Commissioners*, 5 Denio, 401; *Paul v. Mayor, etc.*, 7 Daly, 144; *Taylor v. Same*, 67 N. Y. 94; *Phillips v. Cudlipp*, 50 How. Pr. 363, 365; *Hamersley v. Mayor, etc.*, 56 N. Y. 535. The courts of Missouri are in accord with this principle. *Robbins v. County Court*, 3 Mo. 42; *Skinner v. Platte County*, 22 Mo. 437; *State v. Trustees*, 61 Mo. 155. The case of *Lord v. Mayor*, 3 Hill, 426, cited by respondent to sustain the opposite view, does so only in appearance. It was an action to recover damages for the destruction of a house to prevent the spreading of a fire. The commencement of an action is equivalent to a demand, and interest was allowed only from a date subsequent to that, viz., from the date of confirmation of the award by the court of common pleas, which occurred after the commencement of the action in pursuance of a *mandamus* issued out of the supreme court. *Read v. City of Buffalo*, 74 N. Y. 463, and several other authorities cited by respondent, should not influence us upon this point, for in those cases the city had expressly agreed to pay interest, issuing interest-bearing obligations. The weight of authority leads us to conclude that creditors of a state or city government, holding matured claims without an agreement for the payment of interest, must seek such debtor, and demand payment of their claim, before interest will commence to run thereupon. This is a salutary rule, the wisdom of which is well illustrated by this very claim. The city has taken no steps to widen the street, and the plaintiff has not been disturbed in the use of his buildings erected upon the very land, in part at least, for the taking of which his awards were granted. Both plaintiff and

the city acquiesce in this condition for about 11 years,—the city imposing no assessment upon the plaintiff for the improvement, and changing in no way the physical conditions surrounding the premises; the plaintiff taking no steps to compel the city to make the improvement, and never asking the city for the payment of his awards for about 11 years, lest the city might respond, and at once set in motion the machinery for assessing him and his neighbors for the costs attending the improvement. The application of the rule requiring a demand upon the city for the payment of the award to start the running of interest certainly works no injustice in this case. We do not think that this award is a judgment within the meaning of Laws 1844, c. 324, § 1, providing that “every judgment shall bear interest from the time of perfecting the same.” The statutory definition of a judgment excludes such assumption. This theory is further supported by the fact that this statute was repealed by Laws 1877, c. 417, § 1, subd. 18, and re-enacted in Code Civil Proc. § 1211, in the same terms; and *Id.* § 1200,—a part of the same chapter,—restricts the meaning of the word “judgment” to “a final determination of the rights of parties in the action.” For these reasons we are of the opinion that plaintiff is not entitled to interest on the awards till payment had been demanded on October 4, 1888. Judgment must be reduced by the amount of interest allowed from March 9, 1877, to that date, and the extra allowance on such interest, and, as modified, must be affirmed.

O'SULLIVAN v. NEW YORK EL. R. Co. *et al.*

(*Superior Court of New York City, Special Term. July 1, 1889.*)

1. INJUNCTION—PARTIES—NUISANCE.

In an action to enjoin a nuisance, both the lessor and lessee of the structure constituting the nuisance are necessary parties.

2. ACTION—MISJOINDER—INJUNCTION.

A complaint which alleges that the defendant's structure is a permanent, unlawful nuisance, inflicting irreparable damage on plaintiff's property, and which prays for a permanent injunction, and that the damage inflicted may be ascertained and adjudged to plaintiff, does not improperly unite two causes of action.

On demurrer to complaint.

Action by Eugene O'Sullivan against the New York Elevated Railroad Company and the Manhattan Railway Company. The complaint alleges that the railroad of the defendants is a permanent, unlawful nuisance, inflicting irreparable damage upon the plaintiff's property, and that the defendants had no right to build or operate their railroad upon the plaintiff's premises, and prays “that the defendants, and each of them, be perpetually enjoined and restrained from operating their said railroad in Pearl street running in front of, or past, or over, or upon the said plaintiff's two parcels of land and premises, or either of them, and that they remove their said railroad and structure from said Pearl street in front of plaintiff's said two parcels of land and premises, and each of them, until they have made to the said plaintiff proper and adequate compensation for the damage and injury already inflicted and hereafter to be inflicted upon him by reason of the construction, maintenance, and operation of said railroad.” And further prays “that the damages sustained by the plaintiff by reason of the construction, operation, and maintenance of said railroad, down to the time of trial of this action, may be ascertained and determined by the court, by the judgment herein, and that the plaintiff may have judgment therefor and for the recovery of the same, and that he may have such other and further judgment, order, or relief in the premises as may be right and equitable.”

Evarts, Choate & Beaman, (Thomas T. Sherman and Wm. V. Rowe, of counsel,) for plaintiff. *Davies & Rapallo*, (Brainard Tolles, of counsel,) for defendants.

O'GORMAN, J. This is a demurrer to the plaintiff's complaint on the grounds that causes of action are improperly united in the complaint, and that the complaint does not state facts sufficient to constitute a cause of action against the defendants, or either of them. The action is brought on the equity side of the court for the purpose of obtaining equitable relief by way of injunction, perpetually restraining the defendants, and each of them, from inflicting or continuing to inflict on the plaintiff the injuries to his real estate in Pearl street, which are admitted by the demurrer. One of the defendants, the New York Elevated Railroad Company, inflicted the first trespass on the property of the plaintiff, in the proceedings taken by it in the construction of the Elevated Railroad upon his said real estate. That defendant before any use was made of the structure, and on or about the 20th day of May, 1879, leased the structure so erected to the second defendant, the Manhattan Railway Company, and the said second defendant has occupied the said structure and used it for the transit of its cars since that time, inflicting, as well by the continuance of said structure as by its use of the same, trespasses on the plaintiff's property.

The purpose of the action is to obtain equitable relief preventing forever the recurrence and continuance of these trespasses. This is the relief prayed for.

In order to enable the court effectually to give this perpetual relief it was necessary that all parties having a substantial interest in the title to the structure and its use should be made parties. *Bridge Co. v. Lewis*, 63 Barb. 115. Thus it was proper and necessary that the lessor as well as the lessee should be made parties, so that the person entitled to possession of the structure, in case of termination of the lease for any cause, should be affected by the judgment of the court, perpetually restraining the continuance of the trespass. *Taylor v. Railroad Co.*, 50 N. Y. Super. Ct. 340; *Bridge Co. v. Lewis*, *supra*, 114, 115; *Irvine v. Wood*, 51 N. Y. 224, 230.

I see no reason to regard the uniting the causes of action here as constituting ground of demurrer. The action is not brought in form or in essence to recover damages from either of the defendants, nor is that the main or principal cause or purpose of this action. The purpose of the action was clearly to obtain equitable relief enjoining forever the commission of the trespass begun by one of the defendants and continued by the other.

A court of equity, having acquired jurisdiction of the defendants, and being justified in granting the equitable relief by way of injunction against them, as prayed for, had the power to grant also, as incidental relief, a judgment for such damage to plaintiff's property as had been inflicted by the defendants, or either of them, to make payment of the amounts found to be proper compensation for damages,—part of the conditions it might impose for withholding its equitable relief. *Ulin v. Railroad Co.*, 101 N. Y. 121, 123, 4 N. E. Rep. 536; *Pond v. Railway Co.*, 112 N. Y. 186, 188, 190, 19 N. E. Rep. 487; *Williams v. Railroad Co.*, 16 N. Y. 111, and *Henderson v. Railroad Co.*, 78 N. Y. 428-431, 434, 436, 437, *et seq.* This course a court of equity, is justified in taking, in order to prevent multiplicity of actions, and grant in the one suit such ample and comprehensive relief as will put an end to unnecessary litigation. *Henderson v. Railroad Co.*, *supra*, 431. The learned counsel for the defense justifies his demurrer on the theory that this is an action at law, brought mainly and directly to obtain payment of damages inflicted. The form and substance of the complaint, however, do not sustain that contention. The complaint, in its statement of facts, is necessarily, and to a great extent, narrative, but the cause of action is one, and applicable to each defendant, as is also the main relief asked for.

The facts, as alleged and admitted by the demurrer, sufficiently show the plaintiff's right to a perpetual injunction against both and each of the defendants; against the Manhattan Railway because of its present occupation and

use of the structure, to the damage of the plaintiff; and against the defendant the New York Elevated Railroad by reason of its continuing title in the structure as lessor, and its possible possession on the cessation of the lease, which, by its terms, must occur at a fixed and attached period, and may possibly occur at an earlier period. The fact that the time for the termination of the lease is by the terms of the lease itself remote does not make any material difference in this action, in which the injunction sought for by the plaintiff is perpetual. These views of this contention are, in my opinion, well sustained by the authorities above referred to, and numerous other authorities.

The demurrer must be overruled, with costs, but with leave to answer within 20 days from this date.

FIRST NAT. BANK OF LOCKPORT v. BISSELL.

(Circuit Court, Niagara County. June 8, 1889.)

1. LIMITATION OF ACTIONS—AMENDMENT OF STATUTE—RETROACTIVE LAWS.

Code Civil Proc. N. Y. § 401, provided that "if after a cause of action has accrued against a person he departs from and resides without the state, or remains continuously absent therefrom for the space of one year or more, the time of his absence is not a part of the time limited for the commencement of the action." After an action had been commenced, but before trial, the section was amended by the act of June 4, 1888, so as to require the debtor not only to be a non-resident of the state, but to be absent therefrom. *Held*, that as the effect of the application of the amendatory act to the pending action would be to deprive the plaintiff of a cause of action which was valid when the action was commenced, the amended statute could not operate retroactively without violating the constitution of the United States, prohibiting the states from passing laws impairing the obligations of contracts.

2. SAME—ABSENCE FROM STATE.

A debtor who removes from the state before a cause of action against him has been barred by limitation, and who continues to be a non-resident, cannot during that time, by temporary returns to the state, put the suspended statute again in operation.

Action by First National Bank of Lockport against Rush W. Bissell, on three promissory notes. Plea of statute of limitations by defendant.

I. F. & G. W. Bowen, for plaintiff. *Harmon & Chapman*, for defendant.

LEWIS, J. This is an action against the defendant, as indorser, on three promissory notes. The defense is the statute of limitations. The notes matured December 13, 1877, November 16, 1878, January 22, 1879, respectively. At the time they matured, the defendant was a resident of the state of New York. Thereafter, and in the month of October, 1882, he removed to the state of New Jersey, and has ever since been a resident of that state. This action was commenced in January, 1888. When the defendant thus removed from this state, there was unexpired of the six-years limitation on the first note, one year and two months; on the second, two years and one month; and on the third, two years and three months. All the time the defendant has resided in the state of New Jersey, his place of business has been in the city of New York; having an office there, with his name upon the office door, and he has spent the business part of each secular day in that city.

At the time of the commencement of this action, section 401 of the Code of Civil Procedure provided: "If, after a cause of action has accrued against a person, he departs from and resides without the state, or remains continuously absent therefrom for the space of one year or more, the time of his absence is not a part of the time limited for the commencement of the action." Prior to the trial, and on the 4th day of June, 1888, section 401 was amended so as to read: "If, after a cause of action has accrued against a person, he departs from and resides without the state, and remains continuously absent therefrom for the space of one year or more, * * * the time of his absence * * * is not a part of the time limited for the commencement of the action." So

that by the amended section, to suspend the running of the statute of limitations, the debtor must not only be a non-resident of the state, but be absent therefrom. The defendant claims that this section, as amended, applies to this case, notwithstanding it was passed after the action was commenced,—claiming that the whole matter of limitation is one of process and remedy, and not of right or obligation, and is therefore entirely without the scope of the constitutional prohibition respecting the obligations of contracts. If he is right in his contention, and this amended section is held to apply to this case, the statute has probably run against these notes, and the plaintiff is not entitled to recover; and this is the first question to be considered. The purpose of this section is to regulate the time within which an action may be commenced after the claim matures; it has no reference to the time when it may be tried, but within what time it may be commenced. It should, I think, be limited in its operation to the time of the commencement of the action; and if, when an action is commenced, a cause of action exists, the change in the act should not be construed to be retroactive, unless its language plainly and unmistakably imports that purpose. *Goillotel v. City of New York*, 87 N. Y. 441; *Richardson v. Cook*, 37 Vt. 599; *Hedger v. Rennaker*, 8 Metc. (Ky.) 255; *Van Rensselaer v. Livingston*, 12 Wend. 490.

While the legislature may change and modify remedies and forms of proceedings, and even the tribunal itself, they cannot destroy or abrogate all remedies whatever; for, by so doing, they impair and destroy contracts. Before the amended section took effect, the plaintiff had a valid cause of action against the defendant; and had the plaintiff succeeded in getting its cause to trial before the 4th of June, 1888, the time when the amended section took effect, it would then have been entitled to judgment. If the defendant's contention be correct, the act of June 4th destroyed this claim, and that without giving the plaintiff any opportunity or means of avoiding that result. If the terms of this section, as amended, plainly import that it was to be retrospective in its operations, and apply to actions then pending, thereby defeating a contract previously valid, it would conflict with the prohibition of the United States constitution, which forbids the states passing laws impairing the obligation of contracts.

In an elaborate article written by Judge Cooley, entitled "Effect of a Change in the Law," published in 3 South. Law Rev. (N. S.) 44, the author says that "statutes should be construed so as to apply prospectively, unless by their terms a retrospective effect is clearly intended. * * * If the new defense would defeat a contract previously valid, or take away any right assured to the party, then the defense could not be allowed, for it would come within the prohibition of that clause of the constitution of the United States which forbids the states passing laws which impair the obligation of contracts. Remedies are always under legislative control, and may be changed at will; provided the change does not go to the extent of depriving the one party of substantial redress, or of fastening upon the other some new obligation." In general, when the law is altered pending an action, the rights of the parties are decided according to the law as it existed when the action was begun, unless the new statute shows a clear intention to vary such rights. End. Interp. St. § 282.

The defendant's counsel insists that even if it be held that the amended section does not apply to this case, but that the case is to be disposed of under the section as it existed before it was amended, then there should be added to the time that had elapsed between the maturity of the notes and the time the defendant removed from the state, the time he actually spent in the state of New York while residing in New Jersey; and if that be done, it will appear that the statute of limitations had run against the notes at the time the action was commenced. This claim of the defense has been the subject of much discussion, and the decisions thereon have not been entirely harmonious. The

construction given to this section by Justice INGRAHAM, in *Bassett v. Bassett*, 55 Barb. 518, meets with my approval. The learned justice held that a creditor is not obliged to follow his debtor to another state, nor is he called upon to watch him to ascertain whether he comes into the state for a temporary purpose, so long as his residence is elsewhere. It may also be said that it was intended to give the creditor control as well over the person as the property of the debtor, by requiring a residence in the state to give effect to the limitation. This would not be the case if temporary return from time to time could overcome the residence abroad. The case of *Bassett v. Bassett* was affirmed in the court of appeals, though not reported. When the plaintiff learned that his debtor had removed from the jurisdiction of the courts of this state, he was justified in waiting for his return. He was not obliged to visit the place of his residence in another state for the purpose of ascertaining whether he occasionally came to the state of New York, and, if so, when and where he might be found. Neither was he obliged to institute inquiries in the towns and cities of this state to ascertain if he could be found therein. *McCord v. Woodhull*, 27 How. Pr. 54.

My conclusion is that the defendant has failed to establish a defense, and that the plaintiff is entitled to a judgment for the amount claimed in its complaint.

In re BLAKENEY.

(*Surrogate's Court, Rockland County. February, 1889.*)

EXECUTORS AND ADMINISTRATORS—SETTLEMENT AND ACCOUNTING—COMMISSIONS.

To entitle each co-executor to full commissions, under Code Civil Proc. N. Y. § 2736, providing that where the value of decedent's personal estate amounts to or exceeds \$100,000 over all his debts, each executor or administrator is entitled to the full compensation allowed a sole executor or administrator, it is sufficient if the value of such estate amounts to the requisite sum at the time of the executors' accounting, though it fell short of that amount when the inventory was taken.

Proceedings for an accounting by David W. Kipp and another, executors of Hannah M. Blakeney, deceased.

A. & A. X. Fallon, for petitioners. *Wm. E. Gowdey*, for next of kin.

WEIANT, S. The deceased testatrix died December 12, 1886. Letters testamentary of her will were granted January 7, 1887. An inventory of her personal estate was filed in this office on March 4, 1887, which disclosed the value of her personal estate to be \$96,786.70. This proceeding for an accounting was commenced on June 15, 1888, upon the petition of the executors, and wherein their accounts were filed July 20, 1888, by which it appears that the assets of the estate were then of the value of \$101,189.47. The executors claimed double commissions upon this sum, under section 2736 of the Code of Civil Procedure, which provides that "where the value of the personal estate of the decedent amounts to one hundred thousand dollars, or more, over all his debts, each executor or administrator is entitled to the full compensation allowed by law to a sole executor or administrator, unless there are more than three," etc. To the allowance of these double commissions the legatees and next of kin object, claiming that to bring a case within this section it is requisite that the estate, at the time of the death of the decedent, should be of the value of \$100,000.

Upon the submission of this question to me for determination I had the impression that such was the meaning of the statute. This impression was based upon my understanding that the authorities had placed that construction upon the section; but, after an examination of the decisions, and on application of the principles which have been enunciated by the courts bearing upon the question of the compensation, the extent thereof, upon what based, and when earned and payable, of executors and administrators, and a consid-

eration of the practical application of the language of the statute under the constructions contended for by the respective parties, I have reached the conclusion that my former impression was erroneous. The statute, by its language, contemplates a determination or finding of the "value" of the estate and of the "debts," in order to ascertain whether or not full commissions are allowable to each executor. Now, when and how does the statute contemplate that this should be done? Is it by the making and filing of the inventory? The statute, if such were the intention, could and would most probably have been made thus specific.

In the administration of estates an inventory is not made in any sense conclusive as to values, and forms no fixed basis for a judicial determination. It is merely a piece of evidence, open to impeachment by an interested party. It is, in a sense, an *ex parte* fixing of values to assets, and made under the supervision of the executor. If that alone is to serve as the basis for a determination of the value of the assets, what is there to prevent the executor, in collusion with the appraisers, from fixing untrue or fictitious values to assets uncertain in value or quite worthless, in order to bring the aggregate high enough to entitle him to the increased compensation? He will be thus made a principal actor in fixing his own compensation. The legislature surely never intended to clothe him with such power. No method of review of these valuations is provided except upon an accounting. It seems to me that, as the statute is silent as to how or when this value of the personal estate should be ascertained, it is fair to assume that these questions are to be determined in the method prescribed for the settlement of estates by accounting, and that a determination of the value of the estate is contemplated in that way. Commissions of an executor cannot be retained, until allowed by judicial determination on an accounting. *Wheelwright v. Rhoades*, 11 Abb. N. C. 382, 28 Hun, 57; *Trust Co. v. Bixby*, 2 Dem. Sur. 494; *Freeman v. Freeman*, 4 Redf. Sur. 211. Not only the allowance of commissions, but the amount thereof, is then fixed, and this involves the valuation of the assets or estate. The value must be judicially determined, and this can and should be done only on an accounting, to which all interested persons are parties. Again, the amount of the debts must be determined. As to how and where it shall be done, the statute is also silent. The time and method of ascertaining the debts in the administration of an estate, and the settlement thereof, is prescribed by statute. As no method is prescribed for ascertaining the amount of the debts, in order to decide the question of allowance of additional commissions, it is reasonable to suppose that they are to be ascertained in the usual method provided by the statutes regulating the administration of estates. Now, if the "value" of the estate and the amount of the "debts" of the decedent are to be determined by the usual methods, and upon an accounting, then it seems to me that the "value," as there and then found, is the value that is to be taken as the basis from which to adjudge whether or not double commissions are allowable.

It may be urged, for the purpose of the determination of the right to the additional commissions, that the accounting may relate back to the time of the death of the decedent. But this would thus involve a double examination,—one to ascertain the value at the time of the decedent's death, and another for the purpose of fixing the value of the assets for which the executor or administrator is accountable in his administration. This would cause an additional expense frequently, and generally amount to more than the commissions. Again, this double examination and valuation would lead to confusion. Assets fluctuate in value. A bond and mortgage worth its face at the time of the death of the decedent may, before it could be converted into cash, greatly depreciate. Stocks and bonds may increase or decrease materially in value,—may, indeed, become worthless. In the instances where the assets had decreased, if the value at the time of the death of the decedent

were to prevail, then the executor or administrator claiming double commissions would, contrary to the prevailing rule, not only get commissions on depreciated or worthless assets at their then full value, but also secure double commissions upon such. These, among other circumstances and considerations, have led me to the conclusion that the only construction of this statute that will lead to an orderly, systematic, and uniform determination of the value of the estate over the debts, is to adopt the value at the time of the accounting as the "value of the personal estate of the decedent." I do not believe that the legislature intended to fix one time at which the value should be determined for the purpose of double commissions, and another for the purpose of single commissions, which would be the case if the contention of the legatees herein should prevail against the conclusion I have adopted.

It may be urged that the executors and administrators may be tempted to delay accounting for the purpose of having the estate increase, or otherwise reach an aggregate that will come up to the \$100,000 limit; but in answer to this it may be said that the executor or administrator cannot thus abuse his trust, if the persons interested in the estate see that he is brought to a proper accounting. But it may be argued with even greater force from the opposite side, that an executor, in fixing the value of the estate as of the time of the death of the decedent, will be tempted to give the assets a fictitious value in making the inventory and otherwise, so as to secure the double commissions. There will be every incentive for him to overvalue assets, and to set down worthless properties at some valuation, and then, upon his accounting, claim loss or deterioration from causes uncontrollable by him, which must lead to more or less contention and litigation.

I am aware that in several cases which the counsel for the next of kin has brought to my attention it has been held that the value of the estate, at the time of the death of the decedent, left to be administered, or which comes to a trustee as a trust fund, is the one by which the question is to be determined. If it is meant to be held that the increase, in the usual course of administration, as in this one, may not be considered as a part of the estate of a decedent for the purpose of deciding whether or not the value of the estate is sufficient to authorize double commissions, then I do not assent to the correctness of such construction of the statute. But, however the learned judges may have expressed themselves on this point, each case is distinguishable from this upon the facts, and the decision is made to turn upon circumstances other than exist in this case. In *Re Blackwell*, decided by Surrogate WILLET of Queens county, (not reported,) the learned surrogate states that the statute "must mean the *corpus* of the estate received from a testator, not as it may be augmented by rents, profits, and accumulations realized after his death." But he adds that, upon the "scheme of the will and codicil," annual settlements were contemplated, and the executor will not be allowed to increase their compensation by neglecting their duties in that respect, until the aggregate of income shall make it amount to over \$100,000. In *Re Slosson*, 2 Dem. Sur. 257, I do not think that the learned surrogate decided the exact question here presented, and certainly not adversely to the claim of the executors. It was held that in a case of testamentary trusteeship the income arising from the trust fund could not be added to the principal to make up the \$100,000. In distinguishing that case from *In re Leggatt*, 4 Redf. Sur. 148, the learned surrogate says, at page 260: "It does not appear upon the statement of the facts that the rents so received were regarded strictly as income. * * * The rents in question might very properly have been treated as substantially an accession to the personalty, and as forming, therefore, a part of the principal of the estate, rather than of income collected." Thus, within the views of the surrogate as above expressed, the accrued interest at the time of the accounting, and received by the executors, may be treated as an accession "to the personalty, and as forming, therefore, a part of

the principal of the estate." *Savage v. Sherman*, 24 Hun, 307, was a case of trusteeship. The rents and income were accounted for and paid out periodically, and at no one time did the estate amount to \$100,000. It was sought to bring all of these several amounts of income into one aggregate with the principal, although the same had been accounted for and paid over, and upon which single commissions had, at each accounting, been retained. There are other distinguishing circumstances in the case, and upon which the decision was rested, which show that the exact point here involved was not directly examined and decided. It is said at page 314 that the amounts from time to time "received and disbursed were far below the sum required for the purpose of justifying additional commissions, and those only could be charged upon them which were legally apportioned to the amounts at the time collected and disbursed."

I think that the following authorities sustain the construction of the statute I have adopted: *In re Leggett*, 4 Redf. Sur. 148; *In re Mason*, 98 N. Y. 527; *Smith v. Buchanan*, 5 Dem. Sur. 169. In the *Daily Register*, of the date of September 18, 1888, there appears an article¹ upon the question of the proper

¹MATTER OF BLAKENET.

Some difference of opinion seems to exist as to the right of several co-executors to claim full commissions for each under the statute (Code Civil Proc., § 3786) providing that, "where the value of the personal estate of the decedent amounts to \$100,000 or more over all his debts," such full commissions shall be allowed, unless there are more than three, etc. The question is whether the right to full commissions is to be determined by reference to the inventory valuation, minus the debts and exclusive of income, etc., or whether income and proceeds of real estate can be included in ascertaining what is the aggregate personalty.

In determining this question it is to be observed that there may be a distinction between the amounts on which commissions are to be computed, and those the aggregate of which confer the right to full commissions. There is no doubt that commissions, single or double, are to be computed on income as well as principal, and on proceeds of real estate as well as on personal estate. But this does not necessarily determine the question whether, in judging whether the amount of the personal estate, after deducting debts, exceeds \$100,000, we are to include income or proceeds of realty.

Surrogate Woods, of Albany, in a well-considered opinion in *Smith v. Buchanan*, 5 Dem. 169, in which he reviewed the previous decisions, held that the proceeds of real estate equitably converted by the will were to be regarded as personal estate for this purpose. In the case of *The Leggett Estate*, (4 Redf. 148,) before Surrogate CALVIN, where the personal estate was less than \$100,000, but the rents of real estate collected and paid out by the executors under the will amounted to much more than \$100,000, it was held, upon an accounting which embraced both classes of assets, that the executors were entitled, upon a liberal construction of the statute, to full commissions, as being a case where within the equity of the statute the personal estate of the decedent exceeded \$100,000. There can probably be no doubt that in the intent of the draughtsman of the statute the words "personal estate" were inserted merely because it is ordinarily only the personal estate with which executors have to do. Moreover, if it be held that the statute only applies where movable property belonging to the decedent in his lifetime and left by him at death exceeded the limit, the right of testamentary trustees, who are very commonly charged with the care of real property, would be absurdly subjected to the same restriction by reason of section 2811, which makes the clause as to executors control the right of several testamentary trustees to full commissions. There is much force in the views presented by the court of appeals in deciding the right of executors and trustees annually accounting to charge 5 per cent. on the first thousand dollars of income accounted for, (*Matter of Mason*, 98 N. Y. 527,) and it appears to us that the same reasoning fully supports the doctrine of *Smith v. Buchanan* and *The Estate of Leggett*, and leads to the conclusion that, although executors as such may not be entitled to charge commissions on the value of real estate of which they have charge, all the property of the estate which comes to their hands in money and is paid out by them, as well as all personalty upon the inventory, is to be regarded, when presented upon one accounting, as the basis for determining whether several executors are entitled to full commissions. The justice of such a rule as this seems to be made clear by the cases cited. The only mischief which it might engender is that executors might, in a rare case, be tempted to delay accounting, or to misconstrue their powers, for the purpose of reaching an aggregate which will exceed the limit; but the same discernment of the court which could perceive such a tendency could preclude it from having effect by taking the account with a rest, if even such a formality were necessary. So far as public policy is concerned, we believe that all experience suggests that the statute fixing the compensation of executors, guardians, and trustees should be liberally interpreted, while the rules imposing their duty and liability should be strictly enforced.

construction of this section of the Code, reviewing the authorities, and the conclusion there reached is similar to the one at which I have here arrived. The conclusion there reached is expressed as follows: "That all the property of the estate that comes to their hands in money, and is paid out by them, as well as all personalty upon the inventory, is to be regarded, when presented upon an accounting, as the basis for determining whether several executors are entitled to full commissions." This expresses my view of the statute; and the increase which comes to the estate in the usual course of administration, together with the principal of the estate at the time of this accounting, being of an aggregate of \$100,000 over all debts of the decedent, each executor is entitled to full commissions.

CHILDS *et al.* v. TUTTLE *et al.*

(Supreme Court, General Term, Fourth Department. September, 1889.)

PATENTS FOR INVENTIONS—INFRINGEMENT—JURISDICTION OF STATE COURTS.

A state court has no jurisdiction to enjoin a person from suing for an infringement of a patent. CHURCHILL, J., dissenting.

Appeal from special term.

Action for an injunction by J. Morris Childs and another against Willis H. Tuttle and others. A preliminary injunction was granted, and a motion to vacate it was subsequently made and denied. From the order denying the defendants' motion to vacate the injunction Willis H. Tuttle appeals.

Argued before MARTIN, P. J., and MERWIN and CHURCHILL, JJ.

J. Henry Metcalf, for appellant. *Risley & Perry*, for respondents.

MARTIN, P. J. The controversy between the parties to this action arises out of the claim that the plaintiffs are manufacturing and selling a spring-tooth harrow, which infringes upon a patent-right owned by the defendants. The relief sought by this action was to restrain the defendants from bringing any suit or suits against the purchasers or users of the plaintiffs' harrow for an alleged infringement of such patent, until a certain suit between a portion of the defendants and one Shorden should be determined by the United States supreme court, where said action was then pending on appeal. A preliminary injunction was granted enjoining the defendants, their agents, attorneys, and employes, from instituting or prosecuting "any suit or suits for an alleged infringement of such patent against any of the sellers, purchasers, or users of harrows manufactured and sold by the plaintiffs, and that they may hereafter manufacture and sell until the final hearing and decision of the case now on appeal to the supreme court, wherein the Reed patent is involved, or until the final decision of a case brought by the owners of said patent against these plaintiffs, in a court having jurisdiction of the subject-matter of the alleged infringement, until the further order of this court." A motion to vacate such injunction was subsequently made and denied. The injunction was however modified by striking out the words "decision of the case now on appeal to the supreme court, wherein the Reed patent is involved," and inserting the words "during the pendency of this action," in lieu of the words thus stricken out. The injunction, as modified, restrained the institution or prosecution by the defendants of any suit against the sellers, purchasers, or users of plaintiffs' harrows for infringement of the defendants' patent during the pendency of this action, or until the final decision of an action brought by the defendants against the plaintiffs in the United States court. From the order denying the defendants' motion to vacate such injunction this appeal was taken.

The important question presented by this appeal is, was this court authorized or had it the power to restrain the defendants from prosecuting an action

in the federal courts to secure their alleged rights, under a patent issued by the United States? The federal courts have exclusive jurisdiction of actions for infringement of patent rights. *Dudley v. Mayhew*, 3 N. Y. 9; *Hovey v. Pencil Co.*, 57 N. Y. 119; *De Witt v. Manufacturing Co.*, 66 N. Y. 459; *Service Co. v. Clark*, 100 N. Y. 365, 370, 3 N. E. Rep. 335. "An action for an infringement lies in favor of the owner of a patent against any one who claims to manufacture, use, or enjoy the same in opposition to his rights." *Service Co. v. Clark*, 100 N. Y. 365, 371, 3 N. E. Rep. 335. A state court has no authority to restrain the proceedings of a federal court. *McKim v. Voorhies*, 7 Cranch, 279; *Riggs v. Johnson County*, 6 Wall. 195; *Ableman v. Booth*, 21 How. 516; *Duncan v. Darst*, 1 How. 306; *Amy v. Supervisors*, 11 Wall. 136. While a state court has jurisdiction to decide questions as to the title to letters patent or of an action on contract, although such action involves the validity of a patent, it has no authority to restrain a party from using the patent *pendente lite*, or in any way to pass upon a question as to an infringement of the patent; as to that the federal courts have exclusive jurisdiction. *Service Co. v. Clark*, *supra*; *Manufacturing Co. v. Reineohl*, 102 N. Y. 167, 6 N. E. Rep. 264. Nor have the state courts any jurisdiction to entertain a suit to restrain the infringement of a patent. *Dudley v. Mayhew*, 3 N. Y. 9; *Gibson v. Woodworth*, 8 Paige, 132. I think the doctrine of the authorities cited quite decisive of the question under consideration, and that it must be held that this court had no authority to restrain the defendants from prosecuting actions in the federal courts against either the makers, sellers, or users of a harrow, which was an infringement upon their patent; and as this court could in no way pass upon that question, it could not enjoin the defendants from prosecuting their actions in a court having exclusive jurisdiction of the subject-matter thereof. If this court has power to restrain the defendants from bringing an action in the federal courts against one class of infringers, it can restrain them from bringing an action against any person who infringes upon their rights; if so, then it may enjoin every owner of a patent from maintaining an action for the infringement of his right; and hence a state court would possess the power to nullify the patent laws of the United States, and render the patents granted by it valueless. I think no such power is vested in the state courts. The exclusive jurisdiction of that subject is vested in the federal courts. The question here is not one of comity, nor one of concurrent jurisdiction; it is a question of limitation and authority. No case has been cited which sustains a doctrine which will uphold the injunction granted in this case, and I have been unable to find any. The case of *Emack v. Kane*, 34 Fed. Rep. 46, does not sustain the doctrine contended for, and is not in conflict with the foregoing conclusion. In the *Emack Case* the action was in the federal court, and was brought, not to restrain the defendants from asserting their claimed rights under their patent by bringing actions for infringement thereof, but to restrain them from maliciously injuring plaintiff's business by issuing circulars threatening the complainant's customers with lawsuits for all infringements. This case falls far short of establishing the doctrine that a state court may restrain a party from commencing an action in the federal court for an alleged infringement of a patent, when the latter court has exclusive jurisdiction of such an action.

The effect of the injunction in this case is to restrain the defendants from commencing any actions against the sellers, purchasers, or users of any harrow that has been or shall be manufactured by the plaintiffs, even though it be identical in all respects with the harrows manufactured under the Reed patent. If the plaintiffs' harrow is an infringement upon the defendants' patent, I can perceive no equity in restraining them from asserting their rights against any person or persons who are liable for such infringement, and, as was said by BLATCHFORD, J., in the *Asbestos Felting Co. Case*, 13 Blatchf.

454. "I am not aware of any principle which would authorize the court, in a suit of this character, to restrain a defendant from bringing suits on his patent before that patent is adjudged to be invalid. The granting of the patent to the defendants confers the right to bring suits thereon for its infringement."

I am of the opinion that the court had no authority to grant the preliminary injunction in this case: that the special term should have vacated it, and erred in denying the defendants' motion for that purpose. These considerations lead me to the conclusion that the order denying the said motion should be reversed, with \$10 costs, and an order vacating said injunction should be granted, with \$10 costs and disbursements on this appeal.

MERWIN, J., concurred. CHURCHILL, J., dissented. See *post*, 227.

MORRIS *et al.* v. WELLS.

(Supreme Court, General Term, Fourth Department. September, 1889.)

1. DECEIT—FALSE REPRESENTATIONS—FINDINGS OF REFEREE.

A finding by a referee that a false representation by a purchaser was not relied on by a salesman is contrary to the evidence, when he also finds that the representation was made, and the salesman testifies, without contradiction, that he did rely on it, though it appears that the salesman's employers made other inquiries before the delivery of the goods.

2. REFERENCE—REFUSAL TO FIND—HARMLESS ERROR.

In an action to rescind a sale on the ground that it was induced by the fraudulent misrepresentations of the vendee, an erroneous refusal of the referee to find that the misrepresentation was relied on is harmless, where it does not appear that the vendee knew the representation to be false when he made it, and that he made it with intent to defraud.

3. WITNESS—IMPEACHMENT BY PARTY CALLING.

Where a witness testifies as to a former statement, "I might have sworn to it," the party calling him cannot ask, "If you did so swear, was it true?" as the effect of such question is to discredit his own witness.

4. SALE—RESCISSION—EVIDENCE.

In an action against an assignee for benefit of creditors to recover goods sold to his assignors, on the ground that the assignors bought the goods with intent to defraud, the testimony of the assignor that he did not buy with intent to defraud is admissible.

5. SAME—ASSIGNMENT BY PURCHASER—INVENTORY.

In such action the inventory of the assignors is admissible.

6. SAME—DECLARATIONS.

The declarations of one of the assignors, made before the assignment, are not admissible in such action.

7. EVIDENCE—DECLARATIONS OF THIRD PERSONS.

Statements of another, by which persons obtained credit, if made without their knowledge, are not admissible against them to prove fraud on their part.

8. APPEAL—REVIEW—HARMLESS ERROR.

Though evidence be erroneously excluded, yet if it be subsequently introduced the error is harmless.

9. SAME.

If evidence be erroneously admitted, the error is cured where the same facts are properly proven by other testimony.

10. SAME.

A refusal of a referee to allow the question, "Did you believe this statement to be true?" is harmless, when the witness has testified that he had acted on the statement.

Appeal from judgment on report of referee.

Action of replevin by George Morris and Edmund Lewis against Edwin M. Wells, assignee of Scoville & Roe, to rescind a contract of sale made to his assignors, on the ground that the sale was induced by the fraudulent misrepresentations of the latter, and to recover the goods sold. Judgment was rendered against the plaintiffs, and they appealed.

On the trial the referee found that the plaintiffs were partners; that the defendant's assignors were also partners at the time of the sale of the goods.

referred to in the complaint; that the defendant was a counselor at law, doing business in the city of Syracuse; that on the 20th of September, 1887, Scoville & Roe made a general assignment for the benefit of their creditors to the defendant, which was accepted by him, and that he duly qualified and entered upon the discharge of his duties as such; that by said assignment preferences were made to the amount of \$1,169.19; that the purchase of the goods in question was made in the usual and ordinary course of business, and was necessary for the business of the defendant's assignors; that the plaintiffs sold said goods relying upon a communication or report of the financial standing of Scoville & Roe made by the Wilber Mercantile Agency about April 13, 1887; that such communication was not based upon any statements or information furnished by or received from Scoville & Roe, or either of them, and that it was made without their knowledge or consent; that said goods were not purchased by Scoville & Roe with the preconceived design not to pay for them; that no false representations were made by them to the plaintiffs, upon which they relied, to induce the sale of the goods in question; that the value of the goods replevied was \$233.32; that the title to such goods was in the firm of Scoville & Roe at the time of their failure, and passed to the defendant; that the damages for the detention of such goods was \$9.33. The referee found as a conclusion of law that the defendant was entitled to judgment for the possession of the property in question, and, if it could not be recovered, then for its value, and the sum of \$9.33 damages for its detention, with costs. The referee, at the request of the plaintiffs, also found, among other things, that in the month of April or May, 1887, Scoville & Roe purchased of the plaintiffs' agent the goods referred to in the complaint; that previous to taking the order and making such sale the agent made inquiries of Scoville, one of the assignors, regarding the standing and responsibility of such firm, and the members thereof, for the purpose of ascertaining the credit of said firm, and taking their order for the goods referred to in the complaint; that at the time of making such inquiries Scoville stated to said agent that he, Scoville, was personally worth \$6,000; that such statement was false; that it was communicated to the credit man of the plaintiffs before the shipment of the goods in suit, and before the delivery thereof to the defendant's assignors; that on or about the 17th of August, 1887, between that day and the 4th of September of that year, the plaintiffs delivered to the defendant's assignors the goods so sold, and that the goods were received and accepted by them.

Argued before HARDIN, P. J., and MARTIN and MERWIN, JJ.

Samuel H. Wandell, for appellants. *C. V. Kellogg*, for respondent.

MARTIN, J. The only question relating to the findings of the referee, or to his refusal to find as requested by the plaintiffs, which we deem it necessary to examine arises upon his finding "that no false representations were made by Scoville & Roe to the plaintiffs, upon which the plaintiffs relied, to induce the sale of the goods in question," and upon his refusal to find "that plaintiff's agent relied on the said statement so made by Scoville that he was personally worth six thousand dollars, and sold the bill of goods referred to in the complaint upon the strength of such representation." The plaintiffs excepted both to the finding referred to and to the referee's refusal to find as requested. "Exceptions to alleged findings of fact, when they are unsupported by evidence, and to refusals to find, when they are established by undisputed proof, present questions of law, and are reviewable on appeal." *Bedlow v. Dock Co.*, 19 N. E. Rep. 800; *Bullock v. Bemis*, 8 N. Y. Supp. 390. The referee found that the goods in question were sold by the plaintiffs' agent; that at the time of the sale he made inquiries of Scoville, one of the vendees, as to the standing and responsibility of the firm and the members thereof; that Scoville stated that he was worth \$6,000, and that such statement was

false. The undisputed evidence was that the agent relied upon such representations in making such sale. Woolston, the plaintiffs' agent, testified as follows: "I sold the bill of goods on the information I got from Scoville direct. The purport of it was that Scoville was individually good for six thousand dollars. * * * The conversation was to the effect that Mr. Scoville was personally worth six thousand dollars, and upon that I based my judgment in selling the goods." If the representations were made, and the referee has so found, then it is clear from the evidence that the plaintiffs' agent relied upon them in making such sale, and the learned referee erred in refusing to so find, and in finding to the contrary, although the plaintiffs made other investigations as to the responsibility of such firm and its members before shipping the goods. Nor can it be said that the findings contained in the referee's report are to control. Such is not the rule. If the findings are inconsistent, the appellants are entitled to the finding most favorable to them. *Redfield v. Redfield*, 110 N. Y. 671, 18 N. E. Rep. 373.

Assuming, as we must, that the referee erred in such finding and refusal to find, it follows that the judgment must be reversed, unless the error was a harmless one. The refusal of a referee to respond to a request to find is not a ground for reversal, unless such refusal was prejudicial to the appellant. *In re Hicks*, 14 N. Y. St. Rep. 320. While the findings of the referee and the undisputed evidence in the case establish the making of such representations, their falsity, and that they were relied upon in making such sale, still there is no finding of the referee nor conclusive evidence to the effect that such representations were known to be false when made, nor that they were made with an intent to defraud the plaintiffs; but, on the contrary, the referee refused to find that such sale was induced by the fraud of the defendant's assignors. Before the defendant's assignors could be found guilty of fraud, and the sale of the goods in question avoided on the ground of such representations, it was necessary to establish that the representations were known to be false by the person making them, and that they were made with an intent to defraud the plaintiffs. *Meyer v. Amidon*, 45 N. Y. 169; *Oberlander v. Spiess*, Id. 175; *Hubbell v. Meigs*, 50 N. Y. 480; *Wakeman v. Dalley*, 51 N. Y. 27; *Simar v. Canaday*, 58 N. Y. 298; *Stitt v. Little*, 63 N. Y. 427. There being no such proof or finding we do not perceive how the plaintiffs could possibly have been injured by such error, as, in the absence of such findings, the result must have been the same. Moreover, the plaintiffs submitted no request to find those facts. *Porter v. Smith*, 35 Hun, 118; *Graff v. Ross*, 47 Hun, 152. Our conclusion is that this error of the referee was harmless, and hence would not justify a reversal of the judgment.

On the trial the plaintiffs attempted to prove the declarations of one of the defendant's assignors, made at various times before the assignment. This evidence was objected to by the defendant. The objection was sustained, and the plaintiffs excepted. The plaintiffs contend that the referee erred in excluding that evidence. We think the ruling of the referee was justified by the authorities. *Truax v. Slater*, 86 N. Y. 630; *Bullis v. Montgomery*, 50 N. Y. 352; *Vidvard v. Powers*, 34 Hun, 221; *Flagler v. Wheeler*, 40 Hun, 125; *Flagler v. Schoeffel*, Id. 178. If these rulings were erroneous, still the plaintiffs were not prejudiced, as the questions were subsequently answered by the witness.

The plaintiffs called one of the defendant's assignors as a witness, who testified that he was employed by the defendant at a salary of \$15 per week. He was then asked if he testified on an examination in supplementary proceedings as follows: "I suppose I am on a salary. There was no arrangement as to the amount I was to receive;" and he replied, "I might have sworn to it." This was followed by the question: "If you did so swear, was it true?" This question was objected to, and the objection was sustained. It is quite apparent that the only purpose of this evidence was to affect the

credibility of the witness by the proof of contradictory statements. As the witness was called by the plaintiffs, the evidence was not admissible for that purpose, (*Becker v. Koch*, 104 N. Y. 394, 10 N. E. Rep. 701;) if, however, the evidence was sought for any other purpose, the question in that form was objectionable, and the court in its discretion was justified in excluding the answer.

The defendant introduced in evidence the inventory of the firm of Scoville & Roe, under the plaintiffs' objection and exception. The ruling of the referee in admitting this evidence seems to be justified. *Adams v. Bowerman*, 109 N. Y. 23, 15 N. E. Rep. 874. Besides, the same facts were proved by the plaintiffs on a direct examination of the witness Scoville.

It was not error to permit the defendant's assignor to testify that he did not purchase the goods in question with intent to cheat the plaintiffs, or with an intent not to pay for them. *Seymour v. Wilson*, 14 N. Y. 567; *Cortland County v. Herkimer County*, 44 N. Y. 22. The plaintiffs asked the witness Woolston this question: "Did you rely upon this statement?" referring to the statement that Scoville was worth \$6,000. This was objected to and excluded. If this was error, it was harmless, as the witness had already testified that "the conversation was to the effect that Mr. Scoville was personally worth six thousand dollars, and upon that I based my judgment in selling the goods. I sold the bill of goods on the information I got from Scoville direct. The purport of it was that Mr. Scoville was individually good for six thousand dollars." This evidence shows clearly that the plaintiffs' agent did rely upon such statement in making the sale.

Nor do we think the refusal of the referee to permit the witness Woolston to answer the following question: "Did you believe this statement to be true?" requires a reversal of this judgment, as he was permitted to testify that he based his judgment on that statement in selling the goods, which shows clearly that he believed it. The statement sent by Wells to the Wilber Mercantile Agency was properly excluded. It was not admissible. The defendant's assignors knew nothing of it, and were not shown to have any connection with it in any way. It was not evidence against them, nor was it proper evidence in the action against the defendant.

The counsel for the appellants has called our attention to 30 exceptions relating to the admission or rejection of evidence by the referee. Most of them seem not to have been deemed sufficiently important to merit any suggestion or remark by counsel, except to state the folio where found, and that they "were well taken." We have, however, examined them all. The preceding considerations apply to many and the most important of them. Our examination of the remainder has led us to the conclusion that they neither require special discussion nor warrant a reversal of the judgment.

We are of the opinion that the decision of the referee is justified by the evidence, and that no error was committed on the trial that would authorize any interference with the judgment appealed from.

Judgment affirmed, with costs.

HARDIN, P. J., and MERWIN, J., concur in result.

CHASE v. SENN.

(City Court of New York, General Term. October 3, 1889.)

EVIDENCE—PAROL TO VARY WRITING.

A promissory note was given "for the privilege of advertising purposes of one panel, each 7x22 inches, in 15 cars" of a certain railway, but was silent as to how such privilege was to be enjoyed. *Held*, that the note was ambiguous in this respect, and that parol evidence was admissible to explain the ambiguity.

Appeal from trial term.

Action by Lewis S. Chase on an instrument executed by defendant, Jacques Senn, in these words: "NEW YORK, September 1, 1885.

"I promise to pay to the order of L. S. Chase one hundred and eight dollars monthly, in the following manner, to-wit: \$9, 20 days after date, and \$9 on the 20th day of each succeeding month for twelve months from date, for the privilege of advertising purposes of one panel, each 7x22 inches, in 15 cars of the Broadway and 7th Avenue R. R. Co., in the city of New York, for the term of one year from date."

The defendant for defense alleged that on or about the date of said instrument, and prior to the execution and delivery thereof by the defendant to the plaintiff, and as consideration for said instrument and of the moneys to be paid pursuant to the terms thereof by this defendant to the plaintiff, the plaintiff agreed to furnish, put up, and maintain continuously for this defendant, for a period of 12 months from the date of said instrument, one panel, each 7x22 inches, in 15 cars of the Broadway & Seventh Avenue Railroad Company, in the city of New York, running daily on the surface railroad laid in Broadway, in said city of New York, each of said panels to have a written or printed advertisement therein announcing to persons traveling in said cars defendant's business as an hotel and restaurant keeper at Nos. 9 and 11 Waverley place, near Broadway, as aforesaid. That after the execution and delivery of said instrument by the defendant to the plaintiff as aforesaid, and on or about and from the 20th day of October, 1885, the plaintiff neglected, failed, and refused to perform said agreement on his part, although the defendant duly demanded of the plaintiff that he perform the same, and that on or about said 20th day of October, 1885, the defendant elected to rescind said agreement with the plaintiff, and then and there duly notified the plaintiff thereof. The trial judge directed a verdict in favor of the plaintiff on the ground that the answer did not set up a legal defense to the action, and from the judgment entered on this verdict the defendant appeals.

Argued before MCADAM, C. J., and MCGOWN, J.

E. J. Myers, for appellant. *E. R. Leavitt*, for respondent.

PER CURIAM. It is conceded that the instrument sued upon is a promissory note. This was so decided by this court and by the court of common pleas, in an action upon a similar instrument. *Chase v. Behrman*, 1 City Ct. R. 352. The consideration for the instrument was declared upon its face to be "for the privilege of advertising purposes of one panel, each 7x22 inches, in 15 cars of the Broadway and 7th Avenue Railroad Company, in the city of New York, for the term of one year." The note implies that the plaintiff having given the defendant this "privilege," it (the note) was given in payment for the license. The effective giving of the privilege was not a condition subsequent, but an act concurrent with the giving of the note; for regularly every month thereafter installments were to be paid until the entire obligation was discharged. But how was the privilege to be enjoyed? Who was to determine the form or design of the sign to be put up, and to select which of the several panels of the car into which it should go? In this respect the instrument is ambiguous, for it fails to give us any light whatever upon the subject. Evidence furnishing these particulars would not alter or

vary the consideration clause of the note, for the instrument contains nothing whatever upon the subject. To this extent, the defendant was entitled to give evidence under the answer to prove a total or partial failure of consideration.

The rule which excludes parol evidence where contracts are reduced to writing is not quite as broad as the terms in which it is commonly stated would seem to imply. It only excludes any other evidence of the language used by the parties in making the contract than that which is furnished by the instrument itself. 1 Geenl. Ev. 316, 321. For illustrations of the rule, see *Moore v. Meacham*, 10 N. Y. 207; *Field v. Munson*, 47 N. Y. 221; *Arthur v. Roberts*, 60 Barb. 580; *Hinnemann v. Rosenback*, 39 N. Y. 98; *Walrath v. Thompson*, 4 Hill, 200; *Bank v. Strever*, 18 N. Y. 502.

The plaintiff was entitled to recover on the mere production of the note, but the defendant had the right to attack the consideration of it, under his special defense, and the *onus* of proving the defense was upon him. He could not alter, vary, or contradict any of the written portions of the contract, but could, to the extent before stated, throw light upon the ambiguous clause in regard to the consideration for the contract by proving its meaning. Upon the former trial of the case, the defendant was not limited in his proofs to the extent before stated, and for this error the judgment was reversed.¹ The reversal of that judgment for error in admitting evidence did not justify the exclusion upon the second trial of all evidence on the part of the defendant. It follows, therefore, that the judgment appealed from must be reversed, and a new trial ordered, with costs to the appellant to abide the event.

ISAACS v. JACOBS.

(City Court of New York, General Term. October 3, 1889.)

EVIDENCE—PAROL TO VARY WRITING.

Where a note payable unconditionally has been given in consideration of an absolute assignment of a claim against third persons, evidence of an oral agreement that the note was not to be operative unless the money was realized on the assignment is inadmissible, such a condition being inconsistent with the writings.

Appeal from trial term.

Argued before MCADAM, C. J., and NEHRBAS and MCGOWN, JJ.

A. L. Sanger, for appellant. H. Grasse, for respondent.

PER CURIAM. The defendant gave the plaintiff an assignment of a claim against S. H. Smith & Co., for \$745.70. It was absolute on its face. The plaintiff, in exchange for it, gave his note to the defendant for \$745.70, payable unconditionally six months after date. Each instrument is a complete contract in itself, the one being the consideration of the other. The plaintiff sued to recover \$419.80, and the defendant admitted the plaintiff's cause of action, and recovered judgment for the difference between the plaintiff's note of \$745.70 and his claim of \$419.80; aggregating, with interest, \$408.68. The plaintiff offered to prove at the trial that, at the time the note and assignment were exchanged, it was orally agreed that the note should not become operative unless the money on the assignment was realized. The evidence was ruled out, upon the ground that it tended to alter, vary, and contradict the terms and legal effect of the note and assignment. We think the proof offered did not tend to prove an independent condition consistent with the note and assignment, and that the evidence was properly excluded. *Bank v. Koehler*, 1 City Ct. R. 264; *Cocks v. Barker*, 49 N. Y. 107; *Smith v. Killian*, 16 N. Y. St. Rep. 568. While the rule prohibiting oral evidence varying the terms of a written contract does not apply to separate, independent collateral

¹ Not reported.

undertakings, or where the original contract was verbal, and a part only reduced to writing, yet where it appears, by an inspection of a written contract,—read, it may be, in the light of surrounding circumstances in order to its proper understanding and interpretation,—that it was intended to express the whole contract, it will be conclusively presumed so to do; and oral evidence may not be resorted to to prove that there was a stipulation or an undertaking necessarily connected with, and one of the elements of, the contract, but not contained therein. *Eighmie v. Taylor*, 98 N. Y. 288. For if we may go outside of the instrument to prove that there was a stipulation not contained in it, and so that only part of the contract was put in writing, and then, because of that fact, enforce the oral stipulation, there will be little of value left in the rule itself. See opinion of FINCH, J., in the case cited. The assignment made was absolute on its face, and the note contained no conditions or qualifications, and the evidence offered by the plaintiff, and excluded by the trial judge, sought to ingraft upon them provisions at variance with their terms and legal effect. The exceptional rule, admitting evidence of independent collateral undertakings, does not go to the extent of permitting proof of oral understandings inconsistent with the writings, but only those consistent with and not repugnant thereto. The exception must be kept within bounds, or the rule itself may be impaired, or even destroyed. For the reasons stated, the judgment appealed from must be affirmed, with costs.

HEPKE v. SCHMALHOLZ.

(City Court of New York, General Term. October 8, 1889.)

SALE—DELIVERY.

Where plaintiff agreed to deliver certain vehicles to defendant "at his stable," defendant to pay a certain amount, deposited with his attorney, "when the plaintiff has complied with the foregoing condition," tender of delivery at the place specified is a condition precedent, and a tender of the vehicles in front of the office of defendant's attorney will not entitle plaintiff to recover.

Appeal from trial term.

Argued before MCADAM, C. J., and MCGOWN, J.

D. Leentrutt, for appellant. *John Fennell*, for respondent.

PER CURIAM. The action was to recover for repairing a butcher's cart and truck, and for the price of a wagon sold to the defendant. The defense relied upon an agreement, made after suit brought, in these words: "Whereas, the plaintiff has in his possession in the state of New Jersey a buggy and a cart, belonging to the defendant, which were taken for the purposes of repairing and overhauling; and whereas, the defendant desires to have same returned, and both parties are anxious to compose their differences,—they hereby stipulate as follows: The plaintiff agrees to deliver to the defendant at his stable, in New York city, on or before May 31, 1888, the said buggy and cart in good order, thoroughly overhauled and repaired as agreed upon, with the exception that they are not to be painted; the buggy to have a new set of wheels, as per agreement. When the plaintiff has complied with the foregoing condition, the defendant agrees to pay the plaintiff, in full satisfaction and discharge of all claims against the defendant, including the repairs to the said buggy and cart, as well as the claim in suit, the sum of three hundred and sixty dollars, which amount the defendant has deposited with his attorney for that purpose. Upon payment of the said three hundred and sixty dollars, the plaintiff is to give receipt in full of all claims and demands to date, and to stipulate in writing that this action be discontinued, without costs. Dated May 28, 1888." The agreement was pleaded by way of supplemental answer, interposed by leave of the court. The plaintiff, under this contract, brought the wagons from New Jersey to New York, and placed them in front of the

office of the defendant's attorney, on Broadway. They told him he must take them to the defendant's stable, on Third avenue, according to the agreement, and they would pay the money. The plaintiff distrusted the defendant, and was unwilling to, and did not, take the property to his stable. After the so-called tender of the vehicles in front of the defendant's attorney's office, the plaintiff took the property back to his place in New Jersey. The question presented is whether the plaintiff complied with his agreement.

The contract is specific that the property "is to be delivered to the defendant at his stable, in New York city, on or before May 31, 1888." This is made a condition precedent. The language is plain and unambiguous, and needs no interpretation other than to give the words their plain and obvious meaning. Story, Cont. § 639. Where a place for delivering goods is specified in the contract, they must be delivered at that place, and the vendee is under no obligation to accept or pay for them at another. Delivery and payment were to be concurrent acts. The plaintiff was under no obligation to deliver the property without his money. He was not obliged to relinquish his lien, and might have retained possession of the property until the lien was discharged. He was bound to tender delivery, however, "at the place appointed," before he could put the defendant in default. If he had tendered delivery there, and the defendant had refused to accept delivery, or had failed to tender payment, the plaintiff might have retained possession of his property; tender of performance being, in that case, equivalent to performance. But the difficulty is he never tendered performance at "the place appointed," and the defendant was not put in default. The theory upon which the plaintiff recovered was that the defendant had failed to perform his part of the agreement. This was error. We cannot make contracts for parties, nor change those already made, to suit the proofs offered on the trial. They must be enforced as made, or not at all. We are merely to determine what rights the contracts they seek to enforce give them, and see that these rights are preserved. The plaintiff saw fit to make the agreement. It was his voluntary act. He failed to perform the conditions which were to entitle him to the \$360 therein referred to, and in consequence failed to become entitled to that sum. The defendant had deposited the money with his attorneys, and they had orally agreed that, if the plaintiff would make delivery of the wagons at the defendant's stable, they would pay him the \$360. The plaintiff was not obliged to accept their promise, but he might have done so with safety. It is sufficient for us to decide that the plaintiff did not perform his agreement according to its letter or spirit, and that the verdict rendered in his favor was founded upon a mistaken notion of the plaintiff's legal rights. The case of *Noe v. Christie*, 51 N. Y. 270, relied on by the plaintiff, is inapplicable here. There the defendant, in compromise of a larger claim, agreed to pay a certain draft of \$70, and the taxable costs of suit. The *onus* was on the defendant to prove that he made the payments. He proved that he had paid the draft and tendered the costs; but the court held that this was, at most, a simple, unexecuted accord, and was not a satisfaction. In the present instance, the defendant, by the agreement, was to pay nothing until the plaintiff first delivered, or at least tendered, the wagons, at the defendant's place of business. The plaintiff failed to prove compliance with this condition precedent, and in consequence failed to put the defendant in default. In *Noe v. Christie* the defendant failed to put the plaintiff in default. The distinction between the two cases is obvious. It follows that the judgment appealed from must be reversed, and a new trial ordered, with costs to the appellant to abide the event.

GREEN v. SHUTE *et al.*

(City Court of New York, General Term. October 3, 1889.)

1. TRIAL—DIRECTION OF VERDICT—OBJECTIONS WAIVED.

Where each party has requested a direction of a verdict in his favor neither can complain after judgment that a direction was improper, though there was a disputed question of fact which either might have required to be submitted to the jury.

2. APPEAL—PRACTICE—SETTLEMENT OF CASE.

Settlement of case on appeal by the trial judge is conclusive where the facts are disputed.

Appeal from trial term.

Action by Shirley J. Green against Noah B. Shute, impleaded with others. Argued before McADAM, C. J., and NEHRBAS, J.

Seaman & Conger, for appellant. *Wm. G. McCrea*, for respondent.

PER CURIAM. The case presented a disputed question of fact, and either party had the right to require its submission to the jury, who might have decided the question submitted for plaintiff or defendant. Each side, however, requested a direction of a verdict in his favor, and neither can complain now that a direction was improper. *Strong v. Manufacturing Co.*, 6 Hun, 528; *Leggett v. Hyde*, 58 N. Y. 275; *Koehler v. Adler*, 78 N. Y. 287; *Ormes v. Dauchy*, 82 N. Y. 443; *Dillon v. Cockcroft*, 90 N. Y. 649. If the jury had voluntarily rendered the verdict the trial judge directed, it would have been regarded as conclusive on the evidence. Under the authorities cited, the direction by the trial judge is to be similarly considered. In this view, there was no error committed at the trial, and the judgment entered on the direction must be affirmed, with costs.

APPEAL FROM ORDER DECLINING TO RE-SETTLE CASE.

PER CURIAM. The trial judge settled the case, and we must accept his certification on the facts as conclusive. To do otherwise would be to substitute our opinion for his knowledge. There was a dispute as to what occurred, and the trial judge determined it. His action cannot be reviewed. *Klein v. Railroad Co.*, 53 N. Y. Super. Ct. 531; *Tweed v. Davis*, 1 Hun, 252; *Porter v. Parks*, 2 Hun, 675; *Grossman v. Supreme Lodge*, 5 N. Y. Supp. 122. It follows that the appeal must be dismissed, with costs.

RICH v. MAYER.

(City Court of New York, General Term. October 3, 1889.)

1. BREACH OF MARRIAGE PROMISE—PRIOR UNCHASTITY.

Cohabitation by plaintiff prior to the promise constitutes no defense to an action for breach of marriage promise, where the promise was made with knowledge of the fact.

2. SAME—PARTIES—NAME.

A divorced woman may assume her maiden name, and sue thereunder for breach of marriage promise.

3. SAME—NEW TRIAL—NEWLY-DISCOVERED EVIDENCE.

A new trial will not be granted defendant upon affidavits containing admissions alleged to have been made by plaintiff, which were detrimental to her, and unnecessary for her to make, and which she denies having made, as such evidence would not probably affect the result.

Appeal from trial term.

Action by Mary Rich against John Mayer for breach of marriage promise. Defendant appeals from a judgment for plaintiff, and from an order denying a motion for a new trial on the ground of newly-discovered evidence.

Argued before McADAM, C. J., and NEHRBAS and McGOWN, JJ.

M. A. Gearon, for appellant. *A. P. Weyener*, for respondent.

PER CURIAM. The action is for breach of a promise to marry. It appears that the plaintiff entered the defendant's employ to nurse his sick wife, who subsequently died. The plaintiff, at the time, had a husband, who annoyed her while in the defendant's house. The plaintiff proposed to get a divorce from him, and the defendant furnished part of the money required to get it. The plaintiff swears that, when the divorce was obtained, the decree was handed to her by the defendant, who promised to marry her; that he gave her a locket, containing his picture, and took liberties with her which a disinterested person would not be apt to attempt. The defendant subsequently refused to marry her. There is no doubt about the breach, and the plaintiff was corroborated by her mother in respect to the promise. The defendant undertook to prove, as an excuse for non-performance, that the plaintiff was a lewd woman, and had intercourse with other men. She denied this; and the jury, as they had the right to do, disbelieved the evidence offered by those who assailed her character, and believed the plaintiff when she testified that their statements were without the slightest truth. At the time the promise was made, both parties were in a legal condition to make a contract. The defendant had lost a good wife; and the plaintiff, by divorce, had been forever separated from a bad husband. Both had their experience in the marital relation, and were in a condition to act intelligently. If the defendant did not intend to marry the plaintiff, he certainly exhibited great interest in her divorce proceeding, and, by presenting his picture in a locket, endeavored to impress himself upon the plaintiff as a warm friend, if not admirer. There was certainly evidence enough to warrant the jury in concluding that his intentions were honorable, and that marriage was contemplated. The jury awarded \$1,500 damages. Considering the latitude that juries have in cases of this kind, (3 *Suth. Dam.* 316,) we cannot say that they did not exercise their best judgment, or that the damages are not within reasonable limits. They do not evidence passion or prejudice, and are not excessive; on the contrary, they seem to be moderately fair, in view of the proofs, and the nature of the defense attempted to be established. *Id.* 320, and cases cited. The alleged cohabitation by the plaintiff prior to the promise constitutes no defense, for the promise was made with knowledge of the fact. *Id.* 326, and cases cited. If the defendant did not promise to marry the plaintiff, he has, by his conduct, given strong corroboration to the testimony of the plaintiff and her mother, wherein they swear that he did make the promise. The finding of the jury, upon the evidence, is satisfactory, and the motion for a new trial was properly denied.

The only exception that requires consideration is the denial of the motion to dismiss, on the ground that the action was brought in the plaintiff's maiden name, and not in that of her divorced husband. She had no husband at the time the promise was made or action commenced, and there was no impropriety or illegality in thereafter assuming her maiden name. *In re Snook*, 2 *Hilt.* 566. A name is that by which we distinguish a particular individual, (*Bouv. Law Dict.* tit. "Name;") and if, in making a contract, a person uses a name, he will not be permitted to say that it is not his name. *Id.* The correct party is before the court. The objection did not appear on the face of the complaint, and was not formally taken by answer, (*Code*, § 419,) and must be regarded as waived. The objection is formal, not substantial; and an amendment might have been allowed at the trial, (*Id.* § 723,) or could be made even now, to sustain the judgment, (*Id.*) But we do not regard any amendment as necessary. *Nil facit error nominis cum de corpore constat.* At common law a person may lawfully change his name. He is bound by any contract into which he may enter in his adopted or reputed name, and by his recognized name he may sue or be sued. See cases cited in *Anderson's Dictionary*, tit. "Name." The plaintiff had procured a divorce from a bad husband, and judiciously dropped his bad name, and resumed that given by her

parents. It was, in effect, the resumption of her original name by operation of law, rather than choice or fancy. It was certainly not a change made for sinister or ulterior motives, but one that is praiseworthy and commendable. The marriage relation gave her the name she bore during its continuance. Its dissolution restored her former rights, one of which was the liberty of bearing her family name, and this privilege she has seen fit to exercise. Upon the entire case, we are of opinion that the judgment and order appealed from should be affirmed, with costs.

APPEAL FROM ORDER DENYING MOTION FOR NEW TRIAL.

PER CURIAM. The affidavits of Weismantel and Kennell, upon which the new trial is sought, state admissions alleged to have been made to them by the plaintiff, to the effect that the defendant had never promised to marry her, but that she was going to make the defendant pay anyhow. The plaintiff denies making any such admission; and it is so repugnant to her interest, and so unnecessary to make such admission, that it is not at all likely that their evidence would be credited, and a different result induced. Judge MARCY, in *Guyot v. Butts*, 4 Wend. 579, said: "I feel the force of the objection to letting in proof of the declarations of the parties. In ordinary cases we should be disposed to take a stand against an application like the present." This is an ordinary case of breach of promise to marry, and the remarks are suggestively pertinent. Admissions are so often misinterpreted or misunderstood, and sometimes extended, that they have been found in many cases to be unreliable, and not, as a rule, controlling. At all events, we are satisfied that the proposed evidence would not materially affect the result upon a new trial, if one were ordered; and this is the crucial test on a motion of this character. *Bank v. Heaton*, 6 Thomp. & C. 37; *Anderson v. Bank*, 66 How. Pr. 8; *Powell v. Jones*, 42 Barb. 24. It follows that the order appealed from must be affirmed, with costs.

PEOPLE *ex rel.* THOMPSON v. McCOMBER *et al.*

(*Supreme Court, Special Term, Allegany County. January, 1889.*)

1. TAXATION—TAXABLE PROPERTY.

Rents not due on leases for years are not taxable as personal property.

2. SAME.

Debts, securities, and obligations are taxable, though they are not due.

3. SAME.

The fact that the owner of personalty changed it into real estate, and then executed leases for years thereon in order to avoid taxation on personal property, does not affect the assessment, which must be governed by the legal position of the property at the time thereof.

4. SAME—REVIEW OF ASSESSMENT.

A tax assessment may be reviewed on affidavit, though an examination is also allowed.

5. SAME.

An assessment is presumed to be correct only until the contrary is shown.

6. SAME—COSTS.

Laws N. Y. 1880, c. 269, § 6, provides that "costs shall not be allowed against assessors or other officers whose proceedings may be reviewed under this act, unless it shall appear to the court that they acted with gross negligence, in bad faith, or with malice." *Held*, that where it did not appear that assessors, in making up the assessment roll, acted otherwise than in good faith, costs on review could not be taxed against them.

7. CERTIORARI—PLEADING.

A petition for *certiorari*, which clearly states the grounds of the complaint, should not be quashed because it also sets out other grounds not material to the questions involved.

Application by Calvin Thompson for a writ of *certiorari* against Orson McComber and others, assessors, and James K. Hall, supervisor, to correct the tax assessment against relator's personal property.

Hamilton Ward, for relator. *Rufus Scott*, for defendants.

CORLETT, J. On the 19th day of September, 1887, a writ of *certiorari* was issued on the application of the relator, based upon the claim that he had been unjustly assessed for personal property in the town of Ward, Allegany county. He filed an affidavit with the assessors to the effect that he had no personal property subject to taxation after deducting his just debts. He was assessed for \$7,000 for personal property. The assessors examined him upon oath and refused to reduce the assessment. A referee was appointed to take evidence, and his report is submitted with the other papers. The return of the assessor to the writ states the way in which he had been previously assessed on personal property. It also alleges that he had purchased farms, executed leases, reserving rents, giving the lessee an option to purchase. The leases also charged the tenant with the payment of all taxes, and contained the right of re-entry. They were for years, usually from seven to nine. The proof before the referee was largely directed to leases, and the purposes for which they were executed. The return and evidence satisfactorily show that the purpose of the relator in changing mortgages and other securities into real estate and leases, was to avoid taxation on personal property. While the evidence does not distinctly show how much rent was past due and unpaid on the leases, nor does it clearly appear from the return how much, if any, personal property the assessors found outside of the leases, still it is very clear from all the evidence that the theory the assessors proceeded upon was that if the leases were executed to avoid taxation they should be taxed the same as if the money remained in other securities; also that they treated the leases as taxable without distinguishing between the rent in arrears and that to grow due.

The question as to how much, if any, personal property the relator had subject to taxation outside of the leases does not appear to have been considered or passed upon by the assessors.

§ Rev. St. (7th Ed.) p. 2175, § 1, is as follows: "Estates in lands are divided into estates of inheritance, estates for life, estates for years, and estates at will and by sufferance." Section 5 (same page) provides: "Estates of inheritance and for life shall continue to be denominated estates of freehold, estates for years shall be chattels real, and estates at will or by sufferance shall be chattel interests, but shall not be liable as such to sale on executions." For the purpose of descent real estate is defined by section 27, p. 2214, *Id.* That section expressly provides that leases for years, etc., shall not be included in the term "real estate" for the purposes of descent. Same statute, section 6, p. 2294, provides that leases from year to year shall be deemed assets, and go to the personal representatives. Real estate for taxation is defined in 2 Rev. St. (7th Ed.) p. 981, § 2, and personal estate on page 982, § 3. Leases are not mentioned in either section. Burrill's Law Dictionary, p. 282, defines chattels real thus: "Such chattels as concern, are annexed to, or savor of the realty; as, terms for years of land." 2 Steph. Comm. p. 65. Section 1430, Code Civil Proc., provides that real property, including leases, may be sold on execution, where at least five years of the term remains unexpired. Section 5 of the Revised Statutes, above cited, prevents estates at will or sufferance, though chattel interests, from being sold on execution. In *Trustees v. Dunn*, 22 Barb. 402, it was held that leases were properly taxed as real estate. The effect of the laws of descent is also considered in that case. The same was held in *Scully v. People*, 104 Ill. 349, decided in September, 1882. It was there held that rent due is a chose in action, and taxable as a credit, but that rent to grow due is an incident to the land, and is not the subject of taxation against the owner. So in *City of Buffalo v. Le Couteux*, 15 N. Y. 451, 452, where the court says: "Until the year 1846, there was no authority for taxing the rents reserved on leases as personal estate. Land, of course, was taxed

as land, but the rents reserved on leases, and not past due, were not personal estates, and therefore not taxed at all." Chapter 327, p. 466, of the Laws of 1846, provides for the taxation of certain leases, amounting either to a freehold, or a life-estate, or for upwards of 21 years. It has been amended several times, but not as to the character of the lease, which could be taxed. The object of the act was probably to meet some of the difficulties created by the Van Rensselaer leases, and was the outcome of the anti-rent agitation. The taxes referred to in the statutes were charged to the landlords instead of tenants, but the rule as to ordinary leases remained unchanged. In *Despard v. Churchill*, 53 N. Y. 192-199, the courts say that at common law leases for a short term of years were personal property. The court refers to the change made by statute. *Livingston v. Hollenbeck*, 4 Barb. 9. It will thus be seen that rents not due on leases for years are not taxable as personal property.

It is insisted by the learned counsel for the assessors that because the relator took a deed of the land, and executed leases for the purpose of avoiding taxation on personal property, the change ought not to exempt it as personal property. While it is true that assessors act judicially while in the discharge of their duties, (*Barhyte v. Shepherd*, 35 N. Y. 238,) it does not follow that they have equity powers. This was adjudged in *People v. Ryan*, 88 N. Y. 142. It is not suggested that the act of the relator in exchanging mortgages into leases was illegal. He had a right to invest in any form he saw fit, so long as he violated no law. His purpose in making investments in such a way as to escape personal taxation is immaterial. The lands of which he became the owner to enable him to execute leases were assessed at their full value. It is not very easy, therefore, to see how any portion of his property escaped taxation if invested in lands. He having obtained the legal title, and executed leases valid between the parties, the assessors must be governed by the legal position of the property at the time of the assessment.

It is urged by the learned counsel for the relator that debts not due are not taxable. This cannot be so in the very nature of things, otherwise a person by loaning his money on long mortgages or notes would escape taxation altogether. It is suggested that if securities not due can be taxed it could be imposed each year. This is so of all property subject to taxation. A farm is taxed every year upon its value. A good note or mortgage is property the same as land, only in another form, and there is no reason why it should escape the same burden. The question was up in *People v. Vail*, 6 Abb. N. C. 206-210, where the court says: "It requires the sum 'due from the directors of the bank or banking association making the report.' * * * It cannot be plausibly argued, if the objects and purposes of the act be considered, that the word 'due' is used in its narrow sense so as to require a statement only of such liabilities as had matured. It ought to have no such interpretation, for the public would then never know how officers were using the institution. The word, evidently, is used in its larger sense to signify and cover liabilities by the directors to the bank, whether matured or not. This (see Webster's Dictionary) is the general meaning of the word." So here, if all obligations not due can escape taxation, it would be easy for any person owning personal property to put it in such shape that it would be exempt.

The learned counsel for the assessors insists that the writ should be quashed for not clearly stating the grounds of complaint; also for being too broad. It clearly states the complaint so far as it concerns personal property, which is now the only question urged. If it sets out other grounds, not material to the questions involved, it is not apparent that there is any good reason for quashing the writ.

It is also urged by the assessors' counsel that at the time of the assessment there was enough rent past due, including other personal property, to equal the assessment. This is denied by the relator's counsel. An examination of

the evidence fails to show which of the learned counsel is approximately right. The reason why those matters were not clearly proved was obviously the result of the controversy being upon other grounds. The real questions in dispute were the object of the relator in taking deeds of land, and making leases, and as to whether they were taxable as to rent not matured.

The assessors' counsel also claims that the option to purchase has been exercised in certain cases by the lessees, and that from such times it became a contract to sell the land. This part of his contention is based upon certain indorsements on the leases, indicating greater payments than the amount due for rent. It was probably the intention, in all cases, that the option would be exercised, but the proof fails to show that it actually was, or that the question was either considered by the assessors, or determined by them.

It is also insisted by the counsel for the assessors that an affidavit is now of no importance, as an examination is allowed. Formerly an affidavit was the only proof. It was discovered that it might be misleading or erroneous as to material facts; therefore proof was authorized. The ordinary way still is to make an affidavit. Then, if the assessors are not satisfied, proof may be taken.

It is also manifest that in collecting material for making an assessment the assessors may avail themselves of such information by inquiry, and otherwise, as they can obtain. Then, if the party assessed claims that injustice has been done, he may file his affidavit, and the assessors may afterwards examine.

As an assessment is in the nature of a judgment, it is presumed to be correct until the contrary is shown; but if it appears that it was based upon an erroneous principle, like a wrong application of the law, their determination cannot be upheld. It is a familiar rule that error in the application of the rules of law requires the reversal of the judgment. *Brown v. Penfield*, 24 How. Pr. 64, 70.

Chapter 269, p. 402, § 6, of the Laws of 1880, provides that "costs shall not be allowed against assessors or other officers whose proceedings may be reviewed under this act, unless it shall appear to the court that they acted with gross negligence, in bad faith, or with malice." There is no ground for claiming that the assessors acted otherwise than in good faith. The assessment for personal property must be stricken from the roll, but without costs. The above suggestions will enable the assessors to act without difficulty in future cases.

INDERLIED *et al.* v. WHALEY.

(*Supreme Court, General Term, Fourth Department. September, 1889.*)

1. COSTS—WITNESS FEES—AFFIDAVIT.

Under Code Civil Proc. N. Y. § 3267, providing that witness fees cannot be allowed without an affidavit stating the number of days of actual attendance, and the distance for which travel fees are allowed, affidavits failing to state the distance the witnesses severally resided from the place of trial are insufficient.

2. SAME—INDEMNITY BOND.

Where an application for postponement of trial is granted with an order that plaintiff indemnify defendant for costs in preparation for trial, such order includes witness fees paid out, which were rendered ineffectual by the postponement, and also fees paid witnesses who did not attend court, where the latter cannot be recovered back.

Appeal from circuit court, Delaware county.

Argued before HARDIN, P. J., and MARTIN and MERWIN, JJ.

Martins & Hanford, for appellants. *W. H. Johnson*, for respondent.

MARTIN, J. This case was on the calendar of the Delaware circuit, held in February, 1889. The plaintiffs applied to the court for a postponement of the trial. This application was granted on terms. The terms imposed were

that the plaintiffs should pay the defendant his costs of the term, to be taxed by the clerk of Delaware county. In pursuance of this order, a bill of the defendant's costs and disbursements was prepared by him, and taxed by the clerk at the sum of \$75.33. Included in the bill as thus taxed was the sum of \$65.33 for witness fees. On the taxation the plaintiffs objected to the allowance of such witness fees, on the ground that the affidavits as to such witnesses were insufficient to authorize the clerk to tax such fees. The plaintiffs' objections were disregarded, and witness fees were allowed. The plaintiffs subsequently moved at a special term for an order to strike from such bill all sums taxed for witness fees, or for such other or further relief as might be just. This motion was denied. From the order denying that motion this appeal was taken.

The court may, as a condition of the postponement of the trial of an action, compel the party seeking such postponement to pay his adversary the fees of his witnesses, and other taxable disbursements already made or incurred, which are rendered ineffectual by such postponement. Code Civil Proc. § 3255. The power of the court to impose such terms as a condition of postponement is not questioned in this case. But the contention here, as it was before the clerk, is that the plaintiffs' affidavits were not sufficient to authorize the clerk to allow such witness fees. If we give to the defendant's affidavits the most favorable construction possible, they were at most to the effect that the persons making the same, neither of whom was the defendant, subpoenaed the witnesses therein named at the places mentioned, where they resided, by delivering to each a subpoena ticket, and paying to each a sum stated as and for the traveling fees of such witness in traveling to and returning from the residence of the witness to the place mentioned in the subpoena, and one day's attendance as such witness; and that the evidence of the witnesses subpoenaed was necessary and material for the defendant on the trial. The defendant's affidavits utterly failed to state the distance the witnesses severally resided from the place where the trial was to have been had, nor did they state the number of miles that each witness would have had to travel for the purpose of attending such trial. Moreover, the affidavits failed to disclose, except by possible inference, that the witnesses named were subpoenaed for the defendant, and do not disclose that he paid the fees charged, or that he was in any way liable therefor. A charge for the attendance of a witness cannot be allowed without an affidavit stating the number of days of his actual attendance; and, if traveling fees are charged, the distance for which they are allowed. Code Civil Proc. § 3267. The affidavit of witnesses must state the residence of each witness, and the distance traveled by each. *Wheeler v. Lozee*, 12 How. Pr. 446; *Hicks v. Brennan*, 10 Abb. Pr. 305; *Logan v. Thomas*, 11 How. Pr. 160; *Haynes v. Mosher*, 15 How. Pr. 216; *Taaks v. Schmidt*, 25 How. Pr. 340. We think the affidavits used on the taxation were insufficient to justify the clerk in allowing such witness fees.

We do not think the plaintiffs' contention—that the order to pay the costs of the term did not include the disbursements rendered ineffectual by the postponement of the trial—can be upheld. It is quite obvious that the intent and purpose of the order was to indemnify the defendant for the disbursements incurred in preparing the case for trial at that term, and we think the order should be held to include the witness fees paid out in preparing the case for trial, provided the sums thus paid were rendered ineffectual by the postponement; but that fact should appear by affidavit. Nor do we think that the plaintiffs' claim that witness fees can be charged only for such witnesses as actually attended the court can be sustained. Fees that have been paid a witness on subpoenaing him cannot be recovered back unless the witness, without a reasonable excuse, failed to attend the court in obedience to the subpoena. If the case be settled by the parties after the service of the subpoena, or be put off by the court or the parties, the witness is not bound to refund,

though he is then excused from attending. *Ford v. Monroe*, 6 How. Pr. 204; *Moulton v. Townsend*, 16 How. Pr. 306; *Roth v. Meads*, 20 How. Pr. 287. We are of the opinion that the order made on the postponement of the trial—that the plaintiffs pay the defendant his costs of the term—included the disbursements rendered ineffectual by such postponement; that such witness fees as were paid by the defendant, which could not be recovered back, were a part of such disbursements; and that, upon filing a proper affidavit, they should be allowed; but, as the affidavits used on the taxation before the clerk were insufficient to justify such allowance, the order appealed from should be reversed, and an order granted directing a new taxation of defendant's costs and disbursements before the clerk of Delaware county; and that, upon such retaxation, either party should have leave to furnish such additional affidavits and papers as they deem proper and necessary,

Order of special term reversed, with \$10 costs and disbursements on this appeal, and motion for new taxation before the clerk of Delaware county granted, with leave to either party to use, upon such new taxation, such further affidavits or papers as they shall deem necessary. All concur.

LAWTON v. GOODRICH *et al.*

(Supreme Court, General Term, Fourth Department. September, 1889.)

DECEIT—FALSE REPRESENTATIONS—SCIENTER.

In an action for false and fraudulent representations on the sale of a horse, it is necessary to prove that defendant knew of the defect, or had reason to believe that it existed.

Appeal from Oswego county court.

Action by Thomas W. Lawton against George W. Goodrich and James H. Goodrich. Judgment was rendered for plaintiff, and defendants appeal.

Argued before HARDIN, P. J., and MARTIN and MERWIN, JJ.

M. J. Shoecraft, for appellants. *S. C. Huntington*, for respondent.

MERWIN, J. As this case is here presented the question is not whether there was a breach of warranty, but whether the defendants were guilty of a fraud in the sale of a three-year-old mare colt. The allegation of the plaintiff is that the defendants "falsely and fraudulently represented said horse to be sound, kind, true, and gentle and quiet in harness;" that it was in fact "unsound, unkind, and untrue, restive and ungovernable in harness, and was vicious and ungovernable to drive, and had a vicious habit of kicking,"—all of which was known to the defendants. The plaintiff, testifying as to the sale, said, among other things, as follows: "One or both of the defendants said that she was a good, pleasant driver; there were no bad tricks about her; she was all right, she was kind and gentle. They used her in all places; had dragged with her ten acres a day. She was well broke, single or double, and they had marked out corn-ground with her. There was another colt there of same age. They did not tell me she had been hitched up with any horse other than her mate. They told me they had done the work spoken of with the pair. There was something said about her being hitched up with other horses. I inquired of defendants about hitching her up. They said the colts had been hitched up together, but they generally hitched her up with the old mare. The young man said this. He did not tell what they had done when the colt was hitched up with the old mare." Another witness, called by the plaintiff, to the transaction, testified, among other things, as follows: "James said they drove the mare before a wagon and cutter, had dragged with her; and drove her before a carriage. George said he had driven her but once. Said that they had dragged ten acres a day. The last they said about working her they hitched her onto the corn-marker, and marked the ground. Both said she was kind and gentle, and all right."

This is the substance of the representations as shown on the part of the plaintiff. The sale was on Saturday. The plaintiff led the colt home, put her into his barn till Monday morning, fed her well; then, on Monday morning, harnessed her up by the side of his other horse, hitched them to a wagon together, drove them a few rods, when the colt kicked and was over the tongue. There was evidence that she afterwards kicked when hitched up with another horse. There is no evidence that any of the statements made by defendants as to what they had done with the colt were false. There is no evidence that they knew of her kicking when harnessed up with another horse, or that she ever did kick while they had her. The plaintiff never used her single. He testified he never hitched her up single to a buggy. The sale was last of May, 1885; the trial was in August, 1885. The only material trouble was her kicking when hitched up with a strange horse. On that particular subject there was no representation by the defendants. They told him truly, for aught that appears, what they had done with the colt, and how they had used her. The colt was in fact owned by the defendant George W. Both of the defendants took part in the sale. It may be that the evidence would have authorized a finding of a warranty that would have covered the defect; but there is no evidence to show that the defendants knew of any propensity on the part of the colt to kick, or had any reason to believe that such existed. This is an essential element to be shown as a basis for fraud. *Oberlander v. Spiess*, 45 N. Y. 175. Its absence in this case is fatal to the recovery. The judgment should be reversed.

MARTIN, J., does not vote.

HARDIN, P. J., (*concurring*.) In the complaint it is stated that the defendants "falsely and fraudulently represented said horse to be sound, kind, true, and gentle and quiet in harness. * * * Plaintiff further alleges that, at the time of said warranty, representations, and sale, the said horse was unsound, unkind, and untrue, restive and ungovernable to drive, and had a vicious habit of kicking, and was actually worthless, and was of no value whatever to plaintiff, all of which was well known to the defendants at the time of said sale."

The learned counsel for the respondent correctly characterizes the complaint when he says in his printed points, viz.: "The complaint states a cause of action in fraud and tort." Inasmuch as the complaint contained a cause of action of fraud and deceit, the plaintiff at the trial was required to prove such fraud and deceit as he had alleged in his complaint. In establishing such a complaint as the one from which we have just quoted, the plaintiff was called upon to give satisfactory proof of a *scienter*. The plaintiff was not at liberty, under the complaint, to rely for the right of recovery upon a simple warranty. Having elected to charge the defendants with a fraud, and framed a complaint for that purpose, he was bound to establish the fraud as the basis of a recovery. We may appropriately apply the language used by DANFORTH, J., in *Neudecker v. Kohlberg*, 81 N. Y. 301, where he says, viz.: "The principle still remains that the judgment to be rendered by any court must be *secundum allegata et probata*. *Wright v. Delafeld*, 25 N. Y. 266; *Tooker v. Arnoux*, 76 N. Y. 897." In the case from which we have just quoted it was distinctly held, viz.: "Where a complaint states a cause of action *ex delicto*, it was not competent at the trial to convert it into one *ex contractu*."

For the reasons stated in the opinion of Brother MERWIN, showing that the allegations of fraud contained in the complaint were not satisfactorily established at the trial, I agree with him in his conclusion that the judgment of the county court and of the justice's court should be reversed. It may be that the plaintiff, under a proper complaint, with the proofs which

he has given in the case before us, may be able to make out a right of recovery upon a warranty; however, we may not pass upon that question. Upon the ground already stated I agree to a reversal.

CHELLIS v. CHAPMAN.

(*Supreme Court, General Term, Fourth Department. April, 1889.*)

1. BREACH OF MARRIAGE PROMISE—EVIDENCE—WEALTH OF DEFENDANT.

In an action for breach of promise of marriage, the pecuniary circumstances of defendant may be shown by general reputation.

2. SAME—CROSS-EXAMINATION OF PLAINTIFF.

Where plaintiff on cross-examination has testified that she was then unwilling to marry defendant, she may testify on re-examination to the reason of her unwillingness.

3. SAME—STATEMENTS TO THIRD PERSONS.

One whom defendant has requested to communicate his matrimonial wishes to plaintiff, may testify that she communicated to plaintiff the conversation with defendant.

4. SAME—FORMER ENGAGEMENTS—HARMLESS ERROR.

Allowing defendant to be asked on cross-examination, "Were you ever engaged to marry any other woman aside from" plaintiff? is harmless error, when he answers in the negative, saying: "Never had any real settled engagement; no more than talk from one time to another; no bargain made."

5. WITNESS—PRIVILEGED COMMUNICATIONS—ATTORNEYS.

Compelling defendant to testify whether he gave to his counsel all the letters received from plaintiff is not contrary to Code Civil Proc. N. Y. § 835, which prescribes that the attorney "shall not be allowed to disclose a communication made by his client to him, or his advice given thereon, in the course of his professional employment."

6. SAME—CONTRADICTIONS.

Defendant may be asked on his cross-examination to explain statements in his testimony contradicting his answer to the complaint.

7. BREACH OF PROMISE OF MARRIAGE—EVIDENCE.

Where the answer charges that plaintiff was never attached to defendant, and evidence has been adduced to sustain the averment, plaintiff may testify that she was attached to defendant.

8. SAME—INSTRUCTIONS—MOTIVE.

A charge that the jury may allow punitive damages in their discretion, if they find that defendant was actuated by dishonest motives, is not erroneous.

9. SAME—DAMAGES—EXCESSIVE.

In such an action, where defendant was a farmer of some means, 74 years of age, and plaintiff was 46, and had given up a position as principal of a public school at defendant's request, a verdict for \$8,000 will not be set aside as excessive. *MENWIN, J.*, dissenting.

Appeal from circuit court, Jefferson county.

Action by Sarah S. Chellis against John B. Chapman, for a breach of promise of marriage. In addition to several denials contained in the answer, the defendant alleged that he was of the age of 74 years, and was never married; and "that since the date of the alleged promises set forth in the complaint, to-wit, since about September, 1886, he has been and still is in very feeble health, so as to be more or less prevented from continuing or carrying on his ordinary business, having been and still being afflicted with rheumatism, with a disease of his kidneys, and 'fits,' whereby he has suffered and still suffers great bodily pain, is bent over so that he cannot stand erect, and is lame; that when attacked by said 'fits' he falls prostrate and so remains for a long space of time. * * *" His answer also alleges "that the plaintiff resides in a city, is fond of and accustomed to dress, gayety, luxury, and much society, and is unfamiliar with and has no taste for the hard labor and solitude of a farmer's wife in the country; that the defendant is, and has been all his life, a farmer residing in the country remote from any large town, and of plain dress, simple and economical habits, and but little inclined to society; that the plaintiff and defendant are not suited to each other so as to make the relation of husband and wife desirable, but, on the contrary, the disparity of age, occupa-

tion, education, habits, and tastes is such as to make the marital relation intolerable to either; that, as defendant is informed and believes, the plaintiff has not now nor ever had any affection for him, nor any desire that she should ever become his wife, and that her only purpose was and is to procure money of defendant on the pretense that he had promised to marry her, and then been guilty of a breach thereof."

Plaintiff was a maiden 46 years of age, and had for several years been a school-teacher in the public schools in the city of Watertown. She had been principal of the Cooper-Street school from 1879 to 1886, which position she resigned in August, 1886, at the request of the defendant. She first became acquainted with the defendant in December, 1880, or January, 1881. He visited her then in the city of Watertown, at her home, and he said to her that he had called because he had been recommended to do so, and he stated to her "he would like to form her acquaintance." In the summer of 1881 he visited her and remained two or three hours at a time, and she testifies that on one occasion "he said to me that he wished a wife; he wished some one to love him,—one for a companion. Asked me if I could be happy in the country after living in town. In reply to that I said: 'I like the country, but I know very little, if anything, about farming, and there would probably be a good many kinds of work connected with farming that I would know very little about.' I also said I didn't think it would be best, as there seemed quite a difference in our ages. In reply to that he said he didn't think it need make any difference about our ages. He thought we could be happy together for all that; and he said that the work he cared nothing about. He said he did not want a wife for the work she could do. And then he said: 'Leave the question, but if you change your mind and think you can live with me, let me know, and we will not talk about it in the mean time.'" He visited her again in June, and she testifies, viz.: "I remember an occasion in June, 1886, when he visited my house. At this visit in June, 1886, he asked me if I had changed my mind in regard to the question. He said again he wanted a wife; wanted some one to love him; wanted a companion. He said no matter what troubles came up, if a man had a loving wife, he could get along with all such. I said I had thought more favorably of it, and had changed my mind and decided to marry him. And he talked about his home, and about his house; told of the different rooms; how they were arranged. He spoke about its being in the country, and told where it was located more particularly. He said he could make it very happy for me if I went to his house. I don't think of anything else he said upon the subject upon this occasion. He remained there some three or four hours on this occasion. He came in the morning and stayed until after dinner. He took dinner at my house. On this occasion there was not any time fixed when the marriage was to be performed. I next saw him after that in July. I don't think I saw him again during June. I saw him in July at my home again. I then told him I had accepted my appointment as teacher, and he urged me to send in my resignation. * * * The substance of what he said was that he wished me to send in my resignation and be married in September. He spoke of his house again. Told me of the different rooms, and how they were arranged. And he said he was going to have his house repainted in September. I asked him about the size of his parlor, as I wished to get a carpet for it. I told him I wanted to furnish some rooms myself. He told me he didn't know the size of the room. He would send me the dimensions, which he afterwards did do. I afterwards received a letter from him in which he gave what he said was the size of his parlor. I preserved a part of the letter. The room was 15-7 by 13-8." Plaintiff further testified: "It was during July that he fixed upon the time. On one of his visits during July, we settled upon the day. We fixed upon the 15th of September as the day when this marriage was to take place. It was about that time that the letter containing the size of the rooms for which I was to get a

carpet was received. * * * He said he was very busy. He was building a barn. That his other work made him very hurried, and said another week would be more convenient for him. It would give him a little more time for his work. I said I would as soon it would be deferred another week. He and I finally fixed upon the 22d of September, one week from that time, as the time when the marriage should take place. I said that we would have no guests at the wedding. We would invite but very few guests, if any. We would have a very private, or very quiet, at least, wedding." She detailed the preparation she had made in preparing her wardrobe, bedding, and some things necessary for housekeeping. On one of his visits to her in July or August, "he brought a suit of clothes for himself, which he said was to be his wedding clothes. He said it was not convenient for him to take them home with him then. He would like to leave them at my house for a while, and he did so. He showed the suit of clothes to me when he first brought them. He left them there." When the 22d of September arrived, and the plaintiff was in readiness to carry out the contract on her part, the defendant failed to appear. He sent her a letter, however, in which he claimed that he had injured one of his eyes, as his reason for not appearing, "but should be there in a few days, just as soon as he was able to come. I don't know the date the letter was written. I received it on the morning of the 22d." Other evidence was given tending to show the contract between the parties and the breach thereof, and the circumstances attending the failure of the defendant to carry out the contract on his part. When the defendant was upon the stand as a witness, he did not dispute the engagement to the plaintiff.

Defendant appeals from a judgment entered on a verdict for plaintiff for \$8,000, and from an order denying a motion for a new trial on the minutes. Argued before HARDIN, P. J., and MARTIN and MERWIN, JJ.

L. E. Pruyn, for appellant. *Porter & Walts* and *Hannibal Smith*, for respondent.

HARDIN, P. J. Abundant evidence was given at the trial to establish the contract between the parties, and the breach thereof by the defendant. Appellant's learned counsel claims that several errors were committed during the progress of the trial which should lead to a reversal of the judgment. We will proceed to examine them.

1. Appellant insists that it was error to allow the pecuniary circumstances of the defendant to be shown by general reputation. The objections taken to that class of evidence were as follows: "(1) Incompetent. (2) Not proper evidence upon the subject of damages in an action for breach of promise of marriage." We think this court is so far committed upon the question that it is not open for further examination in this court. *Croster v. Craig*, 47 Hun, 84, opinion of FOLLETT, J., and cases there cited. See, also, *James v. Biddington*, 6 Car. & P. 589; *Hall v. Wright*, 96 E. C. L. 765.

2. During the plaintiff's re-examination she was asked, viz.: "Was it after reading defendant's answer that you decided that you would not care to marry him?" This was objected to, and the objection overruled. She answered: "After reading it, and thinking of it, I made up my mind I didn't want to marry him." Then she was asked, "When you say now, or at this time, rather, in answer to Mr. Rogers' question, 'I am not willing to marry him,' what are the reasons for that answer?" This was objected to by the defendant as incompetent and immaterial. The court thereupon remarked, "I think I will let her answer in answer to your cross-examination." Thereupon the defendant excepted, and she answered: "Because he has shown himself without any honor, and false in every respect." Then there was a motion made by the defendant to strike out the answer as incompetent and immaterial; a statement of the opinion of the witness, and not any fact. Thereupon the court remarked, viz.: "It is not offered for the purpose of establishing he has not been honorable,

but simply what the ground in her mind is, or what there is in her mind which induces her now to be unwilling to marry him. It is not proof of the fact that he was not honorable, or any expression of opinion upon the subject." Thereupon the following question was propounded: "That is what you mean, not that he is not so, but you so regard him as not honorable and false since the service of the answer?" The witness answered: "That is the impression that his conduct has made upon my mind." The counsel for the defendant asked if his motion was denied, and the court said "Yes," and the defendant took an exception. Thereupon the counsel for the defendant moved "to strike out the statement that his conduct had been such that it had made that impression on her mind." Thereupon the court remarked: "I will allow that to stand, I think;" and thereupon the defendant took an exception. We think there was no error in the rulings. In the cross-examination the plaintiff had been pressed to say whether she was then willing to marry the defendant, and she had then declared that she was not, and we think all the facts which she stated in her redirect examination were allowable in giving an explanation of why she was then unwilling to consummate the marriage contract with the defendant. The defendant voluntarily sought during the trial to probe her then mental condition in respect to the defendant. Having pressed her to declare her position, it was not improper that she be permitted to give the reasons for the then condition of her mind on the subject of intermarriage with the defendant.

3. It appeared that the defendant held several conversations with Mrs. Fitch, a sister of the plaintiff, upon the subject of his proposed intermarriage with the plaintiff, and that he had asked Mrs. Fitch to intercede for him; and on one occasion he asked Mrs. Fitch if she had had a talk with the plaintiff. Mrs. Fitch replied, "I had, but had not found out much." Thereupon the court asked Mrs. Fitch: "When you had this long talk that you have detailed with Mr. Chapman when your sister was down at Adams, when your sister came home did you say anything to her, and, if so, what with reference to Mr. Chapman?" That question was objected to by the defendant as incompetent and immaterial, and a declaration of the witness, no statement of any fact by which the defendant can be bound. The court overruled the objection, and the defendant took an exception. The answer given to that question was as follows: "I think I told her about word for word, as near as I can remember, just what he said, and about what I told him about his sisters, and about his not dressing well and being stingy. I had a good many talks with him upon the subject of my sister, at my house, on occasions when my sister was absent. I don't think we ever talked when she was there, but he came a good many times when she would go to school before he left, and then he invariably stopped and talked with me a while. He would say, 'I think, Mrs. Fitch, you are my friend, and I think you will do all you can for me,'—something to that effect." The defendant made a motion to strike out the last sentence. The court refused, and the defendant took an exception. The principal evidence involved in the last answers of the witness had already been stated by her in narrating the conversation which she had held with the defendant, and as he had asked Mrs. Fitch to intercede for him, and to communicate his wishes to the plaintiff, we think no error was committed in allowing Mrs. Fitch to state that she had communicated to the plaintiff the details of the conversation she had held with the defendant, and that the rulings had were not erroneous.

4. In the course of the cross-examination of the defendant, he was asked, viz.: "My question is, were you ever engaged to marry any other woman, aside from Miss Chellis?" An objection and exception were taken by the defendant. According to the ruling of the court it was regarded as a part of the cross-examination, and as bearing upon the witness' *status*; however, as the witness answered, in effect, that he had not been engaged, saying, viz.:

"Never had any real settled engagement; no more than a talk from one time to another; no bargain made," we think he was not required to give any evidence that was so prejudicial to the defendant as might cause a reversal. He did not admit that he was "much of a Lothario."

5. While the defendant was being examined, he was asked in respect to certain letters which he had received from the plaintiff. He was required by the court to state in respect to those letters. He did state that according to his best judgment he saved them, and that he "picked them up, what I could find, and gave them to Mr. Pruyn." And he added: "I don't know how many letters I delivered to Mr. Pruyn. I intended to and did deliver all I could find. I am inclined to think I destroyed one letter written in pencil two or three years before the engagement. If I did receive any after the engagement, I have forgotten it. If I did, I saved them. I don't know where they are. I don't know as they exist anywhere, or ever did." Then he was asked: "If you received any they are with this bunch which you delivered over to your lawyers?" That question was objected to, and exception taken, and the witness answered, "Yes, sir. I should think they had read in evidence all the letters which I gave to Mr. Pruyn. I don't know of any that they have not read. I don't know of any that I had that I did not give him. I didn't deliver to Mr. Pruyn letters of a later date than May 17, 1886, to my knowledge. I picked up all I could find and gave them to him. I wrote to her after the engagement. It is my opinion that I received replies to those letters, but am not certain. I don't know how many. I think two or three, or more or less, but am not certain. I think I put them in the drawer with the rest of my other papers. I have no recollection of destroying but one, and am not certain about that. I put them in loose in a drawer. Had more than a bushel other papers in there." *Question.* Did you take those letters that you received after your engagement with the others, and deliver them to your attorney?" This was objected to as privileged; overruled, and the defendant excepted. The witness answered: "I don't recollect. It has gone from my knowledge. I can't tell much about it. I picked up all I could find of them and gave them to Mr. Pruyn. I don't know whether there are other letters that have not been read or not." We think the rulings do not violate the privilege in respect to conversations and transactions between the attorney and client, and that the plaintiff was entitled to exhaust the witness' recollection in respect to the letters which were the subject of inquiry. We see no satisfactory ground upon which the rulings can be disturbed. Section 835 of the Code of Civil Procedure, referred to by the counsel for the appellant, prescribes that the attorney "shall not be allowed to disclose a communication made by his client to him, or his advice given thereon, in the course of his professional employment." It does not, however, shield the party from a disclosure of the facts relating to his parting with letters which are the legitimate subject of inquiry.

6. Complaint is made of the course the examination took in respect to the defendant's statements in his answer, and his statements upon the stand as a witness, and the pressure put upon him to explain why the contradictions found in his testimony of certain positions taken in his answer. We are of the opinion that the latitude indulged by the trial judge was not an abuse of his discretion, nor was it beyond the practice which has been tolerated quite generally in the progress of the trial.

7. During the examination of the plaintiff as a witness the following question was propounded to her: "*Question.* During these years he visited you, and down to the time of your engagement, or promise to marry him, in June, 1886, you may state whether or not you became attached to him." A general objection was taken to this, and the court remarked: "I think that is proper. To state what her feelings became towards him." Thereupon the defendant excepted, and the witness answered, viz.: "*Answer.* I certainly was, or I

should not have agreed to have married him. During his visits—after the engagement to marry him—he had kissed me. I think that occurred before the engagement as well as after. I was ready at the times agreed upon to marry him on my part, and desired to do so.”

We think the facts disclosed in answer to the question were entirely legitimate, and that they were pertinent and proper, inasmuch as the defendant in his answer had set up, viz.: “The plaintiff has not now nor ever had any affection for him, nor any desire that she should ever become his wife, and that her only purpose was and is to procure money of defendant on the pretense that he had promised to marry her, and then been guilty of a breach thereof.” Considering that language found in the answer, and also considering the evidence which the defendant offered, with a view of having the position taken in his answer believed to be a just one, we think the plaintiff was entitled to the evidence which she gave in answer to the question objected to, and that the defendant’s exception to the ruling, allowing such evidence to be received, is unavailing.

When *McKee v. Nelson*, 4 Cow. 355, was decided, the parties to a marriage contract could not be witnesses for or against each other, and evidence in respect to the apparent attachment existing between the parties was allowed, and the court remarked, viz.: “It is true, as a general rule, that witnesses are not allowed to give their opinions to a jury; but there are exceptions, and we think this one of them. There are a thousand nameless things indicating the existence and degree of the tender passion, which language cannot specify. The opinion of witnesses on this subject must be derived from a series of instances passing under their observation, which yet they never could detail to a jury.” In commenting upon that case, SELDEN, J., says in *De Witt v. Barly*, 17 N. Y. 344: “That was an action for breach of promise of marriage, and a witness, who knew the plaintiff, and had observed her conduct and deportment towards the defendant, was permitted to testify whether, in her opinion, the plaintiff was sincerely attached to him, a fact which it is plain could be proved in no other way.”

We find nothing in either of the cases which warrants us in condemning the ruling which allowed the plaintiff to state the fact that she “became attached to him.”

8. It is contended by the defendant that the court “erred in submitting to the jury the question of exemplary damages.” At the close of the charge, the defendant’s counsel took an exception in the following language: “I except also to submitting the question of punitive damages to the jury at all in this case.” In the course of the charge the learned trial judge said: “The law is well settled now that juries may in their discretion—you are not compelled to—that juries may in their discretion, in a proper case, allow what are known as exemplary or punitive damages, and this is the only kind of action on a contract where that kind of damages can be allowed. Ordinarily, such damages are allowed in cases of wrong, slander, libel, malicious prosecution, and that kind of actions where a wrong has been committed, but in no other action on a contract, except breach of promise, can this kind of damages be allowed; and I say, gentlemen, before reaching the decisions which I propose to read, to show you the rule to be applied,—this kind of damages in any case the jury are not compelled to give,—it is a matter of discretion with the jury in a proper case whether they shall give them. There are some cases of breach of promise of marriage in which a jury would not be justified in giving punitive damages; but in a case where you are justified in doing it, whether you will do it at all, or to the extent to which you will allow these damages, is a matter of discretion with you. I read you a few passages of the law as found in 42 N. Y., commencing page 477, ‘as to the measure of damages this action [this is an action for breach of promise] has always been classed with actions of torts, as libel, slander, seduction, criminal conversation, etc., and

not without reason. It is the policy of the law to encourage matrimony, and society has an interest in contracts of marriage, both before and after they are consummated. A man who enters into a contract of marriage with improper motives, and then ruthlessly and unjustifiably breaks it off, does a wrong to the woman, and also, in a more remote sense, to society, * * * as well as the man who commits a tort under circumstances showing a bad heart. The rule of damages applicable to ordinary contracts would be wholly inadequate. So much depends in each case upon the circumstances surrounding it, and upon the conduct, standing, and character of the parties. In all cases where vindictive damages are allowed, it is upon the theory that the defendant's conduct has been such that he deserves to be punished; and with a view of measuring out punishment to him, as well as compensation to the plaintiff, it is always competent to inquire into his motives and intentions, to show that the act complained of was done wantonly, insolently, maliciously, or with a bad and wicked heart. In such actions it is not only proper to show the main transaction, but any facts bearing upon or relating to it, showing it was done wantonly, maliciously, and wickedly, with a view of enhancing the damages. * * * In an action for breach of promise of marriage, it is always competent for the purpose of enhancing the damages to prove the motives that actuated the defendant; that he entered into the contract, and broke it with bad motives and a wicked heart, and it is competent for him to prove in mitigation of damages that his motives were not bad, and that his conduct was neither cruel nor malicious." He also quoted quite extensively from *Johnson v. Jenkins*, 24 N. Y. 253. He then added, viz.: "Exemplary or punitive damages, to which I have just called your attention, are in your discretion. Not wholly in your discretion. You have not an arbitrary right to fix what you please, or to fix them at all. You must believe, in the first place, in order to permit you to award punitive damages at all, that the defendant either entered into this contract originally dishonestly, without any idea of carrying it out, for a bad purpose, and perhaps I may say there is no evidence of that here. When he entered into the contract, so far as appears here, he seems to have been in earnest about it, and, if that be so, then you can only allow exemplary damages in this case, provided you believe there was something which actuated him, some bad motives, bad purpose, or bad design in the manner of the breaking of it off. If he thought, when he came down to the time when he was called upon to marry this woman, being honest down to that time,—if he then thought that his condition of health was such that he ought not to carry out his contract, and then in breaking it he did nothing unduly to oppress the plaintiff, withdrawing from it or avoiding it as easily as he could, and with as little trouble to the plaintiff as possible,—then, gentlemen, you would not be justified in punishing him for it. He is liable for compensatory damages fully, no matter what his motives were. Having made the contract, if he has violated it, whatever will fully and fairly compensate the plaintiff she is entitled to anyhow, without reference to his motives. The question of his motives bears only upon the question as to whether you shall allow any, and, if so, what, exemplary or punitive damages; and you should not allow those—you haven't any right to allow them—in a case where the original contract was made with good intentions, unless there was something in the manner of the breach of it which was malicious, which was from bad motives, or there was some act of his which was particularly oppressive to the plaintiff in the manner of his avoiding the provisions of the contract."

We are of the opinion that the question of damages, compensatory and punitive, was properly and clearly submitted to the jury by the learned trial judge. *Hunt v. Bennett*, 19 N. Y. 173; *Johnson v. Jenkins*, 24 N. Y. 252; *Thorn v. Knapp*, 42 N. Y. 474; Sedg. Dam. (6th Ed.) 248, 455.

Nor do we think the damages given by the jury are excessive, or that the amount indicates that the jury was "influenced by prejudice, passion, or cor-

ruption." Mr. Sedgwick says, at page 455: "This action is given as an indemnity to the injured party for the loss she has sustained, and has always been held to embrace the injury to the feelings, affections, and wounded pride, as well as the loss of marriage. From the nature of the case it has been found impossible to fix the amount of compensation by any precise rule, and, as in tort, the measure of damages is a question for the sound discretion of the jury in each particular instance, subject, of course, to the general restriction that a verdict influenced by prejudice, passion, or corruption will not be allowed to stand." It was said in *Thorn v. Knapp*, 42 N. Y. 474, that damages in this class of actions "have never been limited to the simple rule governing actions upon simple contracts for the payment of money." "For the breach of the contract of marriage, though in form of an action of *assumpsit*, is, in fact, and always has been since it was sustained at common law, in respect to this question of damages, really in the nature of an action for a tort." Page 483.

In *Mitnick v. City of Troy*, 19 Hun, 258, BOCKES, J., in referring to the case of *Coleman v. Southwick*, 9 Johns. 51, approves of the language of KENT, C. J., used in that case, wherein he says, viz.: "The question of damages was within the proper and peculiar province of the jury. It rested in their sound discretion, under all the circumstances of the case, and unless the damages are so outrageous as to strike every one with the enormity and injustice of them, and so as to induce the court to believe that the jury must have acted from prejudice, partiality, or corruption, we cannot consistently with the precedents interfere with the verdict. It is not enough to say that, in the opinion of the court, the damages are too high, and that we would have given much less. It is the judgment of the jury, and not the judgment of the court, which is to assess the damages in actions for personal torts and injuries."

In *Coppins v. Railroad Co.*, 48 Hun, 800, we had occasion to review the cases bearing upon the question of excessive damages, and to deduce therefrom the rule applicable to such cases, and while we interfered with the verdict in that case, there was wanting in it many of the elements which enter into the question of damages in the case in hand. In that case, there was no predicate for punitive damages. It was a case simply for compensatory damages.

In *Grant v. Willey*, 101 Mass. 856, it was held that the "time during which an engagement had subsisted is a proper circumstance for the jury to consider." And it was held in *Berry v. Da Costa*, L. R. 1 C. P. 331, that the "jury may take into account the plaintiff's altered social position, in consequence of the defendant's misconduct." And in *Smith v. Woodfine*, 1 C. B. (N. S.) 660, the language which we have quoted from Sedgwick on Damages was approved; and it was stated, viz.: "The jury are allowed to take into their consideration all the circumstances." In January, 1889, the general term of the First department sustained a verdict in *Campbell v. Arbuckle*, 4 N. Y. Supp. 29, for \$45,000, in a case somewhat like the one before us.

In *Houghkirk v. Canal Co.*, 92 N. Y. 224, the power of the general term to interfere with the verdict on the ground that it is excessive is recognized and reaffirmed, and the court remarked that "while the judgment of the trial court should not be lightly disturbed, it should not be held necessarily conclusive."

After a full and deliberate consideration of all the circumstances disclosed in the evidence, and in the light of the precedents and rules of law to which we have already adverted, we are of the opinion that we ought not to interfere with the verdict on the ground that the same is excessive. Judgment and order affirmed, with costs.

MARTIN, J., concurred. MEEWIN, J., concurred in the foregoing opinion, except upon the question as to the amount of damages.

SMITH v. CREGO.

(Supreme Court, General Term, Third Department. September 21, 1889.)

1. COMPOUNDING FELONY—EVIDENCE—MINUTES OF MAGISTRATE.

In an action on a note, where the defense is made that it was given in consideration of an agreement to compound a felony, statements by the prosecuting attorney, contained in the minutes of the magistrate who conducted the preliminary examination into the felony, are not admissible to prove such an agreement to compound by the plaintiff.

2. SAME—EMBEZZLEMENT—AGREEMENT TO REFUND.

A promise by a father to repay money embezzled by his son is not in itself an agreement to compound a felony.

3. WITNESS—PRIVILEGED COMMUNICATIONS—WAIVER.

Under Code Civil Proc. N. Y. § 836, allowing a person to waive the right of having his communications with his counsel kept secret, a party may call his counsel to testify to conversations between them.

4. SAME—WHAT ARE PRIVILEGED.

A communication to his counsel by one party, in the presence of the other, is not privileged.

5. EVIDENCE—PAROL.

An admission contained in a letter may be explained by parol evidence.

6. APPEAL—REVIEW—EXCLUSION OF TESTIMONY.

Where there is a conflict of testimony, the erroneous exclusion of any testimony, bearing on the merits, is cause for reversal.

Appeal from circuit court, Albany county.

Action by Oscar Smith against Russell Crego. Judgment was rendered for defendant, and plaintiff appeals.

Argued before LEARNED, P. J., and LONDON and INGALLS, JJ.

Mark Cohn, for appellant. Chase & Delehanty, for respondent.

LEARNED, P. J. This action is on a note made by Dwight L. Crego and indorsed by Russell Crego. The defense is that it was given on an agreement to compound a felony. Dwight L. had been in the employment of the Wheeler & Wilson Manufacturing Company, and had been charged with embezzling money. He had been arrested, and was still under arrest when the note was given. On the defense above stated, the testimony of the plaintiff and that of the defendant are in conflict. The plaintiff offered in evidence the minutes of the magistrate, with the affidavit and warrant. The defendant objected to a part of the minutes, as follows: "Prosecuting attorney stated that all money due the company had been refunded, and, the prosecution paying expenses, the court admitted defendant to bail in \$500." At the close of the case, the plaintiff requested the court to charge that the plaintiff is not to be prejudiced, or the jury infer there was such agreement or understanding, from the statement in the minutes of the justice that the prosecuting attorney stated, etc. The court, in reply, said to the jury: "You are to take into account all that was received before you, and give it such weight as in your judgment it is entitled to." The defendant excepted.

Now, the minutes of the justice were admissible, and therefore this statement was before the jury. But it was merely the statement of the magistrate of what was said by the prosecuting attorney. It was no evidence against the plaintiff of any agreement or understanding as to compounding the felony. Yet the jury might, under this instruction, have understood that this statement of the magistrate had some weight in supporting the defense. We think that the plaintiff was entitled to have the jury instructed as he requested. The defendant says that the statement was harmless, because the money was refunded in fact; but the manner in which this statement is made in the minutes seems to indicate that it was inserted as a reason for putting the bail at a small amount, and thus to afford some evidence that there was an agreement to compound the felony.

The defendant, in support of his defense, testified that he and one Storah, an agent of the company, went to the law-office and papers were drawn up. That law-office was the office of Mr. Thompson, who, as the defendant testifies, was plaintiff's lawyer. The plaintiff then called Mr. Thompson, who testified that he was present when the note was executed, and that plaintiff and Storah and defendant Russell were present at his office before the execution of the note. He was then asked by the plaintiff to state the conversation which then took place. This was objected to, under section 835 of the Code, and was excluded, to which the plaintiff excepted. Now, Thompson was not attorney for Russell Crego, or for Dwight L. Crego. He was plaintiff's attorney, or, as is said in one place, the company's attorney, which was practically the same thing. As he was Smith's attorney, Smith could waive the privilege. Section 836. And he did waive it, by calling on Thompson to testify to the conversation. *In re Coleman*, 111 N. Y. 220, 19 N. E. Rep. 71.

Furthermore, both parties to the agreement were present at the conversation; and, under the common-law rule as to privilege, communications to an attorney were not confidential when both parties were present. *Whiting v. Barney*, 30 N. Y. 380; *Britton v. Lorenz*, 45 N. Y. 51. Section 836, though it does not use the word "confidential," is intended to be only a statement of the common-law rule. See note to the section. So far, then, as appears in the case, it seems to us that Thompson should have been allowed to testify to the conversation inquired about.

About four months after the execution of the note, a letter was written by plaintiff to defendant, containing the words: "I went to Schenectady yesterday morning, and arranged, through the district attorney, to drop Dwight's case." The plaintiff testified that he did not arrange with the district attorney to drop the case that was then pending. He was then asked: "Explain what the language [above quoted] refers to." This was objected to and excluded. The plaintiff excepted. And the learned justice, in his charge commenting on this letter, said that the law prevented the plaintiff from stating what he intended by the letter; that the law presumed that he intended what the letter imported on its face. Now, this rule would be quite correct if applied to a written contract, or to a writing on which another party had relied in his action. But this letter was a mere admission; not any more binding because it was in writing. Whatever contract the parties entered into had been made long before; and this letter was only a statement of what plaintiff had subsequently done. He might disprove the truth of the statement. He might, if the fact were so, show to what his words referred. Suppose (merely to illustrate) that "Dwight" referred to some person other than Dwight L. Crego, the plaintiff could have shown this. We think, then, that the witness should have been allowed to answer the question.

It is plain, in this case, that the note was given principally to settle a large part of the moneys which Dwight L. Crego owed the company. It was right that he should pay or secure these moneys, and it was proper that his father should assist him in restoring to the company what he had taken from it; and the father might rightfully do this, in the hope that the burden which would thus fall on an innocent man would be a sufficient punishment for the crime. *Hatch v. Collins*, 34 Hun, 814. Of course, an actual agreement to compound must not be made; but full compensation to the wronged party is a duty, and is not illegal.

In the conflict of evidence in this case, where the plaintiff fully denies the alleged agreement, the exclusion of any proper evidence bearing on the merits is especially material, and may have operated to defeat the plaintiff's claim. We are therefore of opinion that the judgment should be reversed, and a new trial granted; costs to abide the event. All concur.

MULFORD v. YAGER *et al.**(Supreme Court, General Term, Third Department. September 21, 1889.)*

1. TRIAL—FINDINGS BY COURT.

Where the court, under Code Civil Proc. N. Y. § 1023, providing that it must determine the facts of the case which are submitted to it by either party, has found that certain conveyances are not fraudulent, it is not required to determine the truth of facts tending to show fraud.

2. NEW TRIAL—SURPRISE—DISCRETION OF TRIAL COURT.

The question of a new trial on the ground of surprise is largely within the discretion of the trial court.

Appeal from special term.

Argued before LEARNED, P. J., and LANDON and INGALLS, JJ

James B. Olney, for appellant. John J. Linson, for respondents.

LEARNED, P. J. This is an action brought by a receiver, appointed in proceedings supplementary, against John Yager, to set aside as fraudulent two conveyances,—one made by John Yager to Schoonmaker; and the other, of the same property, by Schoonmaker to Anna C. Yager, John's wife. The ground is that the conveyances were made with intent to defraud the judgment creditor. The conveyances were made August, 1873; the judgment against John was recovered in January, 1876; the action had been commenced in September, 1878; and such recovery was for \$155.12 damages, and \$178 costs. The present action was commenced in September, 1885. On the trial, a jury was drawn, and evidence was given on both sides. At the close of the case, the court, without objection, submitted to the jury the question whether the conveyances were made with intent to defraud. The jury found in the negative. The court thereupon found the formal facts of the recovery of the judgment, and the appointment of the receiver, and of the conveyances, and further found that the conveyances were not made with intent to defraud. The plaintiff asked the court to find nineteen propositions of fact, and five of law. The court declined to find on these propositions, on the ground that it had directed judgment on the verdict. Perhaps it should be more accurately said that the court had adopted the finding of the jury. This refusal to find is urged as error.

Assuming, for the present, that section 1023¹ applies to a case triable by the court, but in which a jury is impaneled to pass on some issues, still I am of the opinion that no error was committed. That section does not require a judge to find upon every piece of evidence offered, but to find upon facts put in issue. Looking over the propositions of fact which the plaintiff requested the judge to find, we shall see that, so far as they were material, they were matters of evidence which bore, or might be thought to bear, on the question of fraud in the conveyances. Of themselves they determined nothing. The facts on which the court is required to pass must be those which, when found, determine the result as a matter of law. When it is found as a fact that there was no intent to defraud in the execution of the conveyances, it follows, as a matter of law, that the plaintiff cannot recover. The numerous matters to which the plaintiff called attention in his 19 propositions—many of them—tended to show fraud. On the other hand, there were other matters in the case which tended to disprove the intent to defraud. It is the part of the

¹ Section 1023. Before the cause is finally submitted to the court or referee, or within such time afterwards, and before the decision or report is rendered, as the court or referee allows, the attorney for either party may submit, in writing, a statement of the facts which he deems established by the evidence, and of the rulings upon questions of law which he desires the court or referee to make. * * * At or before the time when the decision or report is rendered, the court or the referee must note, in the margin of the statement, the manner in which each proposition has been disposed of. * * *

tribunal (judge or jury) which tries the case to settle the fact of fraud or no fraud, upon these conflicting matters; and the court is not called upon to find as to everything testified to, whether he found it to be true or false. It may not always be easy to draw the line between "facts" and "evidence," as the words are used in legal matters. Sometimes, indeed, the word "facts" is used so as to include matters which are really but the evidence of the facts in issue. But I do not think that the section above cited was intended to require the judge to pass upon the truth of every piece of evidence to which either party should choose to call his attention. This would be intolerable, and of no use. I think, therefore, that there was no error in this respect.

On the merits of the case, after carefully looking at the whole testimony, I think we should not be justified in reversing the finding of the jury and of the trial court. The question of fraud, being purely one of fact, in such cases as the present, is best disposed of by the tribunal which has seen and heard the witnesses. It is true that there are some suspicious circumstances, but explanation of them is given; and the jury were satisfied that the transactions attached were honest. The question of a new trial on the ground of surprise must be largely one of discretion; and that discretion is generally better exercised by the judge who tried the case than by an appellate court. The judgment and order appealed from should be affirmed, with costs. All concur.

PEOPLE v. HAIGHT.

(*Supreme Court, General Term, Third Department. September 21, 1889.*)

BURGLARY—INDICTMENT—DESCRIPTION OF PREMISES.

Under Pen. Code N. Y. § 498, providing that a person who, "with intent to commit a crime therein, breaks and enters a building, or a room, or any part of a building," (defined by section 504 to include an "inclosure,") is guilty of burglary in the third degree, an indictment which alleges that accused broke and entered certain "stove-works," without stating that the works were a building, or a room, or a part of a building, is defective, and the defect is not such "an imperfection in matter of form" as is cured by Code Crim. Proc. N. Y. § 285.

Appeal from court of sessions, Columbia county.

Argued before LEARNED, P. J., and FISH and PUTNAM, JJ.

G. D. B. Hasbrouck, for appellant. A. B. Gardinier, Dist. Atty., for the People.

LEARNED, P. J. The prisoner was indicted for the crime of burglary in the third degree. He demurred to the indictment. The demurrer was overruled. Thereupon he pleaded not guilty; was tried, convicted, and sentenced. He now appeals from the judgment, in order to review the order overruling the demurrer.

The indictment charges that on a certain day, and in the night-time, he "feloniously and burglariously did break and enter the stove-works of one Zebulon Hunt," with the intent to steal, etc., and did steal, certain property. The simple question is whether the allegation that he did break and enter into the stove-works of one Zebulon Hunt is a sufficient allegation that he broke and entered a building, or room, or part of a building. Section 498, Pen. Code, is defined in section 504 to include a railway car, vessel, booth, tent, shop, or other erection or inclosure. It is hardly to be supposed that a place inclosed by a fence is an "inclosure," within the meaning of these sections. *People v. Richards*, 108 N. Y. 148, 15 N. E. Rep. 371. The words "stove-works" do not necessarily imply a place inclosed by a fence. Still less do they imply, of necessity, a building. These words are used to mean all the grounds used by a manufacturer for the manufacture of stoves. They include the buildings, and also the grounds about the buildings, whether such grounds are fenced in or not. They are words of the most general meaning. Webst. Dict. under "Work." One who entered into grounds used for the

manufacture of stoves might, in the legal phrase, be said to break into the close of the owner; and plainly the allegation of the indictment does not necessarily include the breaking into any building or even into any grounds inclosed by a fence. This is not an imperfection in form, such as is spoken of in section 285, Code Crim. Proc. Notwithstanding the liberality with which indictments may now be construed, they must allege facts which show that the crime has been committed. The breaking and entering into a building is a material part of the crime here charged, and must be alleged. We think the indictment is defective, and that the demurrer should have been sustained. Judgment reversed; demurrer sustained; prisoner discharged.

KENNEDY v. WOOD *et al.*

(*Supreme Court, General Term, Third Department. September 21, 1889.*)

1. CONTINUANCE—CONDITIONS—COSTS.

Under Code Civil Proc. N. Y. § 3255, providing that it may be required as a condition before granting an adjournment of a trial that the adverse party shall be paid "a sum not exceeding \$10, * * * besides the fees of his witnesses, and other taxable disbursements, already made or incurred, which are rendered ineffectual by the adjournment," the court has no power to impose payment of a gross sum, as \$50 "for costs and expenses," as a condition.

2. SAME—APPEAL.

Where illegal conditions of adjournment are imposed, an appeal lies, and the right thereto is not waived by payment of the illegal amount under protest.

Appeal from special term, Rensselaer county.

Application by William S. Kennedy, as receiver, for a postponement of the trial of a cause against Jacob C. Wood and others. Code Civil Proc. N. Y. § 3255, providing for costs upon adjournment of trial, recites: "Where an application is made to a court or a referee to adjourn a trial, the payment to the adverse party of a sum not exceeding ten dollars, * * * besides the fees of his witnesses, and other taxable disbursements, already made or incurred, which are rendered ineffectual by the adjournment, may be required as a condition of granting the adjournment." The court ordered the postponement, and directed plaintiff to pay to defendant's attorneys the sum of \$50, as a condition, to indemnify defendants for their costs and expenses in preparing for trial. Plaintiff appeals.

Argued before LEARNED, P. J., and FISH and PUTNAM, JJ.

Charles J. Baker, (*Henry A. King*, of counsel,) for appellant. *King & Rhodes*, (*Charles E. Patterson*, of counsel,) for respondent.

LEARNED, P. J. We are of the opinion that section 3255 of the Code of Civil Procedure limits the power of the court, on adjourning a trial, to requiring, as a condition, the payment of \$10 costs, the fees of witnesses and taxable disbursements rendered ineffectual by the adjournment. See *Hall v. Dwinell*, 10 Wend. 628; *Noxon v. Bentley*, 6 How. Pr. 418; *Hand v. Burrows*, 15 Hun, 481. The sum imposed in this case was \$50 for costs and expenses in preparing for trial. We cannot construe this as meaning \$10 costs, and \$40 witnesses' fees and taxable disbursements. That is plainly not the meaning. And we think that the court has no power to impose a gross sum as a condition. Of course the parties may agree on what the witnesses' fees and the taxable disbursements are. Otherwise they must be adjusted in the ordinary way.

We have no doubt that an appeal lies to this court if conditions of adjournment are imposed which are not legal. Nor is the right to such appeal waived by the fact that the aggrieved party, to prevent a dismissal of his complaint, has paid the illegal amount under protest. He could do no otherwise with safety to himself. As to the other part of the order, viz., that it was on the understanding that no further application, etc., should be made,

we do not know from the language whether this was not an agreement volunteered by the plaintiff's counsel to induce the adjournment. The language is not so clear as to put this beyond question. The order must be modified so that the condition shall be on the payment of \$10 costs, and of fees of witnesses and other taxable disbursements made or incurred which are rendered ineffectual by the adjournment. On the adjustment of these witnesses' fees and taxable disbursements the defendants must repay any part of the \$50 in excess of the sum thus allowed. No costs of this appeal to either party.

PEOPLE v. TUNNICLIFFE.

(*Supreme Court, General Term, Third Department. September 21, 1889.*)

PLEADING—ANSWER.

An answer denying "the said complaint in each and every allegation therein contained" is not frivolous.

Appeal from special term, Warren county.

Action by the people of the state of New York against George W. Tunnicliffe for penalties for violating game laws of New York. Laws 1879, c. 534, § 19. After answer by defendant, plaintiff moved for judgment on the ground that such answer was frivolous. The court awarded judgment for plaintiff unless defendant amended his answer. Defendant appeals.

Argued before LEARNED, P. J., and FISH and PUTNAM, JJ.

Coyle & Cunningham, for appellant. *Charles R. Patterson*, Dist. Atty., for respondent.

LEARNED, P. J. We are satisfied that the answer in this case was a good denial of all the allegations in the complaint. It denies the complaint in each and every allegation therein contained. This plainly means that the defendant denies all the allegations of the complaint. Neither complaint nor answer was verified. There was therefore no reason why the defendant should attempt any evasive denial. We think that the answer was not frivolous. The order appealed from is reversed, with \$10 costs and printing disbursements, and the motion for judgment on the frivolousness of the answer is denied, with costs.

FISH, J., concurs. PUTNAM, J., not voting.

MITCHELL v. BAUCUS.

(*Supreme Court, General Term, Third Department. September 21, 1889.*)

SHERIFFS AND CONSTABLES—FAILURE TO EXECUTE WRIT—EVIDENCE.

In an action against a sheriff for neglecting to arrest a judgment debtor on an execution against his person, evidence of directions given by plaintiff to a former sheriff as to another execution against the debtor, on the same judgment, is inadmissible.

Appeal from circuit court, Saratoga county.

Action for damages by Commodore P. Mitchell against A. B. Baucus, sheriff of Saratoga county, on account of failure of defendant to arrest, on execution against his person, one Francis McCue, a judgment debtor of plaintiff. Verdict having been given for defendant, and judgment entered thereon, plaintiff appeals.

Argued before LEARNED, P. J., and LANDON, J.

E. T. Brackett, for appellant. *John Foley*, for respondent.

PER CURIAM. Evidence of directions given by the plaintiff to another sheriff, or his deputy, in regard to his enforcement of another execution

issued on this judgment, a year or so before the execution in question, was inadmissible. It tended in no way to justify the defendant for any neglect to enforce the execution placed in his hands. Nor did it tend to prove what directions the plaintiff had given to this defendant. The evidence in this case was conflicting, and this improper evidence very probably had influence with the jury. Judgment reversed; new trial granted; costs to abide event.

In re PRESTON.

(Supreme Court, General Term, Third Department. September 21, 1889.)

MORTGAGES—ASSIGNMENT OF DEBT—RIGHTS OF ASSIGNEES.

The payee of certain notes indorsed some of them over, and then made an assignment for the benefit of creditors. Afterwards the maker, without knowledge that any of the notes had been transferred, executed a mortgage to the assignee for the benefit of creditors to secure the notes. *Held*, that the proceeds of the mortgage should be applied *pro rata* to the notes in the hands of the assignee and indorsees without regard to any preferences contained in the assignment, and it is immaterial that the mortgage was executed in pursuance of a prior agreement that the notes were to be so secured.

Appeal from special term, Ulster county; SAMUEL EDWARDS, Judge.

Fitch made a general assignment to Preston in November, 1884. Before that time, Mrs. Anderson had given Fitch several promissory notes in payment of goods sold, amounting to over \$13,000. One of these notes, of the amount of \$1,169, remained in his hands at the time of the assignment. The others had previously to the assignment been discounted by banks, and were held by them with Fitch's indorsement, amounting as follows: By National Bank, \$4,194; by National City Bank of Brooklyn, \$1,200; by State of New York National Bank of Kingston, \$5,861. Fitch's assignment, after wages due employes, preferred notes held by the National Bank of Rondout, on which he was liable as indorser or otherwise. A few days after the execution of the assignment, Fitch procured from Mrs. Anderson a mortgage on real estate. It was given to Preston, assignee of the estate of Fitch. It recited that Mrs. Anderson was indebted to the estate of Fitch in the sum of \$8,000, and was conditioned to pay that sum February 2, 1885. This mortgage was given to secure the aforesaid notes, amounting to over \$13,000. It was made for \$8,000, because that was all the property was worth. The mortgage was given in pursuance of a prior understanding between Fitch and Mrs. Anderson that she was to secure these notes on that property. At the time the mortgage was given Mrs. Anderson did not know by whom the notes were held, but supposed they were held by Fitch. The notes were spoken of when the mortgage was given, and there was no other indebtedness of Mrs. Anderson to Fitch than these notes. Preston, the assignee, subsequently foreclosed the mortgage and obtained \$4,284.46 as the net proceeds. Of that sum he applied \$1,169 to the discharge of that note of Mrs. Anderson which Fitch had at the time of the assignment, and which passed to the assignee. On the accounting, this application was approved by the court, and he was directed to apply the residue so far as it would go to the payment of those notes of Mrs. Anderson, which were held by the National Bank of Rondout, the first preferred creditor of Fitch. The State of New York National Bank of Kingston, a creditor in a subsequent class, appeals.

Argued before LEARNED, P. J., and FISH and PUTNAM, JJ.

F. L. Westbrook, for appellant. *Severyn B. Sharpe* and *Howard Chipp, Jr.*, (*J. N. Fiero*, of counsel,) for respondents.

LEARNED, P. J. There can be no question that Mrs. Anderson gave this mortgage to secure all the notes which she had given to Fitch. Such is the testimony of Fitch, and such is the evident meaning of the transaction. She had no intention to secure one rather than another of all these notes; and the

reason why the mortgage was not made for the whole amount of the notes was explained to be because the property was not worth more than \$8,000. The property was hers, and she had a right to apply it as she chose. She did apply it to the payment of all these notes. Therefore it was the right of each holder of these notes to share *pro rata* in the avails. No one of these several holders of these notes had a right to take more than his *pro rata* share of the net avails. Mrs. Anderson was the debtor, and she had a right to secure one debt, or all, as she might prefer. There is not any evidence that she desired to prefer one above another. Indeed she supposed that all the notes belonged to Fitch. Her appropriation, therefore, of her own property settled the rights of her several creditors; and each became at once entitled to share *pro rata* in the proceeds. The previous assignment of Fitch, by which, as to his own property, he preferred the National Bank of Rondout, did not affect Mrs. Anderson's mortgage. Fitch had no right to control Mrs. Anderson's property, and he did not attempt to control her property; for when he made the assignment, the mortgage had not been executed. It is suggested that there had been a previous understanding that she would secure these notes—that is, all of them—on this subsequent mortgaged property. If this gave Fitch any equity, such equity would equitably pass to the several owners of the notes to whom he had transferred them. It is not material to the proper disposal of this case that the mortgage was in form to Preston, assignee. It was given to secure these notes, and Preston cannot be permitted to apply the proceeds in any other way than as the mortgagor determined. It is fully in the power of the court, under the statute, to make a proper and just disposition, and to cause these net avails to be applied *pro rata* among all who are entitled. All the persons entitled to share are before the court, and the person in possession of the property is here also. The respondents urge that if Preston took the property as assignee, then he should distribute it according to the preferences of the assignment; that if it took it in any other capacity it cannot be brought into this accounting. But this is not sound. As assignee, Preston is entitled to the *pro rata* share belonging to the note which was in Fitch's possession when he assigned; but the mortgage belonged in equity to all the holders of the notes *pro rata*. And as he is in possession of the avails the court can, under the equity powers given by the statute, prevent the assignee from misappropriating to the use of the assignment property which is not subject thereto. It is a settled rule that the debt is the principal, and the security is the collateral. The debts in this case consist of the several notes, and of all of them. The mortgage is but the collateral. The holders of the notes are the equitable holders of the collateral; and the person who has possession of the avails of the collateral must distribute those avails among all the holders of the notes in proportion to their claims.

The decree appealed from must be modified so that Preston, the assignee, shall retain only his *pro rata* share of the avails of the mortgage, and shall distribute all of the said avails *pro rata* among all of the Anderson notes, without regard to the preferences of the assignment. The appellants are entitled to costs of their appeal against the respondents except assignee. All concur.

PARSONS *et al.* v. RAMSEY.

(Supreme Court, General Term, Third Department. September 21, 1886.)

EVIDENCE—COMPETENCY.

In an action on account, a letter written by a third person, material to the issue, and calculated to prejudice the jury, which is a mere unverified statement, for the admission of which no foundation is laid, is inadmissible, over objection.

Appeal from Albany county court.

Argued before LEARNED, P. J., and LANDON and INGALLS, JJ.

R. W. Brass, (J. H. Clute, of counsel,) for appellant. F. E. Wadhams, for respondents.

INGALLS, J. This action was brought by the plaintiffs to recover of the defendant the sum of \$146.50, for printing certain matter contained in the following bill:

"ALBANY, N. Y., _____, 188—.

"M. Hon. J. H. Ramsey to Weed, Parsons & Co., Dr., 39 and 41 Columbia St., near Broadway.

"Book & Job Printers, Publishers, &c.

"1881.

"Mch. 12.	Ptg.	100 cops. bill rel. to canal towing, 2 pp.,	-	4 00
		5,000 speeches of Hon. W. W. Astor and		
		Hon. Dolphus S. Lynde, 12 pages,		80 00
		Composition on speech of Hon W. W. Astor for Jour-		
		nal and Argus, - - -	-	9 00
	Ptg.	100 cops. Senator Astor's speech separately,	-	2 50
		250 Circular, Anti-Monopoly, 1 page,	-	2 50
16.	Ptg.	800 Circular, Anti-Monopoly, 1 page,	-	3 50
18.		5,000 Speeches of Senators Astor and		
		Lynde on Canals, 12 pages, -		45 00

146 50"

The plaintiffs claimed at the trial in the county court that such printing was done at the instance of the defendant, who promised to pay therefor. Evidence was produced in support of the plaintiffs' theory, and the defendant was examined as a witness on his own behalf, and positively denied that he requested the plaintiffs to perform the work, or that he promised to pay therefor. There was a direct conflict in the evidence upon the main question involved. The plaintiffs were allowed, against the objection of the defendant, to read in evidence the letter of H. E. Tremain, which was addressed to Mr. Frederick E. Wadhams, the plaintiffs' attorney, which was dated July 8, 1886, which was an answer to a letter addressed to Mr. Tremain by Mr. Wadhams, in relation to the plaintiffs' claim for such printing, and as to the defendant's liability therefor. The letter objected to is contained in the printed case, and is as follows:

"Henry Edwin Tremain. Mason W. Tyler.

"Law Offices of Tremain & Tyler, 167 Broadway.

"NEW YORK, July 8, 1886.

"*Frederick E. Wadhams, Esq., Albany, N. Y.*—DEAR SIR: Absence from the city has delayed this reply to your note of June 29th. I am quite sure that I did not personally incur or permit myself directly or indirectly to become responsible for any unpaid printing bills in the matter you mention. My relation to the subject you mention was purely advisory, and under the direction of Mr. Ramsay. I remember co-operating with him, and with the private secretary of Mr. Astor in correcting, for prompt circulation, the proofs of Mr. Astor's speech. If I had had any idea that this printing had not been ordered by some one else than myself, I should have paid further attention to the matter, such as ordering or receiving the stated number of copies, and insuring the payment of the bill. My recollection that I had nothing to do with incurring this bill, and was not even indirectly charged with the duty of seeing that it was paid, is confirmed by the circumstance that I never knew there was any printing bill incurred, while I was professionally employed in the matter, that remained unpaid until a few weeks ago, when Mr. Parsons, in his store, called it to my attention. My recollection is further confirmed by learning, as I then learned, that there were other items in the bill (such as printing speeches of others) which I never knew were printed until the printed copies were distributed, and in the proofs of which I never was consulted.

Irrespective of any question of liability, had I known of any unpaid bills of this character in the summer of 1881, I should have exerted myself actively to have insured their payment. I cannot undertake, however, to shoulder a loss, the result of inadvertence on the part either of Mr. Ramsey or my client, particularly at this late day, when I would be without any means to recoup my loss if I should assume it. Had I known of this unpaid bill in season, I should have done my best to have it paid. Even since the failure of my client, had I personally incurred it, I should pay it. I do not think Mr. Ramsey's recollection will be found to differ from mine, or that he will say under any circumstances that I should pay this bill, even though not liable. I did not have an opportunity to see Mr. Ramsey after Mr. Parsons mentioned the matter to me this spring, so you are at liberty, if you choose, to show him this letter.

Yours, truly, H. E. TREMAIN.

"P. S. I had supposed that Mr. Crane, not Mr. Ramsey, ordered the printing."

The statements contained in the letter are clearly material as bearing upon the principal question involved in the controversy, viz., whether the defendant procured the work to be done by the plaintiffs, and promised to pay therefor. The letter was well calculated to prejudice the defendant's case with the jury, and it doubtless had that effect. The letter amounted merely to the unverified statement of Mr. Tremain, and we are not able to gather from the case, or elsewhere to discover, any substantial ground which justified its reception as evidence. The counsel for the defendant not only objected to its admission, but moved to strike it out after it was received, and excepted to the ruling of the court in admitting it as evidence, and in refusing to strike it out. We do not discover that the defendant admitted the truth of the material statements contained in the letter, or that any sufficient foundation was laid for the admission of the letter as evidence. This error seems to us so clearly fatal to the recovery that it becomes unnecessary to consider any other question raised upon this appeal.

The judgment must be reversed, and a new trial ordered, with costs to abide the event of the action. All concur.

CLARK v. ELDRED.

(*Supreme Court, General Term, Third Department. September 21, 1889.*)

1. APPEAL—APPEALABLE ORDER—COUNTY COURT.

Under Code Civil Proc. N. Y. § 1842, amended by Laws 1881, c. 185, which provides for an appeal from an order made by the county court in an action taken to it by appeal; and section 1840, amended by Laws 1888, c. 507, which provides for an appeal from an order of the county court granting or refusing a new trial,—an appeal lies from an order of a county court granting a new trial in an action taken to it by appeal.

2. REFERENCE—MISCONDUCT OF REFEREE—NEW TRIAL.

Where a new trial has been granted to plaintiff for misconduct of the referee, partly caused by defendant, on condition that plaintiff shall pay the costs of the reference if finally successful, the condition will be stricken out as unreasonable.

Appeal from Rensselaer county court.

Action by Anna M. Clark against Perry W. Eldred. Judgment was rendered for defendant, and new trial afterwards granted to plaintiff on certain conditions. From the part of the order imposing conditions plaintiff appeals.

Argued before LEARNED, P. J., and FISH and PUTNAM, JJ.

H. A. King, for appellant. D. M. Westfall, for respondent.

LEARNED, P. J. The opinion in *Reilly v. Canal Co.*, 102 N. Y. 888, 7 N. E. Rep. 427, gives two reasons for its conclusion,—one, that no order had been entered in the county court. If no order had been in fact entered, then, of course, there was no occasion justifying a decision that such order could not be reviewed. The other reason was that an order granting or refusing a new trial was not an order affecting a substantial right. See Code Civil Proc. § 1840. This decision made it necessary for the legislature to express its mean-

ing more clearly. And it did so by chapter 507, Laws 1888,¹ amending section 1340, Code Civil Proc. Since that amendment, it would be difficult for the court of appeals to deny the right of appeal under that section. *Agricultural Works v. Eggleston*, 107 N. Y. 277, 14 N. E. Rep. 312. With this section, thus amended, and with section 1342, as amended in 1881,² we think that the present appeal lies to this court. *Cramer v. Lovejoy*, 41 Hun, 581; *Gray v. Fisk*, 53 N. Y. 630.

We think, also, that there are cases where the terms imposed on granting relief may be so contrary to those established by law and practice as to justify a review in this court. *O'Brien v. Long*, 1 N. Y. Supp. 695. The order of the county court granted a new trial on the ground of misconduct of the referee. He had reported in favor of the defendant for costs. The court imposed as terms that, if the plaintiff should be successful on the merits upon a new trial, she should credit the defendant on the judgment and execution with the sum paid by him for referee's fees and stenographer's fees on the first trial. There are two constructions which may be given to this order. One is that the plaintiff, if successful, would, on final judgment, include in her costs the referee's fees and stenographer's fees on the former trial, and therefore that the defendant should not pay these twice; the other is that the plaintiff would not include these sums in her costs, and that the defendant would offset what he had paid for the referee and the stenographer. The latter is the construction put on the order by the plaintiff, and on that construction she insists that the order is unjust in its terms. The alleged improper conduct of the referee consists in drinking liquor with the defendant, at his expense, in saloons, while the reference was pending, and in altering his report after it had been delivered to the defendant's attorney. Enough appears in the affidavits to fully justify the setting aside of the report; and it will be seen that the grounds on which it was set aside are, to some extent at least, chargeable against the defendant. It seems, therefore, rather strange that the terms imposed on setting the report aside should be beneficial to the defendant, on whom some of the blame must rest for this miscarriage of justice. Justice plainly would require that the referee should refund what he has received for fees; but perhaps this cannot be brought about. But, should the plaintiff finally recover in the action, then it will have been determined that she had a just claim, and that the defendant was wrong in neglecting to pay it. It would, then, seem unreasonable to make the plaintiff, in that case, pay the fees of the first referee and of the stenographer, when she was in no way blamable for the misconduct. The claim in suit is about \$60. The defendant's costs are over \$374, of which the referee's fees are \$125, and the stenographer's \$53.50. To require the plaintiff, if successful, to pay these sums, is practically to deny her justice. She is entitled to a fair trial. It is decided that she has not had that, owing to the fault of the referee, and perhaps of the defendant. If the referee alone were culpable, it might then be the just disposition to make these fees of the referee a part of the final costs, so that they would fall on the unsuccessful party. But the order appealed from casts these fees on the finally successful party; for, if the plaintiff is unsuccessful in the end, then we suppose the defendant will tax these fees in his final bill; and, if the plaintiff is successful, she is required by this order to pay these fees. On the whole, it seems to us that the best disposition is to strike out that part of the order which is appealed from. The part of the order appealed from is stricken out; the \$10 costs of this appeal and printing disbursements to abide the event of this action.

¹Laws N. Y. 1888, c. 507, amending Code Civil Proc. § 1340, provides that an appeal may be taken to the supreme court from an order of the county court granting or refusing a new trial.

²Laws N. Y. 1881, c. 135, amending Code Civil Proc. § 1342, provides that an appeal may be taken from an order made by the county court "in an action brought in, or taken by appeal to, the county court."

HELLER v. DE LEON.

(City Court of New York, General Term. October 3, 1889.)

SUPPLEMENTARY PROCEEDINGS—ARREST OF NON-RESIDENT DEBTOR—AFFIDAVIT.

An affidavit in accordance with Code Civil Proc. N. Y. § 2437, providing for the arrest of a judgment debtor on affidavit that he "will leave the state, or conceal himself, and that there is reason to believe that he has property which he unjustly refuses to apply to the payment of the judgment," furnishes no legal ground for an arrest, where the debtor's home is in another state, and the proof fails to show what property he had, or that he had any.

Appeal from special term.

Code Civil Proc. N. Y. § 2437, cited in the opinion, provides for the arrest of judgment debtors upon proof and affidavit. The affidavit, it is declared, must recite "that the judgment debtor will leave the state, or conceal himself, and that there is reason to believe that he has property which he unjustly refuses to apply to the payment of the judgment."

Argued before McADAM, C. J., and NEHRBAS and MCGOWN, JJ.

Lewis Johnston, for appellant. *A. L. Sanger*, for respondent.

PER CURIAM. The resettlement was made on the application of the appellants. If they were dissatisfied with the decision made, they ought to have had it reviewed upon appeal from the original order. The order last made is more favorable to the appellants than the former one; and to reverse the latter is, in effect, to reinstate the former. We doubt the right of the appellants to review the propriety of the original order upon this appeal. But we have examined the matter upon the merits, and in this respect deem the order as resettled to be correct. The defendant, who is a resident of Georgia, was temporarily in this city, and, being about to return to his home, was arrested because one of the plaintiffs made affidavit "that there was, in his opinion, danger that the defendant will leave the state of New York, and that there is reason to believe that he has property which he unjustly refuses to apply to the payment of the judgment" herein. The defendant had the right to return to his home in Georgia; and the fact that the affiant had reason to believe that he had property which he unjustly refused to apply to the judgment furnished no legal ground for an arrest, even under section 2437 of the Code. It was not the case of an absconding debtor, nor did the proof show what property the debtor had, or, indeed, that he had any. The justice had jurisdiction, but the process was, for the reason stated, "voidable," and was properly set aside on motion made for the purpose. It follows that the order appealed from must be affirmed, with costs.

WALSH v. BOWERY SAV. BANK.

(City Court of New York, General Term. October 3, 1889.)

PLEADING—AMENDMENT—FURTHERANCE OF JUSTICE.

Where the complaint alleges a gift *inter vivos*, and evidence is introduced, without objection, showing a gift *causa mortis*, an amendment of the complaint to conform to the proofs is in furtherance of justice, within Code Civil Proc. N. Y. § 723, and was properly allowed.

Appeal from trial term.

Action by Mary Walsh against the Bowery Savings Bank. Defendant appeals from a judgment directed by the court in favor of plaintiff.

Argued before McADAM, C. J., and MCGOWN, J.

Norwood & Coggeshall, for appellant. *William H. Regan*, for respondent.

PER CURIAM. The case involved a pure question of fact, which was carefully submitted to the jury, who found in favor of the plaintiff. Their finding is satisfactory. The exceptions taken apply to the refusal of the trial

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judge to dismiss the complaint because it alleged a gift *inter vivos*, and the testimony established, if anything, a gift *causa mortis*, and no proper demand was proved. The evidence clearly established a demand, with notice of the plaintiff's rights; and in defiance of such demand and notice the money claimed was paid to another. The complaint alleged an absolute gift and transfer, and under this the plaintiff was allowed, without objection, to prove a gift *causa mortis*, and the trial judge properly allowed the plaintiff to amend his complaint, then and there, by alleging a gift *causa mortis*, (Code, § 723;) in other words, by making the pleadings conform to the proofs. No one was misled or surprised, and the amendment was in furtherance of justice. We have failed to discover any error, and the judgment and order appealed from must be affirmed, with costs.

DENNING *et al.* v. SCHIEFFELIN.

(City Court of New York, General Term. October 8, 1899.)

SUPPLEMENTARY PROCEEDINGS—ARREST OF NON-RESIDENT DEBTORS.

On proof that a non-resident judgment debtor has property in, and is about to leave, the state, a warrant of arrest may issue in supplementary proceedings, as provided in Code Civil Proc. N. Y. § 2437; such proceedings being made applicable to non-residents by section 2458, subd. 8.

Appeal from special term.

Action by Edwin J. Denning and others against Brodhurst Schieffelin. Plaintiffs, having recovered judgment, commenced supplementary proceedings by warrant, under Code Civil Proc. N. Y. § 2437. A motion to vacate the warrant and dismiss the proceedings was denied, and defendant appeals.

Argued before MCADAM, C. J., and MCGOWN, J.

D. D. McKoon, for appellant. *Charles R. Allison*, for respondents.

PER CURIAM. The Code contains provisions as to the manner in which supplementary proceedings shall be commenced, and the different modes of securing the debtor's presence. Code, § 2432. It authorizes such proceedings on domestic judgments against non-residents of the state found here, (Id. § 2458, subd. 8;) so that no distinction is made between residents of the state and non-residents thereof. The creditors proved that the debtor had property within the state which he refused to apply to the satisfaction of the judgment, and that he was about to depart from the jurisdiction. This entitled them to the warrant which they obtained. Id. § 2437. We have failed to discover any defect in the proofs, and, as the order was properly made, the justice at special term committed no error in refusing to vacate it. It follows that the order appealed from must be affirmed, with costs.

CLAPP v. COLLINS *et al.*

(City Court of New York, General Term. October 8, 1899.)

ALTERATION OF INSTRUMENTS—INDORSEMENT OF NOTE.

Under Laws N. Y. 1884, c. 381, providing that the separate estate of a married woman shall be liable for her contracts, and that in no case shall a charge on her separate estate be necessary, it is not a material alteration to write above a married woman's indorsement on a note that she charged her estate with its payment.

Appeal from trial term.

Action by John H. Clapp against John Collins and others. Defendants appeal from a judgment on a verdict directed by the court for plaintiff.

Argued before MCADAM, C. J., and NEHRBAS and MCGOWN, JJ.

A. M. & G. Card, for appellants. *J. H. Clapp*, for respondent.

PER CURIAM. The plaintiff's right of action was admitted by the pleadings, and the defendants had the affirmative. That is matter of little conse-

quence, however, as the trial judge directed a verdict, and the real question is whether the direction was warranted or not. The only defense urged that requires serious notice is the plea that the note was altered by writing over the indorsement of Mrs. Collins that she charged her estate with the payment of the note. No one seems to dispute the elementary rule that a material alteration, wrongfully made, destroys the instrument, for it ceases to be the contract the parties made. At the time *Taddiken v. Cantrell*, 69 N. Y. 597, was decided, the alteration charged would have been regarded as material, but since the Laws of 1884, c. 881,¹ it must be regarded as immaterial. It did not enlarge the indorser's liability, nor change her relation to the paper. It proved nothing against her that the very nature of the obligation did not imply without the addition. It was surplusage; nothing more. If Mrs. Collins, instead of being a married woman, had been a man engaged in trade, no one would for a moment contend that the alleged alteration was of any consequence whatever. The act of 1884, *supra*, puts her on the same footing, so far as her contracts are concerned. The direction was right, and the judgment entered upon it must be affirmed, with costs.

OLIWILL v. VERDENHALVEN.

(City Court of New York, General Term. October 3, 1889.)

1. ATTORNEY AND CLIENT—COMPENSATION—LIEN.

Where plaintiff's attorney, for the preservation of his lien on his client's cause of action, under Code Civil Proc. N. Y. § 66, desires to avoid the defense of accord and satisfaction, he should immediately upon the filing of such plea apply for leave to prosecute the action for his own benefit; and without such application made, and leave granted, the court has no right to try his claim.

2. SAME—WHEN LIEN ATTACHES.

The attorney's lien upon his client's cause of action which cannot be affected by any settlement between the parties, as provided by Code Civil Proc. N. Y. § 66, does not exist before judgment in an action for personal injuries, such cause of action being unassignable.

3. SAME—COSTS.

In such an action, prior to judgment, plaintiff's attorney is entitled to recover against defendant no more than his taxable costs.

Appeal from trial term.

Action by Mary Oliwill against Daniel Verdenhalven, to recover \$5,000 for personal injuries, received through the negligence of defendant and his employees, in the management of a tenement house owned by defendant. Defendant interposed an answer denying the negligence charged. Thereafter, plaintiff and defendant came together and settled the litigation for \$200, and plaintiff executed the following instrument: "Received from D. Verdenhalven the sum of two hundred dollars in full of all demands to date, including the charges of the plaintiff's attorney in the suit of Mary Oliwill against D. Verdenhalven, which charges are to be paid by me. *New York, Jan. 14, 1889. MARY OLIWILL.*" Plaintiff then applied for an order that the action be declared discontinued in consequence of the settlement. The motion was denied, with \$10 costs. Defendant then moved for leave to plead the compromise by way of supplemental answer. The application was granted on payment of all the costs of the action up to that time, including the \$10 costs aforesaid. The costs were paid, and the supplemental plea interposed. Plaintiff served a reply to the supplemental plea, alleging that the release had been obtained by fraud and imposition; but there was no return or offer to return the consideration paid to and accepted by plaintiff. Upon the trial plaintiff

¹Laws N. Y. 1884, c. 881, § 1: "A married woman may contract to the same extent, with like effect, and in the same form as if unmarried; and she and her separate estate shall be liable thereon, whether such contract relates to her separate business or estate or otherwise, and in no case shall a charge on her separate estate be necessary."

proved her cause of action, and defendant, the truth of his supplemental plea. There was no evidence of fraud or imposition in obtaining it, and the trial judge held that the release was effectual as against plaintiff, but permitted the case to go to the jury on the question whether plaintiff's attorney had a lien by agreement with his client, to the extent of one-half of the recovery that might be had, and whether defendant prior to the settlement had notice thereof, the theory being that if there was no lien by notice the verdict was to be for defendant. Upon the conclusion of the evidence defendant's counsel moved to dismiss the complaint on the ground that the defense of release had been proved, and that no lien upon the cause of action had been established. The trial judge denied the motion, under exception, and sent the case to the jury. The jury found a general verdict for plaintiff for \$650, and a special finding to the effect that plaintiff's attorney had given the defendant notice of his lien prior to the settlement. From the judgment entered on the verdict, defendant appeals.

Code Civil Proc. N. Y. § 66, provides that from the commencement of an action the attorney who appears for a party has a lien upon his client's cause of action which attaches to a verdict, report, decision, or judgment, in his client's favor, and which cannot be affected by any settlement between the parties before or after judgment.

Argued before McADAM, C. J., and NEHRBAS and MCGOWN, JJ.

George M. Mackeller, for appellant. *Samuel H. Randall*, for respondent.

PER CURIAM. The only issues before the court at the time of the trial were whether the plaintiff had a cause of action, and whether it had been legally discharged by release. Indeed, the main question was as to the release, and, no fraud or imposition having been established, it was conclusive against the plaintiff, and her complaint ought to have been dismissed. Whether or not the plaintiff's attorney had a lien, its nature or amount, was not before the court for adjudication. The issue was one of accord and satisfaction. If the plaintiff's attorney, for the preservation of his lien, desired to avoid this defense, he should, immediately after the plea of settlement was interposed, have applied for leave to prosecute the action for his own benefit, and at his own risk and cost. *Dimick v. Cooley*, 3 Civ. Proc. R. 141; *Quinlan v. Birge*, 43 Hun, 483; *Smith v. Baum*, 67 How. Pr. 267; *Tullis v. Bushnell*, 65 How. Pr. 465; *Murray v. Jibson*, 22 Hun, 386; *Stahl v. Wadsworth*, 13 Civ. Proc. R. 32. And see *Coster v. Ferry Co.*, 5 Civ. Proc. R. 147; *Lablache v. Kirkpatrick*, 8 Civ. Proc. R. 256; *Kipp v. Rapp*, 7 Civ. Proc. R. 385; *Ackerman v. Ackerman*, 14 Abb. Pr. 229; *Chase v. Chase*, 29 Hun, 527; *Eberhardt v. Schuster*, 10 Abb. N. C. 393, 395, note; *McBratney v. Railroad Co.*, 87 N. Y. 467. The order might have provided for a supplemental complaint, giving the nature and amount of the lien claimed; and the defendant, by his plea, might have created an intelligent issue for the trial judge to determine, with or without the aid of a jury, as the parties might determine. But no such application was made; no leave was obtained to prosecute in aid of the lien; no issue in respect thereto was created; and the trial judge had no right to enter upon the trial of any such claim.

But, in addition to this, the plaintiff's attorney had no lien at the time of the trial, and it was useless to undertake to ascertain the nature or amount of a thing having no legal existence. The cause of action was for personal injuries, and was not assignable; so that the plaintiff could not, by any arrangement with her lawyer, transfer any part of the cause of action to him as against the defendant. *Coughlin v. Railroad Co.*, 71 N. Y. 443. In the event of a recovery and subsequent satisfaction, the agreement, however, might have been good as between the attorney and client for the purpose of fixing as between them the amount of the attorney's compensation, (Code, § 66;) but as against the defendant, prior to judgment, the arrangement, even

followed by notice, imposed upon him no legal obligation. If the cause of action had been of an assignable character this rule would not have been applicable.

Upon the motion for leave to interpose the supplemental answer pleading the release in bar, the plaintiff's attorney received all of his taxable costs up to that time; and this, upon an unassignable cause of action, was all he was entitled to recover against the defendant prior to judgment, when the cause of action for the first time assumes the form of a contract of record. Section 66 of the Code protects the legal lien of the attorney upon the cause of action. This presumptively is measured by the amount of his taxable costs. If he claims a lien for a greater amount, he must protect it by notice. If the cause of action is unassignable the notice that part of it has been assigned must be held to amount to this: that the attorney holds an agreement which, as against the defendant, gives him no rights, and imposes on the latter no liabilities. The law does not discourage settlements in negligence cases or in those involving personal controversies. *Cahill v. Cahill*, 9 Civ. Proc. R. 241. Whether a legal obligation exists, as well as its nature and amount, are all matters of uncertainty; and if a defendant can buy his peace for a reasonable amount he should not be prevented from doing so. In such cases the plaintiff and defendant may come together and make terms, and the only risk the defendant runs is being obliged to pay the taxable costs,—a duty he is generally willing to perform. If the plaintiff breaks faith with his attorney, he, like other people, must seek redress from the defaulting party to the obligation. He should not be allowed to stand between two litigants and tell them to fight, when they have settled their grievances and do not want to fight. For the reasons stated, it follows that the judgment rendered cannot stand, and that the order made by the trial judge after the verdict, for ascertaining the amount of the attorney's lien, does not assist us in sustaining the recovery. The judgment appealed from will therefore be reversed, and a new trial ordered, with costs to the appellant to abide the event.

PEOPLE *ex rel.* DELAWARE & H. CANAL CO. v. ASSESSORS, ETC., OF SHARON.

SAME v. ASSESSORS, ETC., OF SEWARD.

(*Supreme Court, General Term, Third Department. September 21, 1889.*)

TAXATION—ASSESSMENT—REVIEW—CERTIORARI.

Laws N. Y. 1880, c. 269, provides that the supreme court may allow *certiorari* on the petition of any person or corporation assessed and claiming to be aggrieved to review an assessment, when the petition shall set forth that the assessment is illegal, or is erroneous by reason of overvaluation, or is unequal, etc.; and, if it shall appear that the assessment is illegal or erroneous, the court may order it to be stricken from the roll, or order a reassessment of the property, or correct such assessment in whole or in part, and testimony may be taken if necessary to the proper disposition of the matter. Under this statute a *certiorari* was granted on petition alleging illegality of assessment upon the grounds of exemption from taxation, and also of unequal valuation. *Held*, that it was improper to grant a motion by defendant to modify the writ so as to prevent the relator from raising any other question than that of exemption, on defendants' affidavits that no question was raised before them but that of exemption, where an affidavit of a clerk in the office of relator's attorney stated that he had also objected to the assessment by reason of overvaluation, as the question was one affecting the merits.

Laws N. Y. 1880, c. 269, provides that the supreme court may allow a writ of *certiorari* on the petition of any person or corporation assessed and claiming to be aggrieved, to review an assessment, when the petition shall set forth that the assessment is illegal, specifying the grounds of such illegality, or is erroneous by reason of overvaluation, or is unequal, etc.; and, if it shall appear by the return to such writ that the assessment is illegal or erroneous, the court may order it to be stricken from the roll, or order a reassessment of the property, or correct the assessment in whole or in part; and if it appear

at the hearing that testimony is necessary to the proper disposition of the matter, such testimony may be taken, and shall constitute a part of the proceedings upon which the court is to determine.

Argued before LEARNED, P. J., and FISH and PUTNAM, JJ.

Edwin Young, for appellants. *Hobart Krum*, for respondents.

LEARNED, P. J. In each of these two cases a writ of *certiorari* under chapter 269, Laws 1880, had been issued to review assessments of relator's property. The defendants moved on notice to modify the order and the writ, so as not to require any return as to the inequality of the assessment in question as compared with other assessments, and so as to prevent the relator from raising on the return, or in the proceedings, any other question than that of the legal exemption from taxation under chapter 297, Laws 1886. The order and writ were so modified, and the relator appeals. The affidavits of the relator which had been presented to the assessors were used on the motion. The affidavits of the assessors and the clerk were produced, stating that no question was raised before them except that of exemption, and that no claim of unequal assessment was made. In opposition an affidavit of a clerk in the office of relator's attorney was produced, stating that he did also protest against the assessment as illegal by reason of overvaluation. It would seem that the learned justice who modified the order must have held that the weight of the evidence was that no objection was taken other than that of absolute exemption. It may be admitted that that is the prominent matter in the affidavits used before the assessors.

The petition for the writ of *certiorari* states the alleged illegality as based on the exemption claimed, and also on the unequal valuation. The act of 1880, above mentioned, undoubtedly gave an entirely new relief. It did not provide for a mere review of the action of the assessors, but for an examination of the whole matter, and for what was practically a new assessment by the supreme court in case the relator showed that he was aggrieved. There was to be a rehearing on new evidence; and the return of the assessors was not to be conclusive on the matter. The act was undoubtedly passed because the legislature saw that the action of assessors was often arbitrary; and that, under existing laws, there was no redress against the most unjust assessments. It was a remedial statute, and while it may impose some labor on the court, it has already operated to redress injustice, and probably, in some degree, to prevent unequal assessments. In the enforcement of the rights given by this act, it may, perhaps, be a sound principle that the court shall refuse relief where the relator has not made his claim at the proper time to the assessors themselves. It may be reasonable that the court should require that the aggrieved party should first seek his redress from the assessors, so that they may have the opportunity to correct any error which they have made, and that the court may not be unnecessarily burdened. *People v. Commissioners*, 99 N. Y. 254, 1 N. E. Rep. 773; *People v. Osterhout*, 24 Wkly. Dig. 101. That, however, is not a condition laid down in the statute, which specifies the cases in which the writ shall be granted. And we do not think it necessary to decide that question on this appeal. The defendants have in the present instance limited the effect of the writ by proof made by affidavits; and these affidavits are in conflict with the affidavit of the relator. It seems to us that this matter should not be determined in this summary manner. The question, what shall be the extent of the relief given by the court? is one affecting the merits. It should properly be determined on the return to the writ, and on the evidence taken in the proceeding. If this were only the ordinary writ of *certiorari*, the court would not determine what relief it should grant until it had heard the return. It would not limit the matters to be returned, as has been done in this instance. Still more when, under this writ, the court does not merely review the proceedings upon the proof before the

assessors, but takes new and independent proof, it would seem best that all the proof should be produced which the parties can show to be proper. Indeed, the circumstance that new proof is to be taken by the court would seem to lessen the force of the rule above mentioned, that objections must be made, in the first instance, before the assessors. For if this court is to investigate for itself in any case the matter of unequal assessment, it does not seem that much can be gained by having the party ask the assessors not to assess him unjustly. If some peculiar privilege or right were to be asserted, there would be more reason for calling the attention of the assessors to it. But the duty of making an equal assessment is well known to the assessors; and the party is not limited, in this writ, to the evidence which he produced before them. As he is not limited to that evidence, the argument of the defendants seems to be simply that he must object to the assessors that his assessment is too high in proportion to others. And such objection would seem to be of no special use. But, without passing on the question which may come up when these writs shall be heard on the evidence taken in this court, we are of the opinion that the writs themselves should not be limited as has been done by the orders appealed from.

Order modifying writs reversed, with \$10 costs, and printing disbursements, and motion to modify denied, with \$10 costs in each case. All concur.

FITZGERALD v. CITY OF TROY.

(*Supreme Court, General Term, Third Department. September 21, 1889.*)

1. DEFECTIVE HIGHWAYS—NEGLIGENCE—PROVINCE OF JURY.

In an action for the death of plaintiff's intestate, caused by being thrown from his sleigh by reason of a hole in the snow which covered a street of defendant to the depth of from one to two feet, it appeared that the street was one on which there was a great amount of traffic; that at the time of the accident it was so crowded that intestate was forced to keep to the side on which the hole was; and that, aside from such hole, the street was in good condition. Plaintiff's evidence showed that the hole had been in the same condition for from five to seven days before the accident, and that it was from four to six feet long, from one and one-half to two feet deep, and thirty inches wide, and ran lengthwise of the street. Defendant's witnesses estimated it as smaller. *Held*, that the question whether defendant was negligent in not discovering and filling the hole before the accident was for the jury.

2. SAME—CONTRIBUTORY NEGLIGENCE.

Where intestate managed his team with skill and prudence, and omitted no duty incumbent upon him, and his view of the hole was obstructed by teams immediately before him, the question of his contributory negligence is for the jury, and their verdict for plaintiff will not be disturbed on appeal.

Appeal from circuit court, Rensselaer county.

Argued before LEARNED, P. J., and LANDON and INGALLS, JJ.

R. A. Parmenter, for appellant. F. S. Black, for respondent.

INGALLS, J. This action was brought by the plaintiff to recover damages for an injury to Thomas Fitzgerald, the intestate, which caused his death, and which is claimed by the plaintiff to have resulted from the negligence of the defendant in allowing a hole to form and continue in a public street of said city, upon which the intestate was, at the time of the injury, engaged in transporting merchandise loaded upon a sleigh, drawn by two horses, which he was driving. The sleigh consisted of two bobs, and the hind right-hand bob went into such hole, in consequence of which the sleigh with the load was canted to the right, and Thomas Fitzgerald was thrown to the ground, and a cask of bluing was thrown from the sleigh upon him, which caused the injury complained of. The street where the casualty occurred was a public business street of the city, and upon which there was a great amount of teaming, in the transportation of merchandise and other commodities. Two railroads, one from the south, and the other from the north, were so located

that their tracks converged so that they approached each other at the locality in question so nearly that such tracks were not more than 75 feet apart where they crossed said street. It seems that at the time the accident occurred the street was crowded with teams proceeding in different directions,—some double, and others single, teams; that the crowd was so great upon the left-hand side of the street that the intestate was compelled to keep to the right, where the hole in question was located, about midway between the tracks of the two railroads. The evidence indicates that several teams were proceeding ahead of the team driven by the intestate, and occupied such a position as to obstruct the view of the street from where he was sitting upon his load, and prevented him from seeing the hole. The streets of the city were covered with snow to the depth of from one to two feet, but so evenly distributed that the sleighing was generally good. The evidence shows that, aside from the hole in question, the street where the casualty occurred was in good condition. The plaintiff produced at the trial evidence to the effect that the hole had been in substantially the same condition for from five to seven days previous to the accident. Two witnesses testified that they had driven into it previous to the time the intestate was injured. In describing such hole, the witnesses for the plaintiff gave its dimensions as from four to six feet in length, north and south, and in depth from a foot and a half to two feet, and thirty inches in width. Patrick Burns, a witness produced by the defendant, in describing the hole, stated that it was one foot and a half deep, two feet and a half wide, and about three feet long. That witness was a flagman at a station located very near where the intestate received the injury, and testified further that he had seen sleighs slide into the hole. The witnesses on the part of the defendant, who were its employees, in speaking of the size of the hole, estimated it at a size less than that stated by the other witnesses. The jury had all of the estimates before them, and it became their province to determine that question, in view of all the evidence.

Considering the location of the street in question, and the fact that it was to such an extent used for the transportation of merchandise, and for other public uses, and regarding the location of the hole in such street, and its size and shape, as shown by the evidence, and that it was the only one discovered in that vicinity, and the length of time it had remained there previous to the accident in question, we think the trial court was justified in submitting to the jury, for their determination, in view of all the facts and circumstances disclosed, whether the defendant was chargeable with negligence in not discovering and filling the hole before the injury in question occurred. We are convinced that the evidence presented a fair question of fact in regard to such negligence of the defendant, and that the finding of the jury in that respect should not be disturbed by this court. The evidence does not indicate that the hole complained of was an ordinary depression in a snow track, caused by an unequal distribution of snow, and forming what is sometimes denominated a "dip hole," descending gradually and crosswise of the track, so that both runners of the sleigh would encounter the depression at the same time, and evenly, and therefore less likely to occasion an injury such as is complained of in this case. In this case it appears that the hole extended lengthwise of the street, and its size and location were such as to render it difficult to be avoided, especially when the street was crowded with teams going in different directions. The hole was in the track, and the intestate was prevented, it seems, from driving further to the right, in consequence of an embankment of snow and ice. If a hole of that description, and thus located, in the pavement of that street, had remained undiscovered, and not repaired, for such a length of time, freedom from a charge of negligence would hardly be regarded so clear as to justify taking the case from the jury. Regarding all of the circumstances, including the size, location, and shape of the hole in question, we think the fact that it was in a snow track, instead of the pave-

ment, can hardly change the rule in that respect. The accident did not occur upon a street in a remote part of the city, where there was little travel, and nothing to particularly attract the notice or attention of the employes of the city, but in a thoroughfare, in a central part of the city, particularly devoted to transportation of merchandise and railroad purposes. It seems but reasonable to expect that those who are charged with the care of the streets of a city will particularly turn their attention to those localities most used, and where danger from defects in the street may be reasonably apprehended.

It was insisted, upon the argument, that the plaintiff should not be allowed to recover damages, for the reason that the intestate was guilty of contributory negligence. We think this also became, in view of the facts, a fair question of fact for the jury to determine. It seems that the intestate managed his team with skill and prudence, and omitted no duty which was incumbent upon him, under the circumstances in which he was placed, so far as we discover. As has already been stated, his opportunity for particular observation was obstructed by the loaded teams which were immediately before him. The person who was injured being dead, the question of contributory negligence must be determined by the surrounding circumstances of the case, unaided by the explanation which the deceased, if living, could have given. While it is true that the plaintiff was bound to make a case from which the jury could reasonably draw the inference that the intestate was free from any negligence which contributed to the injury, yet the jury, having become convinced that no such negligence on the part of the injured person had intervened, and the trial court having approved of such conclusion, we do not think that this court is called upon to indulge in extreme inferences, from the evidence, adversely to the plaintiff's case, upon that question, in order to reverse the judgment herein. Upon the question whether the load was properly adjusted, the evidence, we think, presented a fair question of fact for the jury to determine; and their conclusion, in view of the circumstances, should be accepted. We think it cannot be said that the plaintiff's case, upon the question of the defendant's negligence, and also the freedom of the deceased from any negligence which contributed to the injury, is without competent evidence to sustain it, and sufficient to justify its submission to the jury, and their determination should be regarded final. *Hart v. Bridge Co.*, 80 N. Y. 622.

We have examined the various exceptions to the rulings of the court during the progress of the trial, and discover no error which could have prejudiced the defendant's case, or which calls for a reversal of the judgment. In some instances, general objections were interposed, without specifying any grounds therefor, and are therefore unavailing to the defendant upon appeal. In regard to the charge to the jury, and the refusal of the judge to charge certain propositions as requested, we discover no fatal error committed by the court. In determining the value and force of an exception taken to a portion of a charge, the part assailed must be construed in connection with the entire charge, as it not infrequently happens that one portion of a charge explains and qualifies another part thereof, and renders the whole harmonious, which might not be the result if considered in detached parts. This case, in some of its features, is peculiar, and we think it became at the trial a proper case for the jury, and we fail to discover any substantial ground for interfering with their verdict. The judgment should therefore be affirmed, with costs. All concur.

COHEN *et al.* v. IRION.

(Supreme Court, General Term, Fourth Department. September, 1889.)

1. ASSIGNMENT FOR BENEFIT OF CREDITORS—PREFERENCE OF FICTITIOUS CLAIMS.

Where a firm was known to be insolvent by the partners, and one of them retired from it, selling his interest to the remaining partner for his notes for \$2,500, which notes were afterwards preferred in an assignment by the remaining partner, the assignment is fraudulent.

2. SAME—PROOF OF FRAUDULENT INTENT.

In an action to set aside an assignment, facts showing that assignor bought goods of plaintiffs with intent not to pay for them are admissible to prove the intent with which the assignment was made, even though judgments have been recovered for the price of the goods. MARTIN, J., dissenting.

3. SAME—FINDING OF REFEREE—REVIEW.

A finding of a referee, from conflicting evidence, that an assignment is fraudulent, will not be disturbed on appeal.

Appeal from judgment on report of referee.

Action by Samuel H. Cohen and another against Elias Irion, assignee of George Beltz. Judgment was rendered for plaintiffs, and defendant appeals.

Argued before HARDIN, P. J., and MARTIN and MERWIN, JJ.

S. M. Lindsley, for appellant. William Townsend, for respondents.

HARDIN, P. J. Upon the evidence, the referee was warranted in finding that the firm of Beltz & Reusswig was insolvent at the time it was dissolved, March 1, 1880, and that the firm of Beltz & Reusswig owed from \$4,000 to \$5,000 more than its assets. Upon the dissolution of that firm, Beltz took the assets and "the whole business, and agreed to pay the firm debts." When Henry Beltz purchased an interest of his father in the property, he held a note given by the old firm of Beltz & Reusswig for \$1,350, which he surrendered to his father as part of the purchase price for an undivided half interest in the firm assets. The verbal arrangement was made between the father and son for the partnership to exist between them, and after they entered into business a large number of the debts of the old firm of Beltz & Reusswig were paid. It is quite evident that when the son sold to the father, the 10th of June, 1884, his interest in the firm existing up to that time, the firm was in a state of insolvency, and that fact was known to the father and the son. Inasmuch as there was no value in the interest which the son held in the copartnership at that time, there was no good consideration for the notes, amounting to \$2,500, which the father executed to the son. The evidence warrants the finding that the father and the son knew of the embarrassed and insolvent condition of the parties at that time. The father continued in business until the 21st of February, 1885, when he made a general assignment; preferring, among other debts, the two notes which he had given to his son, amounting to \$2,500. He thus made an attempt to prefer a fictitious debt. The evidence supports the finding of the referee "that on June 10, 1884, the interest of Henry G. Beltz in Beltz & Son was of no pecuniary value, and that the notes given to him by his father for \$1,250, and interest, each, and preferred in the assignment of February 21, 1885, were without consideration; and that George Beltz was insolvent at the time of giving said notes to his son." Bishop on Insolvent Debtors says, in section 232, p. 215, viz.: "An assignment by an insolvent debtor which undertakes to provide for the payment of debts not owing by the assignor, or for amounts in excess of sums justly due by him, is fraudulent and void, for the manifest reason that the provision for such fictitious debts must have the effect either to defraud the *bona fide* creditors of the assignor, or to delay and embarrass them in the collection of their debts;" and he cites numerous authorities upholding the proposition. See, also, *Mead v. Phillips*, 1 Sandf. Ch. 83; *Webb v. Daggett*, 2 Barb. 9; *Bank v. Webb*, 36 Barb. 291.

Whether the assignment was fraudulent in fact or not was a question of fact for the referee. In *Jacobs v. Remsen*, 36 N. Y. 669, it was said: "Whether an assignment made by an insolvent debtor, in trust for the benefit of his creditors, is fraudulent in fact, the finding of a referee or of a jury, upon conflicting evidence, that it is not fraudulent, cannot be legally disturbed by the supreme court." To the same effect in *Ball v. Loomis*, 29 N. Y. 412. Upon the question of whether the assignment was fraudulent in fact or not, the acts of the assignor prior to, and in contemplation of, making the assignment, bear upon the question of intent, (*Peck v. Crouse*, 46 Barb. 151;) and, when such an inquiry is opened, the law permits great latitude, (*Hubbard v. Briggs*, 31 N. Y. 538.)

It is insisted in behalf of the appellant that an error was committed upon the trial in allowing the complaint to be amended so as to allege large purchases by the assignor of the plaintiffs with the preconceived design not to pay for the same; and that an error was committed by the referee in receiving evidence, under such an amended complaint, of the facts tending to show that the assignor purchased between the 10th of June, 1884, and the 21st of February, 1885, when he assigned, a large quantity of goods, amounting to \$10,500, for which purchases the plaintiffs brought their actions, and recovered judgments; and in finding such facts in regard thereto as are stated in the sixth finding by the referee. While the plaintiffs were not in a situation to rely upon such fraud for the purpose of avoiding the assignment, (*Kennedy v. Thorp*, 51 N. Y. 174., the acts and declarations of the assignor before and at the time of the assignment were legitimate facts upon the question of his intent in making the assignment, and giving the preferences therein mentioned, (*McEntee v. Steam-Boat Co.*, 45 N. Y. 35; *Peck v. Crouse*, 46 Barb. 151.)

Upon the whole evidence before the referee, he has found as a matter of fact that the general assignment executed by George Beltz, February 21, 1885, was "a part of a plan to hinder, delay, and defraud creditors of George Beltz, including the plaintiffs in this action, and to hinder, delay, and defraud them;" and thereafter he found as a conclusion of law that the assignment "referred to in the complaint herein was and is fraudulent and void against these plaintiffs, and should be set aside." We think the referee was authorized by the evidence before him to find as a matter of fact that the assignment was made with intent to hinder and delay creditors, and was fraudulent and void. We think his conclusion of law upon the facts found is correct. Judgment affirmed, with costs.

MERWIN, J., concurs.

MARTIN, J., (*dissenting*.) This action was in the nature of a creditors' bill, brought to set aside a general assignment for the benefit of creditors, made by the defendant George Beltz to the defendant Elias Irion. The action was based on the ground that such assignment was fraudulent as to creditors. The plaintiffs' allegations of fraud were that, by such assignment, certain fictitious debts were preferred; that the defendant Beltz secretly withdrew large portions of his assets, diverted them from the payment of his just debts, placed them beyond the reach of his creditors, without any valid consideration, and transferred a large portion of his assets to his son and relatives for his own use and benefit; and that he purchased large quantities of goods with an intent to cheat and defraud his creditors, with a view of including them in his assignment for the purpose of paying fraudulent creditors, and making fraudulent preferences under such assignment. The learned referee found that the assignment was fraudulent, and should be set aside.

The important question in this case is whether the evidence was sufficient to sustain the finding of the referee upon that question. The evidence shows that in 1866 the defendant George Beltz and one Reusswig formed a copart-

nership for the purpose of carrying on the business of merchant tailors at the city of Utica; that this business was continued by them until 1880, when that firm was dissolved, and the defendant Beltz purchased the interest of his partner in the business, and agreed to pay the debts of the firm. The debts of that firm were in excess of its assets. The defendant Beltz assumed the debts of the firm, as he testified, to preserve his good name, and because he wanted to continue the business, and keep his credit good. Upon making this purchase he at once commenced paying the debts of that firm, borrowing the money of his friends for that purpose, and using some of the funds of the firm of George Beltz & Son. All the debts of that firm were paid. After the dissolution of the firm of Beltz & Reusswig, the defendant Beltz and his son Henry G. Beltz formed a copartnership for the purpose of carrying on the same business. Henry purchased a one-half interest in the stock, fixtures, accounts, and business which had become the property of his father, but did not assume or in any way become liable to pay the debts of the firm of Beltz & Reusswig. He paid for such interest the sum of \$2,150. This was paid by the surrender of a note of \$1,000, and interest, amounting to \$1,350, that he held against the firm of Beltz & Reusswig, which his father had agreed to pay, and a debt of \$800 that his father owed him. The business was continued by George and Henry G. Beltz under the firm name of George Beltz & Son until January 10, 1884, when a disagreement arose between them as to the amount drawn out by the father, and as to employing a book-keeper, when, for that reason, the firm was dissolved. The father purchased the interest of his son for \$2,500, and gave his notes therefor, which were preferred in his assignment. At that time Henry's interest in the firm exceeded the amount of such notes. The business was then continued by the defendant Beltz alone until February 21, 1885. During this time the defendant Beltz employed his son, who was a cutter, and who did the cutting for his father, and traveled some from place to place, taking measurements and orders for clothes. During the latter part of the time the business was carried on by George Beltz & Son, and after the son had sold his interest in the business to his father they purchased more goods for the business than they had previously. This was explained as being necessary to carry into execution their purpose to extend the business by taking orders in towns outside of the city where they were doing business. This explanation was in no way contradicted. On February 21, 1885, the defendant Beltz made a general assignment to the other defendant, and, among other claims, preferred the \$2,500 in notes given his son for his interest in the business of George Beltz & Son. Upon making such assignment the defendant Beltz delivered to his assignee all the property in his possession, even to his watch. The assignee took possession of the same, and has since then duly proceeded with the administration of his trust.

Upon these facts it is difficult for me to discover any ground upon which this judgment can be upheld. I have been unable to find any evidence which would sustain the claim that the defendant Beltz has preferred any fictitious debt. The only pretense that this allegation in the complaint has been proved is based on the claim that the debt of Henry Beltz was fictitious because the firm of Beltz & Reusswig were insolvent; and that when he purchased of his father a half interest in the stock, fixtures, accounts, and business which had formerly belonged to that firm, he acquired nothing by such purchase, and, consequently, had nothing which he could transfer to his father for the notes which were preferred. I cannot assent to this proposition, either as one of fact or law. The undisputed proof is that, after the father had purchased the interest of his partner in the business and assets of the firm of Beltz & Reusswig, he sold to his son a half interest in the stock, fixtures, accounts, and business, for which he surrendered to his father a note for \$1,000 and interest, and canceled a debt of \$800. That these debts were owing by

the father to the son is undisputed. The son assumed none of the debts of Beltz & Reusswig. There is no evidence that this sale was not made in good faith; hence I am of the opinion that the son obtained a good and valid title to one-half of the stock, fixtures, accounts, and business then owned by his father, and which was formerly owned by the firm of Beltz & Reusswig. Assuming, then, that the son was the owner of a one-half interest in the business and assets, and as the proof shows that the firm of G. Beltz & Son was not insolvent, but that his interest at the time he sold it to his father was greater than the amount he received, it is impossible for me to see how it can be properly claimed that this debt to the son was fictitious. I do not think the judgment can be upheld on that ground.

I have found no evidence that would justify a finding that the defendant Beltz at any time secretly withdrew any portion of his assets, and placed them beyond the reach of his creditors, without valid consideration. Indeed, there seems to be no claim at this time that that allegation in the complaint has been established, unless as to the debt of the son, which has already been considered. Nor do I think the evidence sufficient to sustain the judgment on the ground that the defendant Beltz fraudulently purchased goods with the intent of including them in his assignment, to pay debts fraudulently preferred. The purpose of making the increased purchase was fully explained, both by the defendant Beltz and his son; and there are no circumstances that I can recall which tend to show that such explanation is not a true one. It is not claimed that he purchased any goods that were not strictly in the line of his business, nor that he purchased an amount greater than was necessary to properly conduct it, when extended, as he proposed to do, by canvassing the surrounding towns for orders for clothes. Moreover, it is doubtful, to say the least, if the plaintiffs could in any way avail themselves of any fraud in making purchases, if it existed. "Where a vendor from whom goods have been obtained by fraud, instead of disaffirming the contract of sale, affirms it by bringing suit thereon, and prosecuting it to judgment, neither he, nor a receiver appointed in supplementary proceedings instituted upon such judgment, can set up the fraud in the sale, for the purpose of defeating an assignment of the property made by the vendee for the benefit of creditors, although the assignment was made in furtherance of the fraud, with full notice thereof upon the part of the assignee." *Kennedy v. Thorp*, 51 N. Y. 174.

A careful study of the evidence in this case has led me to the conclusion that it was insufficient to justify the finding of the referee that the assignment in question was fraudulent. As was said by FINCH, J., who delivered the opinion in the case of *Shultz v. Hoagland*, 85 N. Y. 467: "The case furnishes no exception to the rule that fraud is to be proved, and not presumed. *Grover v. Wakeman*, 11 Wend. 188. It is seldom, however, that it can be directly proved, and usually is a deduction from other facts which naturally and logically indicate its existence. Such facts, nevertheless, must be of a character to warrant the inference. It is not enough that they are ambiguous, and just as consistent with innocence as with guilt. That would substitute suspicion as the equivalent of proof. They must not be, when taken together and aggregated, when interlinked and put in proper relation to each other, consistent with an honest intent. If they are, the proof of fraud is wanting." In *Morris v. Talcott*, 96 N. Y. 107, RUGER, C. J., states the rule as to proof of fraud as follows: "A party, therefore, relying upon the establishment of a cause of action, or a right to a remedy, against another, based upon the alleged commission of a fraud by such person, must show affirmatively facts and circumstances necessarily tending to establish a probability of guilt, in order to maintain his claim. When the evidence is capable of an interpretation which makes it equally as consistent with the innocence of the accused party as with that of his guilt, the meaning must be ascribed to it which accords with his innocence, rather than that which imputes to

him a criminal intent. It is well settled in this state that an intent to defraud cannot be imputed to a party who contracts a debt knowing that he is insolvent, merely from the fact of his insolvency, and his omission upon a purchase of property upon credit to disclose such condition to his vendor. *Nichols v. Pinner*, 18 N. Y. 295; *Nichols v. Michael*, 23 N. Y. 264; *Wright v. Brown*, 67 N. Y. 9; *Bank v. Bogart*, 81 N. Y. 108. A condition of known insolvency on the part of an intending purchaser of property, accompanied with an intention to acquire the property of his vendor without paying for it, constitutes such a fraud as will make the vendee liable to arrest in an action for the debt; but the intention not to pay can no more be inferred from the mere fact of insolvency than the fact of insolvency can be inferred from the existence of an intention not to pay. In either case it is essential that the necessary facts be made out by competent evidence." In the case at bar it does not seem to me that the facts proved naturally or logically indicate the existence of fraud. They are at least as consistent with innocence and an honest purpose as with fraud. The evidence may possibly arouse a suspicion, but it does not establish fraud. Following the principle of the authorities cited, I am of the opinion that the evidence in this case was insufficient to sustain the findings of the referee, and that the judgment should be reversed.

WAIT *et al.* v. CERQUA *et al.*

(Supreme Court, General Term, Second Department. May 18, 1899.)

VENDOR AND VENDEE—TITLE—POWERS OF EXECUTRIX.

Where a will gives the executrix "power and authority to sell, dispose of, and convey all and any portion of" testator's estate, a deed executed by the executrix will convey a good title, and the fact that there has been no advertisement for claims or accounting is immaterial.

Action by Harriet M. Wait, as executrix of the will of W. Howard Wait, deceased, and others, against Sarah Ann Cerqua and A. E. Cerqua, to compel defendants to take title to land.

Argued before BARNARD, P. J., and DYKMAN and PRATT, JJ.

BARNARD, P. J. This will appoints the wife and another executors. The widow only has qualified and acted as executrix. The income of \$5,000 is given to each of the sons, Howard St. C. Wait and Erskine L. Wait. The income of each fund is to each during life, and to the issue of each, respectively, at the death of either son. If one of the sons dies without issue, the \$5,000 he had enjoyed the use of is to be paid to the surviving brother. If he left issue, the \$5,000 is to go to his issue. Of the rest and residue of the estate the widow is to have the use during life. At her death it is to go in the same way. If either son shall have died leaving issue, one share shall go absolutely to the issue, so that the property shall vest in some of them at the end of two lives; the sum of \$5,000 being held in suspense by the will only for the life of the two sons, and the portion of the estate bequeathed to the mother being held in suspense for the life of the mother and one son. The right of this executrix to sell the real estate or any the testator may have left under this will cannot be disputed as a power to sell and convey, as there are no restrictions in the will by way of charge or limitation or otherwise. The fifth section says: "Power and authority to sell, dispose of, and convey all and any portion of said estate," etc. The case of *Chamberlain v. Taylor*, 105 N. Y. 187, 11 N. E. Rep. 625, has no bearing upon this case, where there is a failure to make a valid disposition of the property, involving the primary disposition of nearly the whole estate. The case of *Insurance Co. v. Shipman*, 108 N. Y. 19, 15 N. E. Rep. 58, is in line with the view taken of the case upon the main principle of it. The will gives the authority to sell and convey the real estate; and by the conveyance tendered to the purchaser in this action a good

and valid title is made in fee-simple to the purchasers, provided the testator had such at his decease. There is no contention upon this point. The fact that there has been no accounting, or that there has been no advertisement for claims, has no bearing. The executrix has full power to sell, in order to carry out a valid will, and she but acts in the line of her duty, so far as shown. The purchaser has no excuse upon the facts shown, for not completing her purchase.

WILLIAMS v. AYLESWORTH.

(*Supreme Court, General Term, Fourth Department. September, 1889.*)

EVIDENCE—PAROL, TO VARY WRITING.

In an action on a note on which is indorsed, "I guaranty the collection of the within note," evidence is not admissible to prove that defendant, at the time of indorsement, verbally warranted that the note was good, and would be paid at maturity. MARTIN, J., dissenting.

Appeal from circuit court.

Action by Hanson Williams against Eliphalet Aylesworth on the following note: "\$100.00. Peterboro, April 10th, 1875. Five years from date we jointly and severally promise to pay E. Aylesworth, or bearer, the sum of one hundred dollars, with annual interest, for value received. GURNSEY HARDY. BERTRAM HARDY." Indorsed: "Peterboro, March 9th, 1879. I guaranty the collection of the within note. E. AYLESWORTH." Judgment was rendered for plaintiff, and defendant appeals.

Argued before HARDIN, P. J., and MARTIN and MERWIN, JJ.

Smith & Haskell, for appellant. *Tracy, McLennan & Ayling*, for respondent.

MERWIN, J. The plaintiff was allowed to prove, in substance, that the defendant verbally warranted that the note was good, and would be paid at maturity. This varied the written agreement represented by the written guaranty of collection. In *Van Brunt v. Day*, 81 N. Y. 251, a parol agreement was allowed to be shown, because it did not qualify or change the defendant's written guaranty. In the present case it would, and therefore would be inadmissible. There is, I think, as the case stands, no question of fraud in it. That question is not presented by the pleadings, and was not submitted to the jury. In the absence of fraud, the writing cannot be contradicted or varied. The plaintiff had, as the court held, lost by his laches his remedy on the written guaranty. He should not, in order to avoid this result, be allowed to prove an inconsistent parol agreement on the same subject. Upon this ground I favor a reversal.

HARDIN, P. J., concurs. For opinion, see 8 N. Y. Supp. 113.

MARTIN, J., (*dissenting*.) On the 10th and 28th of March, 1879, the defendant purchased of the plaintiff certain personal property, for which he agreed to pay \$96.25. By the terms of the sale he was to pay the money for the property thus purchased, or give his note for a short time. The property was delivered to the defendant in March, 1879. In the forepart of April, and after such sale and delivery, the parties entered into an arrangement whereby the defendant delivered to the plaintiff a note made by Gurnsey and Bertram Hardy, given to secure the payment of the sum of \$100; the defendant guarantying the collection of the same. The plaintiff paid the defendant \$3.75, the difference between the amount of such debt and note. Whether the plaintiff accepted this note and guaranty in payment of defendant's indebtedness to him, or whether it was taken by the plaintiff conditionally, and upon the representation and warranty of the defendant that the makers were good, and that one of them was the owner of an unincumbered farm, was the

question chiefly litigated on the trial. The evidence of the plaintiff tended to show that the note was taken conditionally, and upon the representations of the defendant, and not in reliance upon the note or guaranty, and that the plaintiff did not see or know what was written upon the back of the note by the defendant when it was delivered to him; while the evidence of the defendant tended to show that the note and guaranty were accepted in absolute payment of the plaintiff's debt. On the trial the court charged the jury as follows: "When a creditor accepts from a debtor a note of a third person to apply upon a precedent debt, the law presumes it not received in satisfaction of the debt, and the burden of proof is upon a debtor to show that it was taken in payment and satisfaction of the debt. This is the presumption the law raises in a case where a man lets another have a note of a third person to apply upon a debt which he then owes the person to whom he transferred the note." To this portion of the charge the defendant duly excepted. I do not think this exception well taken. The law as stated by the court seems to be well established in this state. *Noel v. Murray*, 13 N. Y. 167; *Smith v. Ryan*, 66 N. Y. 354; *Gibson v. Tobey*, 46 N. Y. 637; *Hall v. Stevens*, 40 Hun, 581; *Glenn v. Burrows*, 37 Hun, 605; *Catlin v. Munn*, Id. 34. It is said, however, that this note was not transferred for a precedent debt, but transferred at the time of the sale and delivery of the property in question, and hence the charge was misleading. The evidence as set forth in the appeal-book does not justify that claim. The plaintiff testified that the defendant sought to have him take the note in question, and that he refused to do so, and requested the defendant to give his own note; to which he replied: "All right; we will fix that up." He then testified that about a week after that, and after the delivery of the property in question, he met the defendant at the village of Peterboro, and he said to the plaintiff: "Come over to my house, and we will fix up that matter;" that he went, and it was then that the note in question was transferred. The defendant testified that he bought the most of the property on the 10th day of March, and the remainder on the 28th of the same month; that he took possession of that bought March 10th on the next day, March 11th; that he had taken the property when he saw the plaintiff in the forepart of April; that it was then arranged that the plaintiff should take the note in question; and that it was then transferred to him. Hence we see that the testimony of both the plaintiff and defendant was to the effect that the note in question was transferred to the plaintiff for a precedent debt. Moreover, the defendant, in his verified answer, in effect alleges that the note was taken in payment of a precedent debt. I am therefore of the opinion that the portion of the charge thus excepted to was proper, and that the court committed no error in its instructions to the jury upon that question.

The appellant also contends that the court erred in admitting parol evidence as to the transfer of the note in question, and as to what occurred between the parties at the time. I do not think so. Where, on the sale of goods, the vendor takes the note of a third person, payable at a future date, at his own risk, and there is a fraudulent representation on the part of the vendee as to the note, the vendor may bring his action for the goods sold and delivered. *Willson v. Fores*, 6 Johns. 110; *Pierce v. Drake*, 15 Johns. 475; *Galoupeau v. Ketchum*, 3 E. D. Smith, 175. Where an obligation of a third person is accepted in payment of an indebtedness upon a mistaken belief as to his solvency, the person receiving the same is entitled to recover upon the original indebtedness. *Duden v. Wattzfelder*, 16 Hun, 339; *Roberts v. Fisher*, 43 N. Y. 159. This rule may apply even where the debtor gave the creditor, at the same time with it, substantial collateral security for its payment. *Duden v. Wattzfelder*, 2 Abb. N. C. 295. Where notes of a third person are received as payment for property previously purchased, upon the purchaser guarantying that the maker is responsible, and that, if he does not pay, he will, such guaranty is evidence that the notes were not received as absolute

payment, whether the guaranty is valid or void; and the creditor, when the note becomes due and is unpaid, may sue the original debt, and cancel the collateral security on the trial. *Allen v. Bantel*, 2 Thomp. & C. 342. As, substantially, the only question at issue between the parties was whether the Hardy note was transferred to and received by the plaintiff in absolute payment of his debt, or whether it was received conditionally, it seems to me that the evidence of what was said and done by the parties at the time of such transfer was admissible, and that the court committed no error in admitting the evidence, and submitting the question of the defendant's liability for such debt to the jury. The rule prohibiting the reception of parol evidence varying or modifying a written agreement does not apply when the original contract was verbal and entire, and a part only was reduced to writing; nor does it apply to a collateral undertaking. These facts are always open to inquiry, and may be proved by parol. *Chapin v. Dobson*, 78 N. Y. 74; *Van Brunt v. Day*, 81 N. Y. 251; *Juilliard v. Chaffee*, 92 N. Y. 529; *Eighmie v. Taylor*, 98 N. Y. 289; *Dodge v. Zimmer*, 110 N. Y. 43, 17 N. E. Rep. 399. The evidence introduced bore upon the question whether the note and written guaranty were accepted by the plaintiff in payment of his debt, or whether it was taken conditionally, and in reliance upon the alleged representations of the defendant as to the responsibility of the makers. The plaintiff clearly had the right to show that it was taken conditionally, and in reliance upon the defendant's statement. Such proof was not, I think, violative of the rule prohibiting the admission of parol evidence to vary or modify a written agreement between the parties. Nor do I think it was error for the court to charge: "If, however, you find that the plaintiff's claim is correct, that he received this note for the purpose and under the representations and warranty and promise which the plaintiff testifies to, then he is entitled to recover the amount due him upon the sale of the property to the defendant, provided you find that those representations and that warranty were not true; that the makers were not good and responsible." The authorities previously cited seem to justify this portion of the charge.

It is also contended that the pleadings in this action were insufficient to justify the admission of evidence of the attendant circumstances, and what was said and done by the parties when the note in question was delivered to the plaintiff, and of the representations and warranty made by the defendant at that time. I think otherwise. The indebtedness of the defendant, which was the basis of the only cause of action submitted to the jury, arose upon the sale and delivery to the defendant of certain personal property. The defendant, by his answer, admitted the indebtedness, and that it was a precedent debt, but alleged payment by the sale and delivery to the plaintiff of the Hardy note. Presumptively, the transfer of this note did not discharge the plaintiff's debt. It was in reply to the defendant's defense of payment that the plaintiff was allowed to introduce this evidence. The purpose of the evidence was not to establish the plaintiff's cause of action, but to avoid the defendant's defense of payment, by showing that the note was not received in absolute payment of the plaintiff's debt, but was only received by the plaintiff conditionally, and in reliance upon the representations and statements of the defendant as to the solvency of the makers. Thus it is seen that such evidence was received merely in reply to, or in avoidance of, the defense set up by the defendant. Hence no reply was necessary to enable the plaintiff to introduce such proof; nor was it necessary that the facts constituting such reply or avoidance should be set forth in the complaint. If the plaintiff was induced to accept this note in payment of his debt by the fraudulent representations of the defendant as to the solvency of the makers, or if it was transferred and accepted upon the mistaken belief that the makers were solvent, and that one of them was the owner of an unincumbered farm, and such belief was induced by the statements and representations of the defendant, it

becomes quite manifest that the plaintiff was entitled to prove those facts in reply to, and to avoid, the defendant's answer and proof that the note was taken in absolute payment of the defendant's debt. I think the evidence objected to was proper, and clearly admissible. The other questions presented by the appellant have been examined, but disclose no error which requires or would justify a reversal of the judgment herein. These considerations lead me to the conclusion that the judgment in this action should be affirmed.

NOYES v. TURNBULL *et al.*

(*Supreme Court, General Term, Third Department. September 21, 1889.*)

1. TRUSTEES—LIABILITY—PARTNERSHIP.

The trustees of an estate, though they continue the business, involving additional liabilities, do not sustain the copartnership relation; and a retiring trustee is not liable for purchases in the course of the business, made after his retirement, by the other trustees, though the purchases be from one with whom the firm had previously dealt, and who had no notice of the discharge of the trustee.

2. SAME—RETIRING TRUSTEE—NOTICE.

Where one has been dealing with a firm managed by three trustees, whose names are printed on the letter-heads of the firm, he having received letters written thereon, and subsequently he receives, during several years, some 20 letters from the same firm, written on letter-heads containing the name of only one trustee, the change in the letter-head is notice sufficient to put him on inquiry as to change in the management of the business of the firm.

INGALLS, J., dissenting.

Appeal from special term.

Theodore L. Pomeroy had for some years prior to his death carried on a manufacturing business in Massachusetts with his son Silas H. as his partner, under the name of L. Pomeroy's Sons. He died in September, 1881, having made his will, by which he gave all this manufacturing property to three trustees, William Turnbull, Silas H. Pomeroy, and Charles Atwater, in trust, to continue and carry on the business until his son Theodore L. should arrive at 21, incurring liabilities on account of the estate, exercising the same power which the testator exercised, and paying over during the trust such portion of the profits to Silas and Theodore L. as in their judgment the administration of the trust would permit. The trustees accepted the trust, and in carrying on the business used the name, L. Pomeroy's Sons. In 1882 and 1883 they bought from John Consalus wool to be used in the business. Prior to the death of Mr. Pomeroy the firm of L. Pomeroy's Sons had also bought wool of Consalus; but Consalus had no dealings with L. Pomeroy's Sons from March 13, 1883, to August 28, 1886. Prior to May, 1885, an action was brought by Turnbull and Atwater in the supreme judicial court of Massachusetts against Silas H. Pomeroy and others interested in the estate. In their bill of complaint plaintiffs, for reasons therein given, asked to be released from the trust; and May 18, 1885, an agreement in that action was made between the parties, and subsequently, June 1, 1886, a decree was entered whereby Silas H. Pomeroy was authorized to act as sole trustee. The business was to be so conducted that plaintiffs as trustees were not to be liable for any debt incurred, or on any note or obligation thereafter made by L. Pomeroy's Sons or by Silas H. in that name. As soon as William Turnbull & Co. had received their mortgage for a balance due them, and Silas H. had paid or renewed outstanding commercial paper of L. Pomeroy's Sons, plaintiffs were to be discharged as trustees. January and February, 1887, Consalus sold wool to L. Pomeroy's Sons for which he received notes dated, respectively, May 23, 1887, and June 9, 1887, signed "L. POMEROY'S SONS," which were transferred to plaintiff, and have not been paid. The question is whether William Turnbull is liable on these notes. Prior to the time of the decree the trustees in their business had used for correspondence letter paper with the

following letter-heads: "WILLIAM TURNBULL, CHARLES ATWATER, AND S. HARRIS POMEROY, TRUSTEES OF L. POMEROY'S SONS, PITTSFIELD, MASS.;" all before "L. POMEROY'S SONS" being in red ink. After the decree Silas H. Pomeroy used letter paper with the letter-head: "L. POMEROY'S SONS, PITTSFIELD, MASS. S. H. POMEROY, ——— TRUSTEE." The other letter-heads were not in use by defendants after June 1, 1886. On paper bearing the second letter-head S. H. Pomeroy corresponded largely with Consalus, prior to the purchase for which the notes in question were given.

Argued before LEARNED, P. J., and LONDON and INGALLS, JJ.
E. F. Bullard, for appellant. *Jesse Johnson*, for respondents.

LEARNED, P. J. It is evident that, as a matter of fact, the defendant Turnbull was not one of the persons who bought the wool alleged in the complaint, and was not one of the persons who made the notes therein set forth. That wool was in fact bought, and those notes in fact made, solely by Silas H. Pomeroy. But the plaintiff claims that Turnbull is liable, on the principle that a retiring partner may be liable for subsequent purchases made by the firm of one with whom the firm has previously dealt, and who has not been notified of the retirement.

Two questions are presented,—the one, whether that principle applies in this case; the other, whether Consalus had not in fact notice that he was dealing only with Silas H. The three trustees were never partners; and in many respects their rights were very different from those of partners. They had no beneficial interest in the property. They were joint tenants, not tenants in common. On the death of one, his representatives would have no interest in the trust-estate. One of the trustees could not voluntarily relinquish the trust. They were accountable for the proper management of the trust to the persons beneficially interested therein. All these particulars show that the position of trustees is widely different from that of partners.

It is not perhaps necessary to decide in this case whether or not all of the three trustees were personally liable to Consalus for purchases made prior to the decree. We are not willing to assume that they were thus liable. The cases of *Thacher v. Dinsmore*, 5 Mass. 299; *Schmittler v. Simon*, 101 N. Y. 554, 5 N. E. Rep. 452,—only decide that an executor who signs or indorses or accepts negotiable paper is personally liable, although he adds to his name the word "executor," or the like. *Poland v. Dayton*, 40 Hun, 563, held that an executor will be personally liable for services done for the estate where there is no agreement to look to the estate; and that such agreement may be shown by circumstances. *Austin v. Munro*, 47 N. Y. 360, is to the same effect, for it is said that executors have no right to bind the estate for debts contracted by them. This reason, it will be seen, does not apply to these trustees. So, in *New v. Nicoll*, 73 N. Y. 127, it was held that generally trustees cannot charge the trust-estate, unless so authorized by the instrument creating the trust; but are personally liable on contracts made by them. Now, that exception takes the present case out of the two decisions last cited, for these trustees were expressly authorized to incur, on account of the trust, further liabilities, and were to carry on the manufacturing business, which would require a constant incurring of debts. It cannot be assumed that they were to do this on their own responsibility, especially when they were expressly authorized to do this on account of the trust. Nor did they give their personal obligations, the business being throughout conducted in the old name of L. Pomeroy's Sons. Even if it should be urged that Silas H. Pomeroy, who made the purchases prior to the decree, was personally liable, it would not follow that Turnbull was liable also. As above pointed out, these trustees were not partners. When a partner purchases in the business of the firm all the partners are liable, because all are interested beneficially in the purchase,—in the profits of the business. But it is not so with trustees. They are not interested in

the profits of the business. They are conducting a trust for the benefit of others. An executor who gives his note as executor for a purchase made by him for the estate may be personally liable. But it does not follow that his co-executor is also personally liable on that note. So, even if Silas H. was personally liable for purchases made by him, it would not follow that Turnbull was personally liable therefor, although he knew of the fact; because, as we have seen, the authority, expressly as well as impliedly, given by the will was to incur liabilities on account of the trust-estate. And there was abundant notice given by the letter-heads above mentioned that the business was in the hands of trustees. Those who dealt with the concern must therefore have known that the business was carried on by persons having no beneficial interest therein, and inquiry would at once have disclosed the terms of the will and the authority given thereby.

Passing this question, however, we come to the effect of the discharge of Turnbull from his trust under the decree. Now, the plaintiff compares this transaction to the retiring of a partner. There is no resemblance. A partner who retires often takes some of the capital with him. At any rate he withdraws (or assumes to withdraw) that personal liability for the partnership debts which is on him as a partner. He retires voluntarily, and as a matter of right. The trustee discharged by the decree takes with him no capital. The property of the trust remains unaffected. He withdraws no personal liability; for when the trust-deed authorized (as did this) the incurring of liability, then the liabilities incurred must be those of the trust-estate, unless by some personal act a trustee makes himself liable. Furthermore, the trustee cannot relinquish his trust at pleasure. He can only be released by the court. Whatever the misconduct of his co-trustee, he cannot, as a matter of right, step out of the trust. In all these respects the supposed analogy between the two cases fails. Furthermore, it may be said generally that a trustee is liable only for his own acts or his own negligence. A partner is often liable for the acts or negligence of his copartner. Hence it is that one dealing with a partnership may look to the liability of all the partners, and therefore arises the principle that the retiring partner must give notice of his retirement; but it is not so with a trustee. The court of equity has special power over all express trusts. It may discharge a trustee and appoint another. It may remove a trustee against his will. Should the trustee removed against his will be liable for acts subsequently done, even if he did not give notice of his removal? Some stress is laid on the fact that prior to the decree Turnbull knew that his co-trustee, Pomeroy, was purchasing wool on credit. But it does not appear that Pomeroy was purchasing on the credit of Turnbull; and that Pomeroy should purchase on the credit of the trust-estate or on his own credit would be no ground of liability against Turnbull, for Pomeroy was not, as co-trustee, an agent of Turnbull. Even if the trustees had divided the trust duties among them, we do not see that one would be responsible for the acts of another.

A further consideration is that which was principally relied upon by the learned justice who tried the case,—that is, the change in the letter-heads. We must consider that some years had elapsed between the purchases made before the decree and those made after. Then Consalus received some 20 letters in which the letter-head contained, as above stated, the name only of S. H. Pomeroy as trustee. As the old letter-heads contained the names of the three, this change should have put him upon inquiry. For all these reasons we think the judgment should be affirmed, with costs.

LONDON, J., concurs.

INGALLS, J., (*dissenting*.) This action was brought by the plaintiff to recover upon two promissory notes, of which the following are copies:

"L. POMEROY'S SONS.

"\$1,197.76.

PITTSFIELD, MASS., May 23, 1887.

"Four months after date we promise to pay to the order of John Consalus eleven hundred and ninety-seven 76 dollars at the Agricultural Bank. Value received.

L. POMEROY'S SONS."

"L. POMEROY'S SONS.

"\$2,244.11.

PITTSFIELD, June 9, 1887.

"Thirty days after date we promise to pay to the order of John Consalus twenty-two hundred and forty-four 11 dollars at the Agricultural Bank. Value received.

L. POMEROY'S SONS."

The notes were indorsed by John Consalus, and for a valuable consideration transferred to the plaintiff before the commencement of the action. The defendant Turnbull was alone served with process, and the only defendant who has appeared in the action. The notes were executed in the firm name, L. Pomeroy's Sons, and were given for wool sold and delivered to the defendants, under the following circumstances: Under such firm name a manufacturing business was established at Pittsfield, Mass., by Theodore Pomeroy and Robert Pomeroy, who were sons of Lemuel Pomeroy; and they continued such business, which consisted of the manufacture of woollen goods, until November, 1878, when Robert Pomeroy retired from the firm, and immediately thereafter the defendant Silas H. Pomeroy became a partner in such business, with his father, Theodore Pomeroy, and the business was prosecuted under the same firm name until the death of Theodore Pomeroy, which occurred September 26, 1881. He left a last will and testament, which was duly proved November, 1881. The portion of the will material to be considered is the following:

"EXHIBIT A.

"In the further disposition of my estate, considering that of my five children two are sons, Silas H. and Theodore L., and three are daughters, Fanny, Margaret L., and Mary, and that a considerable part of my estate consists of mills and manufacturing property formerly of the firm of L. Pomeroy's Sons, and since the termination of second firm owned and occupied by me, the business being still carried on under said name of L. Pomeroy's Sons, which property is subject to the hazards of business, needing the continued watchfulness, care, and management of business men, I deem it right and proper that my sons, who, I hope, will, one or both, decide to continue the business with its labors and hazards, should receive a larger share of my estate than my daughters; and recollecting that for similar reasons this mill and manufacturing property was left by my father to his sons; and my son Theodore L. being a minor, so that it is necessary that the care of his estate be committed to the charge of some person of competent age and experience; and believing that such disposition of said estate will be for the interest and advantage of both my sons,—I do hereby give, devise, and bequeath unto William Turnbull, of the city of New York, my said son Silas H. Pomeroy, and Charles Atwater, of said Pittsfield, all the manufacturing property which was of the firm of L. Pomeroy's Sons, or which I have acquired since the termination of said firm, and owned, used, and occupied in my said business under said name of L. Pomeroy's Sons, real, personal, and mixed, of whatever name and nature soever, and wheresoever situate, (the real estate being principally located in said town of Pittsfield,) including all rights and credits and every kind of property which the books and papers shall show to have been the property of said firm, or my property as the successor of said firm, and used by me in and pertaining to my business under the name of L. Pomeroy's Sons, and also the tract of land, and buildings thereon, on the east side of the river in said Pittsfield, which I now own, and which I bought of J. D. Colt, the same being adjacent to, occupied, and properly belonging with, said manufacturing property, to hold to them, the said William Turnbull, Silas H.

Pomeroy, and Charles Atwater, and to the survivors and survivor of them, his heirs and assigns, as trustees, and solely for the trusts, uses, and purposes following, viz.: To continue and carry on without interruption, till my son Theodore L. shall arrive at the age of twenty-one years, the manufacturing business now carried on by me under said name of L. Pomeroy's Sons, in the same general manner said business is now carried on, subject to such changes in detail as, in the judgment of said trustees, the best interest of said trust may require, taking up and continuing said manufacturing business as the same shall be found at my decease, providing for the then outstanding and current liabilities incurred on account of and in said manufacturing business, (but any credit which I may have on the books of L. Pomeroy's Sons is not to be treated as a debt due to my estate, and is not required to be paid to my executors by said trustees,) and incurring on account of said trust-estate during the continuance of said trust such further liabilities from time to time as a wise and prudent management of said trust may require, and in all things that shall pertain to the proper execution of said trust, having and exercising the same power and control in the premises as is now exercised by me in the carrying on of said business. And said trustees shall annually, during the continuance of this trust, pay over to my two sons, Silas H. and Theodore L., in equal proportions, such portion of the profits of said business, if any, as in their judgment a wise administration of said trust and preservation of the estate from depreciation will justify and permit."

The defendants herein accepted the trust created by the will, and entered upon the execution thereof, and continued the manufacturing business in the same manner it had been conducted previous to the death of the testator. The trustees purchased wool, from time to time, upon credit, using the firm name, L. Pomeroy's Sons, in transacting the business; and such wool was made into cloth, and sold in market. The defendants borrowed money of the Agricultural National Bank of Pittsfield for the purposes of the trust, and kept an account in such Bank, using the same firm name. The defendant William Turnbull, who resided in the city of New York, visited Pittsfield as often as once a month, and participated in the business, in executing the trust, and received ample compensation for his services, which was paid from the proceeds of the business. He testified at the trial that he was aware that wool was purchased upon credit, which was used in the business. During the years 1882 and 1883 the defendants purchased wool of said John Consalus upon credit, which was used in such business, and was paid for subsequently by the trustees. The court has found upon that subject the following: "*Sixth*. That during the years 1882 and 1883 the said defendants bought wool from John Consalus, of Troy, N. Y., for said manufacturing business, and which was paid for by the defendants." The defendants, in conducting their correspondence with persons with whom they transacted business connected with the execution of such trust, used paper which contained a letter-head in the following form: "WM. TURNBULL, CHAS. ATWATER, & S. HARRIS POMEROY, TRUSTEES OF L. POMEROY'S SONS. PITTSFIELD, MASS., —, 18—. "The words, "WM. TURNBULL, CHAS. ATWATER, & S. HARRIS POMEROY, TRUSTEES OF," in this letter-head, were printed in red ink, and the remainder in black ink. Considering the nature of the trust, and the duties imposed thereby, and the character of the business involved, and the manner the trustees performed the same in executing such trust, we are convinced that within the principle established by the following adjudications the trustees became personally liable for wool purchased by them upon credit, and which was used in such manufacturing business, as was the case in the purchases made of John Consalus. *Thacher v. Dinsmore*, 5 Mass. 299; *Schmitler v. Simon*, 101 N. Y. 554, 5 N. E. Rep. 452; *New v. Nicoll*, 73 N. Y. 127; *Austin v. Munro*, 47 N. Y. 360; *Foland v. Dayton*, 40 Hun, 563. It does not appear that when the purchases of wool were made of Consalus, that he was informed that they were made

upon the credit of the trust-estate, and that he must look to such fund for payment. Nothing seems to have been said upon the subject, and there is no evidence to the effect that he had any knowledge in regard to the pecuniary condition of such estate. Under such circumstances he was, we think, at liberty to treat the trustees as personally liable to him for the wool, and leave them to look to the trust-estate for reimbursement. It will be perceived that the letter-head contained not only the firm name, but also the names of each of the trustees in full. Assuming, therefore, that the three trustees became personally liable for the wool purchased of John Consalus during the years 1882 and 1883, we are to inquire whether anything occurred subsequent thereto which had the effect to relieve the defendant Turnbull from liability personally for purchases of wool made of Consalus subsequent to that date, and which was used in the business of the trust. The fact that the firm name, L. Pomeroy's Sons, was used by the trustees in transacting the business, under the circumstances cannot change the rule in regard to the personal liability of the trustees. It appears that an action was commenced in the supreme judicial court of Massachusetts, in which William Turnbull and Charles Atwater, trustees under the will of Theodore Pomeroy, said Atwater being also executor of the said will, were plaintiffs, against Silas H. Pomeroy and others.¹ And on the 1st day of June, 1886, a decree was entered in the action, which, among other things, provided, upon certain conditions therein specified, that the said Turnbull and Atwater should be allowed to retire from such trust as such trustees, and that the further execution of such trust should be continued by the remaining trustee, Silas H. Pomeroy. Such decree seems to have been based substantially upon a written agreement executed by the trustees and the other parties who were interested in the execution of the trust, and by its decree the court seems to have given its consent to the carrying out of the scheme devised by the parties, and incorporated in such agreement. The motive which prompted such arrangement is not disclosed, and we can only imagine that the purpose was to reduce the expenses which attended the execution of the trust under the management of the three trustees, which are shown to have been considerable. The defendant Turnbull insisted upon the trial, and now here contends, that by force of said decree he became discharged from such trust, prior to the purchase of the wool of Consalus for the price of which the notes in suit were executed, and therefore that he is not personally liable in this action. Whatever might be the legal effect of such decree as to the parties to that action, or as to parties who had notice thereof, or who furnished wool for the first time after the entry of such decree, to be used in such business, we are persuaded that as to John Consalus, who had sold wool to the defendants upon credit, and to be used in the business of the trust, in the years 1882 and 1883, and received payment therefor from the trustees, and again, in 1887, sold upon credit, and for the same purpose, and under like circumstances, the wool for which the notes were executed, such decree cannot, we think, have the effect, under the circumstances of this case, to exempt Turnbull from personal liability in this action, unless he has at least succeeded in establishing a sufficient notice to Consalus, previous to the sale of the wool for which the notes were executed, that he had been discharged from such trust as such trustee. It is very clear from the evidence that John Consalus had no knowledge, prior to the execution of the notes in suit, that an action had been commenced in the court in Massachusetts, or of the decree entered therein. John Consalus testified as follows: "*Question.* Previous to your selling these last lots of wool, did you ever know of Wm. Turnbull withdrawing from the business, in any shape or manner? *Answer.* No, sir." We perceive nothing in the evidence which conflicts with such statement. We are not able to adopt the contention of the learned counsel for the respondent, as applied to

¹Not reported.

the facts of this case, that Consalus was bound to take notice of the decree of the court in Massachusetts, although not a party to the action, and having had no knowledge of its existence, or of the decree entered therein. We are satisfied that such decree, obtained in the manner it was, could not have the effect to relieve the defendant Turnbull from personal liability for the wool purchased of Consalus in 1887, and for which the notes were executed. There are provisions in such decree which seem to suggest that the parties thereto contemplated that the trustees had become personally responsible for debts contracted in conducting the business under the trust. The wool for which the notes were executed was purchased within a year after the entry of the decree, and it does not seem improbable but that such wool was used in the manufacture of cloth, and the proceeds applied to the retirement of the indebtedness of the trustees, as provided by the decree. We do not discover from the evidence when the conditions were performed upon which, according to the decree, the defendants Turnbull and Atwater were to be discharged from the trust as such trustees; and for aught that appears such period may have extended beyond the time the last lot of wool was purchased of Consalus, and used in the business. It would seem, in view of all the facts, inequitable to apply the avails of such wool to the payment of the liabilities of the trustees, and allow them to escape responsibility upon the notes in suit, which were given for such wool. We conclude that the decree, in view of the facts disclosed, could not, in any event, have the effect to discharge the defendant Turnbull from the trust as such trustee, so as to exempt him from personal liability for the wool purchased of Consalus, and for which the notes were executed, unless the facts sufficiently establish notice to Consalus, with whom previous purchases of wool had been made by the trustees upon credit, that Turnbull had been discharged from such trust, and that such notice had been received by Consalus prior to the last purchase of wool, so that he could be regarded as having made the sale of the wool for which the notes were executed with knowledge of the retirement of Turnbull.

This presents the question upon which the cause seems to have been disposed of at the circuit, and the learned justice based his decision mainly upon the assumption that the change of the letter-head after the decree, in the correspondence with Consalus, constituted sufficient notice of the retirement of Turnbull from the trust to free him from liability upon the notes in suit. We are constrained to differ with the learned justice in the conclusion thus reached by him. The substituted letter-head upon the paper used in such correspondence was in the following form: "L. POMEROY'S SONS, PITTSFIELD, MASS. S. H. POMEROY, ——— TRUSTEE." The evidence is to the effect that Consalus received from the defendants letters in relation to the purchase of wool, written upon paper, some of which bore one form of letter-head and some the other. Consalus was interrogated, as a witness, as to how he regarded such change at the time, and he replied, in substance, that he understood that it merely indicated that Silas H. Pomeroy had the immediate supervision of the manufacturing of cloth, and of the purchase of wool, as incident thereto, which was to be used in such business, and that in that capacity he acted for all of the trustees. Consalus testified as follows: "*Question.* In what capacity did you suppose S. H. Pomeroy was acting in the business? *Answer.* I supposed he was manufacturing, carrying on the business for the trustees of the estate, same as before, only under his management; that is what I always thought. *Q.* Explain what you mean in your answer to Mr. Johnson, that you did understand he was carrying on the business. *A.* I meant this: That he was carrying it on, doing the business there for the trustees, he being one of the trustees of the estate,—the business as it always has been; and I think I said so before." Such inference of Consalus accords with the manner the business was actually conducted by the trustees previous to the change of the letter-head, as appears by the evidence of Silas H. Pome-

roy, found at folio 181 of the case, as follows: "Before May 18, 1885, in carrying on the business under the directions of your father's will, what did each defendant do in that behalf? *Answer.* Turnbull, during that period, did not go up to Pittsfield only three or four times a year, and remain only a part of a day at our mill, up to May 18, 1885. A majority of the manufactured goods were consigned to his firm at New York, for sale on commission. In a few cases he ordered wool bought. That was about all he did in our business. Atwater had charge of the book-keeping at the mill, which was his main business. I had the charge of the manufacturing, and in the majority of cases purchased the wool for the mill." Thus it appears that the business under the trust was distributed by the trustees, among themselves, in such manner that Silas H. Pomeroy, who resided at Pittsfield, where the manufacturing was done, was assigned that branch, which embraced the purchase of the wool. The court has found the following, as appears by the case, folio 388: "*Eleventh.* That said Turnbull knew that said defendant Pomeroy was purchasing wool on credit after June, 1886, for conducting the same kind of business. The court so found. *Twelfth.* That said Turnbull knew that said Pomeroy continued to use the firm name, L. Pomeroy's Sons, after June, 1886, and said Pomeroy paid the said Turnbull \$5,000, by a check dated August 17, 1886, signed by said Pomeroy, in the name of L. Pomeroy's Sons. The court so found." Mr. Turnbull testified that he was aware that the three trustees purchased wool upon credit. It is quite evident from the facts that there was no apparent change in the manner the business was transacted after the making of the decree from what it had been previous thereto; and there was nothing in that respect to inform Consalus that any change had occurred by the retirement of any of the trustees. It therefore appears that the question of notice is reduced to an inference to be drawn substantially from one single fact, viz., the change of the letter-head; and, explained as it has been by the evidence, it seems too indefinite and unsatisfactory to amount to a notice which should have influenced the conduct of Consalus, or such as the law required to exempt the retiring trustee from personal liability, under a trust like the one in question, and executed as this had been by the trustees. The sufficiency of such notice must depend upon the circumstances of the particular case, as a notice which should be deemed sufficient under one state of facts might be regarded insufficient under another. In view of all the facts we think that Consalus was justified in concluding that the wool for which the notes in suit were executed was purchased at the instance of all of the trustees, and upon their responsibility, even though the paper used in the correspondence may have exhibited the letter-head as changed. The new letter-head contained the name of the firm, L. Pomeroy's Sons; also the name, "Silas H. Pomeroy, ——— Trustee." And according to the testimony of Pomeroy, the dash preceding the word "Trustee" was intended to indicate that he was not alone trustee. At folio 152 of the case he states as follows: "I had the dash put in because I was not alone trustee." We think the change in such letter-head was not sufficient to constitute notice that two of the trustees had retired, and that the inference drawn therefrom by Consalus, under the circumstances, was reasonable and justifiable. He knew that there were three trustees who had had charge of the business under the trust, and that they had purchased wool of him upon credit, which had been used in the business, and paid for by them; and, as before stated, the court has so found the fact. Consalus states further that he understood that the trust was created by a will, but did not know the precise terms of the trust. In view of such facts and circumstances we are persuaded that Consalus, in the exercise of reasonable prudence, was justified in assuming that the trust continued, and was being executed by the three trustees, who were responsible for the wool, purchased of him, for which the notes were given. Notwithstanding the changes which were introduced into the form of the correspondence, and the

paper upon which it was conducted, it is fairly presumable that he made the sales relying upon the responsibility of the trustees, rather than the trust-estate, in regard to which he is not shown to have had any definite knowledge. He knew that one of the trustees, Mr. Turnbull, resided in the city of New York, and was there engaged in business, and that the trust-estate was situated in Pittsfield, Mass. It would seem to be a natural inference that Consalus would be likely to rely for payment upon the trustees who could be more conveniently and readily reached, and as to whom the remedy would be more direct and less complicated, than against the trust-estate. However this may have been, in regard to the motive that prompted him in making the sale of the wool, the fact is established that when the sales were made in 1882 and 1883 the three trustees were conducting the business in execution of such trust, and purchased of Consalus wool upon credit, which was used in the business; and for aught that he knew, or was bound to know under the circumstances, they continued in the execution of the trust, and therefore personally liable to him for the price of the wool sold in 1887, for which the notes were given; and he was therefore at liberty to look to the trustees for payment, even though he may have had the impression that in some form the trust-estate might be reached. *Fowler v. Bank*, 113 N. Y. 450, 454, 21 N. E. Rep. 172.

As bearing upon the sufficiency of the notice which should have been given to Consalus of the retirement of Turnbull as trustee, to relieve him of liability, reference is made to *Clafin v. Lenheim*, 66 N. Y. 301. In that case the court say: "Justice to parties dealing with agents requires that the rule requiring notice in such cases should not be departed from on slight grounds, or equivocal circumstances substituted in place of notice." The rule in regard to notice by a retiring partner to persons who had trusted the firm, in order to avoid liability to such persons, for purchases made by the firm after such retirement, we refer to *Bank v. Mudgett*, 44 N. Y. 514; *Clafin v. Lenheim*, *supra*, 305; *Fowler v. Bank*, *supra*. Regarding the nature of the business involved in this trust, and the manner the trustees conducted the same, we are satisfied that the rule requiring notice by a retiring partner to avoid personal liability for debts created after such retirement applies in this case. This trust was peculiar in its nature, and in its execution necessitated the conducting of a business, the characteristics of which were in some respects similar to those which appertain to a partnership, and also to an agency; and we therefore conclude that the reason for the rule requiring such notice in the case of a retiring partner, or of a principal who has discharged an agent, in order to protect such persons from liability, applies with equal force to the retiring trustee in this case. Such rule has its foundation in equity, and is salutary in its effect, and should be enforced in favor of those who deal with trustees, who manipulate trust-estates, and who alone have the means of knowing whether they are solvent. The facts of this case which bear upon the question of notice, and which are relied upon to sustain it, are substantially undisputed, and therefore the question in regard to the sufficiency thereof to establish the same becomes a question of law, rather than of fact. *Clafin v. Lenheim*, *supra*, 305. In our examination of the law upon such question we have not overlooked the case of *Holt v. Allenbrand*, 52 Hun, 217, 4 N. Y. Supp. 922. Regarding the facts of that case, we conclude that it falls far short of affording substantial support to the theory for which the respondents' counsel contends in this case. In the case referred to the changes relied upon to constitute notice of retirement were marked, and such as were calculated to attract notice, and were wholly inconsistent with the idea that the relation continued. Not so in the case under consideration, in regard to the letter-head, particularly as explained by Silas H. Pomeroy, the trustee, who was a witness produced by the defendants. Mr. Turnbull voluntarily assumed the trust in question, not gratuitously, as the facts show that he re-

ceived \$6,000 annually as his individual compensation for his services, and in addition thereto his share of the commissions arising from the sale of the manufactured goods which were consigned to the commission house of which he was a member, in New York, for sale. In view of the facts of this case, and the law which we deem applicable thereto, we conclude that the defendant Turnbull became liable upon the notes in suit, to the plaintiff herein, and that he was required by law to give notice to Consalus of his retirement from such trust previous to the purchase of the wool for which such notes were executed, and that the facts of this case fail to establish such required notice. The judgment should be reversed, and a new trial had, with costs to abide the event of the action.

PEOPLE *ex rel.* STEPHENS v. BARDIN.

(*Supreme Court, Special Term, Tompkins County. June, 1889.*)

OFFICE AND OFFICER—APPOINTMENT—UNION SOLDIERS.

Under Laws N. Y. 1887, c. 464, providing that honorably discharged Union soldiers shall be preferred in municipal appointments, where it appears that though an applicant possessed all the qualifications entitling him to preference required by the statute, and was fully competent to discharge the duties of the office applied for, the mayor refused to appoint him, *mandamus* for the appointment will issue to the mayor, who has no discretion in the matter.

Application by Henry W. Stephens for *mandamus* to John Bardin, mayor of the city of Ithaca.

Bradford Almy, for relator. *D. P. Van Vleet*, for respondent.

FORBES, J. The relator is an honorably discharged Union soldier, having served in the One Hundred and Thirty-Seventh Regiment, New York State Volunteers, in the United States army, in the war between the states known as the "Rebellion." He is also a member of the G. A. R. in good standing, residing in the city of Ithaca, N. Y. The defendant, John Bardin, is the mayor of said city, having been duly elected and having qualified as such mayor, and thereafter having entered upon the discharge of the duties of his office, under a municipal election held in said city March 6, 1889. The office of collector of taxes was made a city office by the charter. Under the city charter, the defendant, as such mayor, has the sole power of appointment to the office of collector of taxes in and for said city. City Charter, tit. 2, § 1, p. 8. "The compensation of the collector of taxes is not to be greater than that allowed to collectors of towns for similar services." Charter, last clause, § 10, pp. 8, 9, tit. 4. The relator made an application to the defendant, as mayor, for an appointment to the office of collector of taxes in and for said city. The mayor knew that the relator had been a Union soldier in the Rebellion, and defendant was also informed that the relator was, at the time the application was made, an honorably discharged Union soldier of the Rebellion; and that he was fully qualified and competent to perform the duties of the said office, acceptably to said city. These facts were fully known to the defendant, at the time of such application, made to the mayor, for said appointment. The relator was the only honorably discharged Union soldier who applied, and his appointment was urged unanimously, and recommended by the Sydney post of the G. A. R., located in Ithaca. There were other applicants, none of whom were discharged Union soldiers or sailors. The mayor refused to appoint the relator, but did appoint another applicant. An application is now made to compel the mayor to appoint the relator to said office. This appointment involves the removal of the present incumbent, perhaps, as well as the appointment of the relator.

All officers appointed by the mayor continue in office during the mayor's term, unless sooner suspended or removed by the mayor, and until their successor shall have been appointed and qualified. Charter, tit. 4, §§ 13, 14. It

became the duty of the said mayor, under the provision of this charter, (title 4, § 1,) "to take care that the laws of the state should be faithfully executed within said city. This duty devolved upon him as the chief magistrate of said city." Has the defendant performed that duty with respect to the relator? The act of May 19, 1884, as amended by chapter 464 of the Laws of 1887, made it the duty of the mayor to appoint an honorably discharged Union soldier or sailor, if one applied, giving him preference over other applicants; and the defendant is charged with a faithful compliance with that law, both in letter and spirit. The act reads as follows: "Section 1. In every public department, and upon all public works of the state of New York, and of the cities, towns, and villages thereof, and also in non-competitive examinations under the civil service laws, rules, and regulations of the same, wherever they apply, honorably discharged Union soldiers and sailors shall be preferred for appointment and employment. Age, loss of limb, or other physical impairment, which does not, in fact, incapacitate, shall not be deemed to disqualify them, provided they possess the business capacity necessary to discharge the duties of the position involved. Sec. 2. All officials or other persons having power of appointment to, or employment in, the public service, as set forth in the first section of this act, are charged with a faithful compliance with its terms, both in letter and spirit, and a failure therein shall be a misdemeanor. Sec. 3. This act shall take effect immediately." The mayor had no arbitrary right or power to disregard this law, especially enacted for his observance; in other words, he had no discretion to exercise, conceding the facts "that the relator was an honorably discharged Union soldier, residing in the city of Ithaca, and an elector in said city; was fully competent, and possessed the business capacity necessary to discharge the duties of the office involved; and that the mayor knew these facts at the time the application was made by the relator." He was then bound to prefer the relator to all others, and appoint him. The law must be construed in such a manner as to uphold it, and give effect to the intent and purpose of the enactment of the law. *In re Breslin*, 45 Hun, 210; *Bell v. Mayor*, 105 N. Y. 189, 11 N. E. Rep. 495; *Weller v. Neubach*, 47 Hun, 166; *People v. Commissioners*, 108 N. Y. 475, 15 N. E. Rep. 692. Invest the mayor with a discretionary preferment, and the object of the act is completely nullified, thwarted, and stripped of its purpose. It is worse than a dead letter. It is a miscarriage of intended justice, meant to be enforced in letter and in spirit; not to be avoided by an arbitrary exercise of discretionary power in making appointments not within the law. This view is taken by the legislature in several acts relating to the same subject, subsequently passed, which may be read in harmony with this act. Chapter 410 of the Laws of 1884, § 2, charges the mayor with the duty of prescribing rules and regulations for the admission into the service of the city of certain persons; and by section 4 "honorably discharged Union soldiers and sailors are to be preferred above all other persons of equal standing." Laws 1884, pp. 488, 489. The act of 1883 was again amended by chapter 29, Laws 1886, still further extending the preference to soldiers and sailors "over all other persons, though graded lower than others so examined and reported," etc., and these acts are pronounced as "in grateful recognition of service rendered in the Rebellion." Laws 1886, § 1, p. 37. The further interpretation of that law is given by chapter 119 of the Laws of 1888, "forbidding the removal from office (unless appointed for a definite time) of any honorably discharged Union soldier or sailor, except for cause shown." Laws 1888, § 1, p. 162; *In re Dubois*, not reported, BARNARD, J. We think the whole tendency is towards compensation for meritorious service in the Rebellion, and the selection of this class of men for civil offices is but a just recognition of their courage and efficiency in that service in saving the general government from dismemberment; and they should now be preferred in sharing the emoluments, if they come within this law, which

was designed to recognize their services then performed. These acts have been pronounced constitutional, and the policy of preferment is upheld by the courts in this state. In *Re Wortman*, 2 N. Y. Supp. 324, DANIELS, J., says: "So far as the law extends, there seems to be no constitutional objection against their validity; and no officer or appointing power, as these words have been employed in the statute of 1886, has authority to deny this preference to the class of persons who are brought within the provisions of these statutes. And where the proceeding may be such as arbitrarily to deny the privilege secured by the statute, a *mandamus* would be the appropriate remedy to enforce the performance of the duty, (*People v. Leonard*, 74 N. Y. 443;) and authority for its allowance has been secured by sections 2068 and 2070 of the Code of Civil Procedure." *People v. Barnard*, 110 N. Y. 548, 18 N. E. Rep. 354; *People v. D'Oench*, 111 N. Y. 359, 18 N. E. Rep. 862. We think the power to grant the right is fully sustained in *People v. Board*, 107 N. Y. 235, 13 N. E. Rep. 920; *In re Hitchcock*, not reported, BARNARD, J.; *People v. French*, 4 N. Y. Supp. 380; *People v. Adams*, Id. 522; *People v. Knapp*, Id. 825. The motion for peremptory writ of *mandamus* is therefore granted, under the rules and practice of this court, compelling the defendant to appoint the relator to the office of collector of taxes in and for the city of Ithaca, with costs.

PEOPLE *as rel.* LOCKWOOD v. TRUSTEES OF SARATOGA SPRINGS.

(*Supreme Court, General Term, Third Department. September 21, 1889.*)

1. OFFICE AND OFFICER—APPOINTMENT—UNION SOLDIERS.

Though Laws N. Y. 1887, c. 464, provide that "honorably discharged Union soldiers * * * shall be preferred for appointment and employment," the appointment of another applicant by a municipal body, after a determination in good faith of his superior fitness as compared with a discharged soldier, is not reviewable.

2. NAME—MANDAMUS.

A *mandamus* to appoint a person to an office should not be granted unless coupled with an application to remove the present incumbent.

Appeal from special term, Saratoga county.

Motion for peremptory *mandamus* requiring defendants to appoint relator, Oscar F. Lockwood, to the office of superintendent of public work of the village of Saratoga Springs. PUTNAM, J., denying the motion, said:

"Relator presents his affidavits, in which he testifies that he is fully competent to perform the duties of said office. At the meeting of the defendants on May 6, 1889, called to elect a superintendent, he appeared, and made application for the appointment in writing, stating that he was an honorably discharged Union soldier, who served in Company D, 77th Regiment, New York State Volunteers, and entitled to a preference by virtue of the provisions of chapter 464, Laws 1887, to said appointment, and he presented his certificate of discharge. He offered no proof of his capacity for the position before the trustees, but his affidavit states that no question was raised in that regard. He presents on this application his own affidavit and that of nine other citizens that he is well qualified to perform the duties of the office of superintendent. None of those affidavits, however, speak of the relator's fitness to perform the duties of the office as compared with Ryall, the person who was appointed by the trustees. The trustees, in their answering affidavits, in substance, state that the office of superintendent of public works of the village is of very great importance. It requires very great ability and business capacity and experience. That officer has charge, under the trustees, of the streets, sewers, tax-lists, highways, public works, and affairs of said village. That they had considered the application of the relator and his claim to the office under the law of 1887, and the applications of the other

candidates. That no proof was offered as to the fitness of either of the candidates for the office. The majority were well acquainted with the relator and his qualifications for the appointment, and the qualifications of the other candidate. That they came to the conclusion that the relator was not competent for the position of superintendent of said village, and that Ryall was; and that therefore, in good faith, and not intending to violate the provisions of chapter 464 of the Laws of 1887, they appointed Ryall to the office, who duly qualified, and at this time is performing the duties of the office. The provisions of the law of 1887 should be observed and faithfully carried out. It voices the public feeling of all citizens that the survivors of the brave soldiers, to whom we are indebted for the preservation of our institutions, should be remembered and preferred in the distribution of public office. My appreciation of this fact, however, as well as my knowledge of the estimable character and meritorious services of the relator, will not allow me to interfere by *mandamus* with the reasonable discretion of the board of trustees of the village of Saratoga Springs in selecting a superintendent, if it is in fact a case where the law confers upon the trustees a discretion, and it appears from the papers that they have exercised that discretion in good faith. The trustees having acted, as they testify, in good faith, and decided that the relator was not qualified for the office, and that Ryall was, and having appointed Ryall, the law having imposed upon them the right and duty to make the appointment, is this court, under the well-settled doctrine, as laid down in many cases, authorized to review the action of the trustees, and direct them to make another appointment?

"On carefully examining the affidavits and papers presented to me, and considering the arguments and points of counsel, I find great difficulty in overruling the action of the trustees in this case. Ryall, the party appointed by the trustees, has qualified, and is now acting as superintendent. He is not a party to this proceeding, and no application is made for an order compelling the trustees to remove him, and it is conceded by counsel for the relator that any order made here would not affect his title to the office. If I grant the order asked for, therefore, the effect would be the appointment by the trustees of two superintendents. Any proceeding to remove Ryall would have to be a separate and subsequent proceeding. The authority of the trustees to appoint a superintendent is under chapter 257, Laws 1874, and the several acts amending the same. The law only gives the trustees power to appoint one superintendent. If I compel them to appoint two, I compel them to do an act beyond their power. I think that a *mandamus* cannot, or at least should not, be granted to compel the appointment of the relator, unless coupled with an application to remove Ryall; that the order (if granted) to appoint relator should also and at the same time command the trustees to displace the present superintendent. Before such an order could be granted, however, Ryall would have to be made a party, and would have a right to appear and be heard in the matter. It is possible that the trustees have no right to remove Ryall, he being regularly appointed by them, except for some cause occurring subsequently to his appointment. See chapter 257, Laws 1874, § 3. If so, if Ryall cannot be removed, this would, in my judgment, be a conclusive objection to the granting of this motion. See *People v. Board*, 27 N. Y. 381, 382.

"The act under which the relator claims the office in question (chapter 464, Laws 1887) provides that 'honorably discharged Union soldiers shall be preferred for appointment and employment.' It means, as I construe it, that where two or more apply for an office, one of whom is a discharged Union soldier, and all are equally qualified, the soldier shall be preferred; but not where the soldier is not equally qualified for the office as one of the others. There are degrees of fitness for such an office as the one in question. One

candidate might barely be able to perform its duties in a reasonably proper manner, and another might have superior qualifications, and be able to do the work much better. In such a case, the appointing power, under the law, would not be bound to appoint the former, although a discharged Union soldier. The trustees, when they met on May 6th, were charged with the duty of deciding the question of fact: Was the relator qualified to perform the very arduous and important duties of superintendent of the village? Was he qualified equally with the other candidates? The law cast upon them the power and the duty of deciding this question. They had to decide it, and they should have acted, in deciding it, honestly and in good faith. They each in their affidavits testify that they did decide the question in good faith, and with the provisions of the law of 1887 in view, and with intent to obey the law. I do not think I would be justified in holding that they did not act in good faith; that they have not honestly and fairly intended to do their duty as they have testified. If they have erred in their conclusion, it does not at all, in my view, affect the validity of their action. Judges and jurors often reach erroneous conclusions, but the error cannot be corrected by *mandamus*; the only remedy is by appeal, when an appeal lies. In my judgment, the trustees having decided the matter that the law gives them the right to pass upon, their decision cannot be overruled by the supreme court. It is a universal rule in respect to all subordinate tribunals clothed with the exercise of judgment and discretion that they cannot be compelled by *mandamus* to decide in any particular way. *People v. Common Council*, 78 N. Y. 33; *People v. Board*, 2 Abb. Pr. (N. S.) 181; *People v. Easton*, 13 Abb. Pr. (N. S.) 161; *People v. Board*, 27 N. Y. 381; *People v. Reardon*, 3 N. Y. Supp. 560; *People v. Chapin*, 104 N. Y. 100, 10 N. E. Rep. 141; *People v. Brennan*, 39 Barb. 651; *People v. Chapin*, 103 N. Y. 635, 8 N. E. Rep. 368; *Howland v. Eldredge*, 43 N. Y. 457. Although the trustees were bound to prefer a soldier, they were not bound to appoint one they deemed incompetent, or one where the other candidate possessed superior qualifications for the office. The law conferred upon them the power and duty of deciding as to the qualifications of the relator, and his fitness, as compared with Ryall. They have passed upon the question against the relator, and I think the decision is final, whether right or wrong. In *People v. Chapin*, 39 Hun, 230, the court held that *mandamus* was 'not a remedy for erroneous decisions. It cannot be addressed to a judicial tribunal to require it to decide in a particular manner.' And the court referred to the case of *People v. Common Council*, 78 N. Y. 33, which holds, among other things: 'Where the duty of selecting the persons to be employed is imposed by law upon the municipal body, and the question whether they possess the requisite qualifications is one of fact to be determined by it, no particular mode of determination being provided by law, and said body has exercised the power and made the selections, its action cannot be reviewed by *mandamus*, nor can it be compelled by that proceeding to appoint particular persons, on their allegation that they in fact, and not the persons actually selected, possess the prescribed qualifications. * * * Where a subordinate body is vested with power to determine a question of fact, the duty is judicial, and it cannot be compelled by *mandamus* to decide in a particular way, however clearly it be made to appear what the decision ought to be.' See, also, *People v. Chapin*, 103 N. Y. 635, 8 N. E. Rep. 368; 104 N. Y. 100, 10 N. E. Rep. 141. The matter of the application of the relator for the appointment was passed upon by the trustees at the meeting of May 6th. They knew he was a soldier, but had no evidence of his fitness or unfitness for the office he desired. But the trustees testify that they knew him and his qualifications, and also the qualifications of the other candidates. They were obliged to pass upon this matter then and with the evidence before them. They did pass upon the question, and found against the relator. I am of the opin-

ion that their finding upon the question of fact as to the relator's qualifications for the office, if wrong, cannot be corrected in this proceeding.

"Other questions were raised and discussed before me, but in the view I have taken of the case it is not necessary for me to consider or pass upon them. I have been referred to a decision by Judge FORBES in the case of *People v. Bardin*, ante, 123. It is sufficient to say that in that case the fitness of the relator for the position he desired, as well as the fact that he was an honorably discharged Union soldier, was conceded and assumed by the judge in his opinion. No question was raised, as appears by the opinion, as to the qualifications of Stephens for the office he desired; hence that case is entirely unlike the case before us. On the whole, I am of the opinion that I have not the power to grant this application. The law has conferred upon the trustees the power of selecting their own superintendent, and of judging of his qualifications for the office. I am unable to find from any evidence before me that they have not acted in good faith in selecting the present incumbent. I think that their selection cannot be overruled in this proceeding. I therefore deny the motion, but without costs."

Relator appeals.

Edward J. Maxwell, for appellant. *J. L. Henning* and *L. B. Pike*, for respondents.

No opinion. Judgment affirmed on opinion of court below.

VAN AERMAN, Respondent, v. FISHER, Appellant.

(Supreme Court, General Term, Fourth Department. May, 1890.)

Judgment affirmed, with costs. Opinion *per curiam*. Dissenting opinion by MERWIN, J.

GRANT, Sheriff, v. TEFFT *et al.*

(City Court of New York, General Term. October 3, 1889.)

1. EVIDENCE—PAROL TO VARY WRITING.

In a suit on an indemnifying bond parol evidence by defendants of conditions that the sheriff would pay the amount of their executions out of the sale if they would give him the bond is inadmissible.

2. BONDS—INDEMNITY TO SHERIFF—NOTICE.

The obligors in the bond are chargeable with notice of a prior levy made under a writ which inures to the benefit of their judgment, and the bond protects the sheriff in making such levy.

3. SAME—CONSTRUCTION—EVIDENCE.

Defendants, with other judgment creditors, gave the sheriff indemnifying bonds to protect him against any damages, attorney's fees, etc., by reason of sales of personal property under their executions. The sheriff sold the property, and was sued by the assignee of the judgment creditor, who alleged title to the property. After two trials the suit was discontinued. *Held*, in a suit on the bond for attorney's fees expended, that defendants could not show that they had notified the sheriff not to defend the suit, as the other creditors were interested in the defense, and did not consent to its discontinuance.

4. SAME.

The obligors had agreed to pay counsel fees incurred by the sheriff. The sheriff, on the trial, showed payment of \$1,000 counsel fee, but did not prove that it was reasonable. *Held*, that the payment was presumptive evidence of its reasonableness, when it was neither attacked by the answer of defendants nor by evidence at the trial, and was sufficient to sustain a verdict for plaintiff.

Appeal from special term.

Action on a bond of indemnity, executed by Tefft, Weller & Co., as principals, and by Andrew J. Shively, Thomas R. Armstrong, and Edward H. Branch, as sureties, to the plaintiff, as sheriff of the county. The bond recites the recovery of a judgment by Tefft, Weller & Co. against Adolph Von Der Linden for \$2,174.73, the issuing of an execution thereon to the sheriff; and that certain personal property, apparently the property of the judgment debtor, was claimed by others. The condition of the obligation was that the indemnitors were to save, keep, and bear harmless the plaintiff against any damage, liability, costs, counsel fees, expenses, suits, actions, and the like, that might at any time arise, come, accrue, or happen by reason of the levying, taking, or making sale under such execution, of all or any personal property which he might judge to belong to the judgment debtor, or for or by reason of any action that might be brought against him on account thereof. There was also in the hands of the sheriff an execution against Von Der Linden, in favor of Abraham Weinberg, for \$469.74, and another in favor of John Cladin and others, for \$3,988.39. In each of these actions a bond of indemnity, similar in form, executed by the plaintiffs in said actions as principals and by others as sureties, was given to the plaintiff as sheriff. A sale of certain property levied on was had, and the various executions were paid in full. James J. Byrne, as general assignee of the judgment debtor, claimed title to the property, and brought action against the plaintiff to recover damages by reason of the levy thereon and sale thereof. The action was defended, tried twice, the jury on each trial disagreed, and the action was thereafter discontinued. The plaintiff paid his counsel, for defending that action, \$1,000, and claimed that Tefft, Weller & Co. were liable to him for \$325, their proportion of the fee. The defendants offered evidence tending to show that inducements were offered to give the bond, that conditions accompanied it, and that certain instructions were thereafter given concerning the defense of the action brought by Mr. Byrne. The evidence offered was excluded under exception. The defendants then moved to dismiss the complaint on the ground that there was no evidence of any levy on behalf of Tefft, Weller & Co., and no proof that the sum paid by the plaintiff as counsel fee was a reasonable and fair charge. The motion was denied under exception. The jury,

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by direction of the court, found a verdict in favor of the plaintiff for \$325, and upon the judgment entered thereon the defendants appeal.

Argued before MCADAM, C. J., and NEHRBAS and MCGOWN, JJ.

Roscoe H. Channing, for appellants. David Leventritt, for respondent.

MCADAM, C. J. The relevancy of the testimony ruled out must be determined by reference to the answer of the defendants, for, if relevant, it must have been offered to sustain its allegations. They allege that a levy had been made on the property of Von Der Linden under attachments issued in the two suits brought by Weinberg and Clafin; that they (the attaching creditors) had indemnified the sheriff in those actions immediately upon the making of the levy; and that the sheriff's attorneys had represented to Mr. Schell, the attorney for Tefft, Weller & Co., that the sheriff was about to sell the property levied on, and that, if they (the defendants) would give the sheriff a bond of indemnity, he would pay the amount of their execution out of the proceeds of the sale about to be made; whereupon they executed and delivered the bond sued upon. The matter pleaded constitutes no defense. The bond was delivered to the obligee, and parol evidence of conditions qualifying the delivery was inadmissible. *Cocks v. Barker*, 49 N. Y. 110. A bond of indemnity given to the sheriff applies as well to a levy made before the bond was given as to one made afterwards, and the obligors in a suit upon the bond are chargeable with knowledge of the prior levy. *Reilly v. Coleman*, 1 City Ct. R. 476. The levy made by the sheriff under the prior writs inured to the benefit of the Tefft, Weller & Co. judgment, (Crock. Sher. §§ 413, 442;) so that the admission in the answer that a levy had been made under the writs in the cases of Weinberg and Clafin sufficiently proves a levy under the execution issued on the Tefft, Weller & Co. judgment.

The next defense is that immediately after the commencement of the action by Byrne against the sheriff the defendants notified the sheriff's attorneys that they did not wish that action defended. Assuming, as we do, that ordinarily an indemnifying creditor may give such a direction in order to save the expense of a useless litigation, the rule cannot be extended to a case like the present, where other creditors have an interest in the defense of such action, and do not consent to its discontinuance. The sheriff was sued for the consequences of his levy and sale under all process in his hands, and was obliged to justify under all such writs for the joint protection of all the judgment creditors interested. True, if the sheriff had become satisfied that the action against him was well founded, and that he had no legal defense to it, he might have allowed judgment to go against him by default, or even by consent. But such a judgment would not have concluded the judgment creditors, who did not consent to that course, from proving that the alleged cause of action on which the judgment was permitted to go *pro confesso* was without foundation; and in that case the sheriff would have been obliged to pay the judgment himself, and have no remedy over on the indemnity bonds given by the objecting creditors. That the defense interposed by the sheriff to that action was meritorious is proven by the result. Two trials were had, at both of which the jury disagreed, and the plaintiff therein as a consequence finally abandoned and discontinued the prosecution. If the action had been allowed to go undefended, as the defendants seem to have desired it to have gone, the recovery against the sheriff could not have been less than the sums collected and paid over, which aggregate \$6,232.86, and this without considering the expense connected with the levy and sale. In consequence of the defense by the sheriff, the indemnitors, instead of being called upon to pay their proportionate amount of the damages and costs that might have been recovered in the Byrne action, are now called upon to pay only their proportionate share of the \$1,000 fee paid for conducting such defense. When the defendants executed the bond of indemnity they knew that other creditors had issued process against

the same debtor; they knew that a levy had been made under these prior writs, and that the creditors issuing them had indemnified the sheriff; and with this knowledge they executed the bond in suit, and became a party to the act of levy and sale, jointly with the other obligors, to such an extent that Byrne could have prosecuted the indemnitors jointly, either with or without the presence of the sheriff as a party defendant. Barb. Parties, 203, 204; 1 Cow. Treat. § 765; *Herring v. Hoppock*, 15 N. Y. 409. If such an action had been brought, Tefft, Weller & Co. could have allowed it to have gone by default, so far as they were concerned; but they could not have prevented Weinberg and Claffin from defending the action, nor could they have escaped the entry of a joint judgment against all for damages and costs if Byrne had ultimately succeeded. *Delatour v. Bricker*, 2 City Ct. R. 22. On principle, Tefft, Weller & Co. stand in no better position now. They must, so far as that suit is concerned, be considered joint tort-feasors with Weinberg and Claffin. They were, in effect, sued as such, and their liabilities must be determined with reference to the nature of that action and its legal consequences. The defendants assumed this position by their bond of indemnity, and could not change the nature of their liability by the giving of a notice in which the other creditors and indemnitors jointly liable with them neither joined nor approved. The evidence as to such notice was therefore properly excluded.

The only other question to be considered is the exception to the refusal to dismiss the complaint on the ground that there was no evidence that the fee paid by the plaintiff to his counsel, \$1,000, was a fair and reasonable charge. In an action against indemnitors the practical question will always be what the plaintiff was obliged or authorized to pay, both in respect to the principal and incidental costs or expenses. 1 Suth. Dam. 135. The plaintiff was authorized, for he was under legal obligation to pay his counsel a reasonable fee, and this they agreed upon and fixed at \$1,000, and the payment of this sum created a legal presumption that it was a fair and reasonable charge. If the plaintiff's counsel had sued him to recover \$1,000, and he had suffered a recovery by default, or even consented to judgment therefor, such a presumption would certainly have attached. The court of appeals, in *Conner v. Reeves*, 103 N. Y. 527, 9 N. E. Rep. 439, committed itself to this principle, which in the opinion of the court, Judge ANDREWS says, "presents a feature not found in any of our Reports." In the case cited the court says: "The bond was given to indemnify the sheriff against suits and judgments to which he should be a party, growing out of that proceeding. The appellants did not make it a condition of their liability that they should have notice. They were satisfied that the sheriff should conduct litigations founded upon his seizure of the property, without reserving any right of intervention. They committed the matter to his discretion, not, indeed, by express words, but by necessary implication. It is true that the sheriff was not in a legal sense the agent of the sureties to manage suits brought against him, but the sureties agreed that no judgments should be recovered against him therein. They did not limit the indemnity to judgments obtained upon an actual trial, or after a contest in court, and they did not undertake to divest the sheriff of the power incident to his position as a party to settle and adjust litigations instituted against him in view of the exigencies of the situation. It might very well happen that a judgment founded upon a compromise or agreement without actual trial would best promote the interest of all concerned." The rule is that a judgment recovered after actual trial is conclusive on the indemnitors, while a judgment conferred is presumptive evidence only against the sureties, who are at liberty to show that it was not founded on any liability to the plaintiff in the action, or exceeds such liability. *Id.* It follows as a legal sequence that, if the sheriff may fix a presumptive liability by suffering a recovery by default or confessing a judgment, he may, without incurring the expense of a judgment, confess the liability by payment without a suit, leav-

ing the indemnitors to attack it by proof that it was not founded on any liability, or that the bill paid was excessive in amount, and therefore exceeded the legal liability; or, as was said in *U. S. v. Behan*, 110 U. S. 345, 346, 4 Sup. Ct. Rep. 81, it will not do to say that the injured party has not been damaged at least to the amount which he has been induced fairly and in good faith to lay out and expend, unless the party objecting "can show that the expenses of the party injured have been extravagant and unnecessary for the purpose of carrying out the contract." If the sheriff believed the charge to be reasonable he was bound to pay it. He had no right, because he had an indemnity, to defend a hopeless action, and put the indemnitors to a useless expense attempting to defend himself against it. See cases cited in Wood's *Mayne*, Dam. 134. The condition of the bond was to protect the sheriff, not only against actions and judgment, but "counsel fees" incurred in defense of actions as well. The plaintiff relied upon the payment as evidence, and did not, therefore, plead the reasonableness of the fee paid. The defendants should have attacked the reasonableness of the charge in their answer, if they thought the sum paid exorbitant, and should have followed it up by proof of its excessiveness at the trial, because the payment was only presumptive, not exclusive, evidence of its propriety. If the charge had been attacked by evidence that it was excessive, the plaintiff could only have recovered what was found to be fair and reasonable. 1 *Suth. Dam.* 799. The rendition of an attorney's bill, not paid, is not conclusive evidence of value, even as between attorney and client. *Williams v. Glenny*, 16 N. Y. 389. If paid, it constitutes a good accord and satisfaction. *Id.* If the sheriff had not paid the bill, the question of value would have been an open one. Having paid it, he presumptively did so because he was obliged to pay it; and he simply ran the chance of being compelled to prove its reasonableness, if first attacked by evidence that it was excessive. It was not so attacked, and the presumption of its accuracy properly prevailed. It will not do to imply that what a person pays in the market for a marketable commodity furnishes some evidence of its value, and to assume that what a client pays his lawyer is of such doubtful character as to require proof in the first instance that the latter did not cheat the former by extravagant charges. If a merchant sues for the value of an article, or an artisan or a professional man for his fees, he must, if it be disputed, prove their reasonable value, because the price named by the one is disputed by the other; but where the bill is paid by a person acting under a bond of indemnity it is not going too far to presume in the first instance that the charge made by the one and acquiesced in by the other, followed by payment, carries with it at least the presumption that it was fair, leaving those who desire to question its propriety to attack it by proof to the contrary. Upon the entire record we are of opinion that no legal error was committed at the trial, and that the direction to find a verdict for \$325, the defendants' proportionate share of the expense incurred and paid in defending the Byrne suit, was proper, and that the judgment entered on such direction must be affirmed, with costs. All concur.

DELANY v. VAN DERVEER.

(City Court of New York, General Term. October 3, 1889.)

PLEADING AND PROOF—VARIANCE.

In an action for \$400, paid defendant for certain stock, the complaint alleged that defendant had agreed to deliver 10 shares of stock in consideration thereof, which he refused to do; but plaintiff testified that he had agreed to pay \$50 a share for the stock, and that defendant had asked him when he would pay the balance. There was no evidence of a tender of the balance of the price, or of a new agreement to reduce the price, and there were no circumstances excusing tender. *Held*, that the variance was fatal.

Appeal from trial term.

Action by William H. Delany against John R. Van Derveer. The complaint alleged that defendant agreed to deliver to plaintiff 10 shares of stock in the American Baking Powder Company for \$400; that pursuant to this agreement plaintiff paid the purchase price, \$400, and thereafter demanded his stock, which defendant refused to deliver. Defendant pleaded that the purchase price was \$500; that the \$400 referred to by plaintiff was a payment on account; and that defendant was at all times willing to deliver the stock on receiving \$100,—the balance of the purchase money. Plaintiff, upon cross-examination, testified that he had agreed to pay \$50 a share, and that defendant had sent for him, and asked when he would pay the balance. Upon the conclusion of plaintiff's evidence, defendant moved to dismiss the complaint on the ground that by plaintiff's testimony the contract for the purchase of the stock was \$500; and that plaintiff not having paid that amount, but only \$400, could not recover. The motion was denied, and defendant excepted. The court submitted to the jury, as a disputed question of fact, whether the stock was sold for \$400 or for \$500, and told them that if the sale was at \$400 the stock had been paid for. Verdict for plaintiff for \$400, and interest, and from judgment thereon defendant appeals.

Argued before MCADAM, C. J., and NEHRBAS, J.

Charles De Hart Brower, for appellant. *George W. Gibbons*, for respondent.

PER CURIAM. The plaintiff's own evidence showed that the contract to purchase was for 10 shares at \$50 a share, aggregating \$500, and that the \$400 paid was not in full, but on account. The plaintiff's evidence fails to show that any specific time for the delivery of the stock was fixed, or that there was any unconditional refusal to deliver it. No new agreement was made by which the price was reduced to \$400. No tender of the \$100 was made, and nothing was proved which put the defendant in default. There was nothing on which the trial judge was authorized to submit to the jury the question whether \$400 was not the contract price, because the plaintiff, aside from his complaint, admitted it was \$500. No rescission of the contract was proved, and none declared upon; nor was fraud or deceit alleged or proved. The action was brought on the improper theory that \$400 was the contract price, when it was in fact \$500. The proofs entirely failed to prove the cause of action as alleged, and there was a fatal variance with the case alleged and the facts proved. It won't do to allege one thing and prove another. The *allegata* and *probata* must agree. Bouv. Dict. If the contract had been for \$400, the plaintiff, having paid this sum, would have been entitled to his stock as of course, and it would have devolved upon the defendant to show some good excuse for not delivering it. But the purchase price was \$500, and no active duty devolved upon the defendant in respect to the delivery of the stock until the balance of \$100 was paid or tendered, in which case it would have been his duty to have delivered the stock, or been liable to an action for the return of the consideration, or for damages for breach of contract. If the defendant had declared his inability to deliver the stock, no tender of the \$100 would in that case have been necessary, for it would then have become an idle ceremony. But the defendant did not declare his inability to deliver. Excuses were given, according to the plaintiff's evidence, for the delay in non-delivery, but the plaintiff apparently acquiesced in these, for he could have terminated them by a tender of the \$100, if he had made it, accompanied by a demand for the stock. Upon the pleadings and proofs, the complaint ought to have been dismissed; and for the error of the court in refusing to dismiss the same the judgment must be reversed, and a new trial ordered, with costs to abide the event.

FASSBENDER v. WESTERN TRANSIT CO.

(City Court of New York, General Term. October 3, 1889.)

APPEAL—REVIEW—OBJECTIONS NOT RAISED BELOW.

A charge that the burden of proof is on the one alleging negligence will not be reviewed on appeal, where no exception was taken at the time, and the attention of the court was not called to any peculiar features of the case which brought it within any exception to the general rule.

Appeal from trial term.

Action by Jacob Fassbender against the Western Transit Company to recover a balance due on freight transported by plaintiff from place of shipment to Buffalo. Defendant pleaded recoupment for damage to freight, and for storage. Trial by jury, and verdict for plaintiff. From the judgment entered on the verdict defendant appeals.

Argued before MCADAM, C. J., and NEHRBAS and MCGOWN, JJ.

Potter & Potter, for appellant. *Hyland & Zabrtskie*, for respondent.

PER CURIAM. We have examined the elaborate appeal-book and briefs submitted, and are satisfied that the evidence sufficiently supports the verdict rendered by the jury. In the exercise of our discretion we decline to review that portion of the charge of the trial judge (that was not excepted to) wherein he said that the burden of proof was upon the defendant to show that the plaintiff, as carrier, was negligent. *Oil Co. v. Insurance Co.*, 79 N. Y. 506. As a rule, a party charging negligence must prove it, and, if the peculiar features of the case brought it within one of the exceptions to the rule changing the burden of proof, the defendant might, by calling the trial judge's attention to it, have elicited a further charge satisfactorily covering the exception applicable. No such request was made, nor was any exception taken to what the judge did say, and he probably assumed that both parties acquiesced in his view that the general rule controlled. There was evidence that the injury about which the dispute arose was discovered in Chicago, and the plaintiff's duty terminated at Buffalo, so that proving the bad condition of the goods at Chicago did not necessarily imply that the plaintiff was the cause of the injury, so as to throw upon him the burden of proving the contrary. Upon the entire case we are of opinion that substantial justice has been done, and that the judgment appealed from should be affirmed, with costs. All concur.

FREESE v. VEITH.

(City Court of New York, General Term. October 3, 1889.)

EVIDENCE—RELEVANCY AND MATERIALITY.

In an action on a promissory note defendant claimed credits for commissions on beer sold him, of 15 per cent., under contract with plaintiff's agent. Plaintiff alleged that the commissions had been paid. When testifying, the agent was asked whether at the time he ceased collecting from defendant there were any claims by the latter against plaintiff for commissions. It appeared that the agent ceased collecting April 1st; that the transaction continued till July 10th; and that the payments for beer during that time were \$341.20, the commissions on which, under the contract, would have amounted to only \$51.80. Defendant was allowed \$244.50. *Held*, that the question was not immaterial, as the answer might have shown that the commissions had been paid.

Appeal from judgment on report of referee.

Action by Charles Freese against John Veith, on a promissory note. Defendant pleaded counter-claim and set-off. Testimony was taken before a referee, on whose findings judgment was entered for defendant, from which judgment plaintiff appeals.

Argued before MCADAM, C. J., and NEHRBAS and MCGOWN, JJ.

David Bilan, for appellant. *Berger Hoffman*, for respondent.

PER CURIAM. The plaintiff admits that he gave his collector authority to make any arrangements he deemed best to induce the defendant to take his beer. The defendant and his witness swear that the collector agreed to allow the defendant 15 per cent. and a keg of beer as commission on all goods purchased. It was conceded that the amount of beer purchased by the defendant from the plaintiff aggregated \$1,630. Fifteen per cent. on this amounts to \$244.50, and this is the sum the referee allowed to the defendant. From this he deducted \$88.70, received on account for commissions, and \$175.95, the note sued upon, with interest, and gave judgment in favor of the defendant for the balance, \$22.07. The plaintiff claims that he settled the commission from time to time, as bills were paid; but this is denied by the defendant, except as to the \$88.70 credited and allowed by the referee.

It seems to us that the question tried was one of fact, and that the finding of the referee, being supported by evidence, should not be disturbed. The difficulty in the case is presented by the exception at folio 74 of the appeal-book, wherein it appears that the plaintiff asked his collector, while on the stand as a witness, whether at the time he ceased to collect from the defendant there were any claims on the part of the latter against the plaintiff for commissions. This was the point directly in issue. The question, in the form in which it was put, was not objected to, and was excluded solely as "immaterial." This was error. The witness was collector until April, 1886. The transactions continued until July 10, 1886. The payments made after March, 1886, aggregated \$341.20. If this approximately represents the beer sold after March, 1886, the commission thereon, at 15 per cent., would aggregate only \$51.80. The referee allowed the defendant for commissions \$244.50, from which he deducted \$88.70 paid, and in effect gave the defendant a judgment for the difference, \$155.80. If the account for commission had been settled to April, 1886,—and the collector might have so testified,—this amount would not have been due to the defendant. At all events, the evidence offered was not "immaterial." It was relevant to the issue; and, the form of the question not having been objected to, the testimony ought to have been received. While we have sustained the referee in his findings on the facts, we would have decided the case differently upon the evidence, particularly in view of the fact that the note sued upon was given after all the transactions had been closed, and, presumptively, all prior obligations had been paid. *Lake v. Tysen*, 6 N. Y. 461. We put our decision, however, on the error in refusing to admit the testimony of the collector at folio 74, and agree that for this reason the judgment appealed from must be reversed, the order of reference vacated, and a new trial ordered, with costs to the appellant to abide the event.

All concur.

RUDOLPH v. SOUTHERN BENEFICIAL LEAGUE.

(*Supreme Court, Special Term, New York County. July 1, 1889.*)

1. ASSOCIATIONS—POWER OF EXECUTIVE BOARD—INCORPORATION.

The executive board of a voluntary association cannot convert it into a corporation, unless the power is conferred on it by the constitution and by-laws, or by an express resolution of the association.

2. SAME—ELECTIONS—EXTENDING TIME TO VOTE.

When all the voters at an election held by the association were members in good standing, entitled to vote, the fact that the polls were kept open after the time prescribed by the constitution and by-laws will not avoid the election.

3. SAME—ACTION OF COMMITTEE—INJUNCTION.

Where the decision of a committee of a voluntary association, transferring property and affecting pecuniary interests, operates unjustly as to any members, the enforcement of the decision will be restrained.

4. SAME—RATIFICATION.

It is necessary that a meeting to ratify the action of a committee which has exceeded its powers in incorporating a voluntary association be called by competent authority; that the members at large of the association be notified of the meeting and its purpose; and that a majority of the members attend.

5. SAME—USE OF NAME.

Members of a voluntary association, who have incorporated themselves under the name of the association without its consent, may be enjoined from using that name.

Action for an injunction by James J. Rudolph, president of the Southern Beneficial League, against the Southern Beneficial League.

T. McCants Stewart, for plaintiff. *George W. Dease*, (*John A. Grow*, of counsel,) for defendant.

LAWRENCE, J. This action is brought by the plaintiff, as the president of the Southern Beneficial League, against the Southern Beneficial League, to restrain and enjoin the defendant, its officers, servants, etc., from using the name "Southern Beneficial League," and from in any manner interfering with the affairs, proceedings, moneys, funds, or other property of the association, and to recover damages alleged to have been sustained by reason of the alleged unlawful acts of the defendant, and for such other and further relief as may be deemed just and proper. The association represented by the plaintiff is a voluntary association, which was organized on the 16th of May, 1886, and in the preamble to its constitution it is declared that "its object is to perpetuate our love and patriotism for the land of our birth; to provide for the sick, distressed, and indigent brothers who have left the place of their nativity in search of sustenance, education, and progression; to bury them when deceased; to unify our mutual interests as true sons to the manor born; to be true to ourselves and those dependent upon us, while recognizing the brotherhood of man and the fatherhood of God."

From the evidence in the case it appears that on the 23d of May, 1888, a certificate of incorporation was approved by me, as one of the justices of this court, incorporating certain persons under the name of "The Southern Beneficial League," the objects for which said corporation was organized being stated in the certificate to be the same as those for which the voluntary association was formed.

It is claimed that the persons whose incorporation was asked for by the executive committee of the voluntary association had no right to appropriate the name in question, or to become possessed of the funds and property of the association, for the reason that said committee was not authorized by the association to apply for the certificate of incorporation. In the constitution of the voluntary association the executive board is also called the "Executive Committee." The duties of the executive committee are defined by article 5 of the constitution. Section 1 provides that the executive board shall meet regularly prior to the monthly meeting of the league to consider and arrange all matters pertaining to the welfare of the league. Section 2 provides that they shall audit and examine all books, decide upon and authorize all expenditures of the league, in accordance with the instructions received therefrom, and transact all business of importance. Section 3: "They shall also serve as a court of appeals for the league, to which shall be referred for final action all matters of difference that may arise. Seven members shall constitute a quorum." By article 13 of the by-laws of the voluntary association, (section 1,) it is provided that "the executive board shall meet regularly, one week in advance of the regular meeting of the league, to perform its constitutional duties, take in consideration the welfare of the league, and advise such measures as in their judgment will be beneficial to the league." Section 2: "The executive board shall assist the steward in case of emergencies pertaining to his duties, and, during the interim of the league, draw upon the treasurer for

such weekly aid as provided by the constitution and by-laws for the benefit of sick members." By section 1 of article 14 of the by-laws it is provided that, "should a member defraud or in any way or manner wrong the league, he shall, on the charge being proven to the satisfaction of the league, after his case has been investigated by the executive board, be expelled, and forfeit all moneys paid by him into the league." Section 5 of article 15 of the by-laws prescribes the manner of electing the members of the executive board, but does not relate to their powers. The provisions from the constitution and the by-laws to which I have referred are all that I have been able to find relating to or defining the powers of such board. It will be seen that the power to apply for a certificate of incorporation, and to convert the voluntary association into a body politic and corporate, is not among the powers expressly conferred upon the executive board; but it is contended that the association, by resolution, expressly authorized the executive board to make such application.

The evidence upon this subject is contained in the minutes of various meetings of the league, which have been produced before the court, and the question as one of fact comes down to this: Was the power to apply for such certificate ever given to the board by the association, or was the matter of incorporation merely recommitted to it, with directions to await the final orders of the league? It appears from the report which was submitted on the 23d of December, 1887, by the chairman of the executive committee, Dr. Miller, that it was recommended that the incorporation of the league be deferred until May, 1888, for the following reasons: "The persons who are incorporated will have to hold office for one year from date of incorporation, which will bring the incorporate body's election in January, 1889. The election of officers of the league, in accordance with the constitution, comes off first Friday in May, 1888." It was moved and seconded that the report stand approved, all but the part pertaining to the incorporation of the "S. B. L.," and that motion was carried. It was moved further, that the incorporating part of the report be referred back to the "E. Board" for completion. As a substitute to this last motion it was moved that the "E. Board" be relieved "from the duty of incorporating the 'S. B. L.,' and the league appoint a committee to perform the duty of incorporating." This substitute was carried. No committee appears to have been appointed under this resolution. From the minutes of the executive board it appears that the subject of obtaining a certificate of incorporation had been frequently discussed prior to the report to the league and the passage of the resolution to which I have just referred. The passage of the substituted resolution by the league seems to have been regarded by the executive board as a reflection upon it, and on the 30th of December, 1887, it was resolved that the committee tender their resignation, but subsequently, at a meeting held on the 4th of January, 1888, on motion of Mr. Alexander, the executive committee reconsidered their intention to resign in a body. On the 6th of January, 1888, at a meeting of the league, Mr. Alexander read a communication in reference to the incorporation of the "S. B. L." being taken out of the hands of the executive board; also recommended that it be recommitted back to them for completion. The president said: "In order to do this it would be necessary to reconsider the motion that had taken the power of incorporation from them, (the E. Board,) that it may come before the league for debate." It was moved and seconded that said motion be reconsidered, which motion was carried. The minutes also recite that "motion yet stand to be amended, substituted, rescinded, or reaffirmed, and that motion pending is, 'shall the league relieve the executive board of the power of incorporating the league, and appoint a committee to complete the incorporation?'" That pending that motion the meeting adjourned. In the minutes of the meeting of the league held on the 3d of February, 1888, the following appears: "Unfinished business. Motion pending from a former meeting: Shall the league recommit the incorporation

back to the executive committee?" Then follow the words: "On motion, said incorporation was recommitted back to the E. Board for completion." Lines are drawn through these words, and afterwards follows this statement: "On motion, the E. Board were requested to lay the matter of incorporation over until after the next election of officers of the league, and await further orders from the league." It is claimed that the erasure of that portion of the minutes which referred the matter of incorporation back to the executive board for completion was fraudulently made, and that the words "await further orders from the league" were fraudulently inserted.

After very carefully examining the evidence upon this subject, I have reached the conclusion that the statement of Mr. Younger, the secretary, is true, and that the erasures and corrections made in the book were made in obedience to the directions of the league in open meeting. He is corroborated in his statement by several witnesses, among them Messrs. Lattimore, Randolph, Johnson, Rudolph, and Hopewell. Sitting as a juror upon this question of fact, I am of the opinion that the strong preponderance of the evidence supports the truth of the secretary's statement. In the minutes of the meeting of the league held February 24, 1888, it is stated that the minutes of the last regular meeting were read. On motion they were adopted with proper corrections, viz.: "That the committee on incorporation await further orders' be inserted." The executive board reported progress; also requested that the four vacancies in said board be filled. In respect to these minutes it is claimed that the entry: "That the committee on incorporation await further orders' be inserted," was fraudulently made by the secretary. Corroborated, as he is, by the witnesses to whom I have above referred, and impressing me, as he did, by his demeanor upon the stand as one who was telling the truth, I shall accept his statement, notwithstanding the expert testimony which was offered on the part of the defendant. If I am right in my conclusion as to the facts, up to the date of the election of officers, which occurred on the 4th of May, 1888, no power has been vested in the executive board to obtain a certificate of incorporation. The matter had been, after some misunderstanding, recommitted to them, with directions to await the further orders of the league. In a matter of such importance it is incumbent upon the agent who claims the power to bind his alleged principal to show most clearly that he has received such power from his principal. The conversion of this voluntary association into a corporate body was one of the gravest and most serious acts which could be directed to be performed; and those members of the league to whom it is alleged that power was committed, when that power is challenged, must be prepared to prove its existence by the amplest authority. As I understand the evidence in this case, they had no such power, either under the constitution or the by-laws; nor had they on the 23d of May, 1888, received it by the express resolution of the league. It is very much to be regretted that an association formed for the benevolent objects and purposes to which the constitution of this association refers should have become involved in such unfortunate difficulties. It is also much to be regretted that the feelings of the members have become so much excited as to endanger the usefulness of the society. But, looking at this matter from a merely legal stand-point, I am forced to conclude on the testimony that the executive board, in obtaining the certificate of incorporation, exceeded its powers. These views, in the absence of a ratification of the action of the executive committee by the association, would lead necessarily to the granting of a portion of the relief which is demanded in the complaint; but as the question of ratification and other questions were discussed upon the trial, and evidence was given in regard to them, it is proper that those questions should be considered before finally disposing of the case.

The contention of the executive board is that the original plaintiff in this action, Mr. Jarrott, had no standing in court, because he was not legally

electd. It is claimed that the polls were kept open after 11 o'clock, in violation of the constitution, and that the alleged election of Jarrott was therefore null and void. Upon turning to the minutes of the meeting of the league held May 4, 1888, I find that the total vote cast for president was 378, of which Mr. J. W. Alexander received 150 and Mr. T. C. Jarrott 228 votes, thus electing Mr. Jarrott by 78 majority. There is no evidence in the case which shows that those who voted at the election were not all members in good standing, entitled under the constitution, and by-laws of the league to vote, and the mere fact that the polls were kept open after the time prescribed by the constitution and by-laws does not, in my opinion, vitiate the election. I had occasion in the case of *People v. Hosmer*, 2 How. Pr. (N. S.) 472, to examine a somewhat similar question, and I came to the conclusion in that case that a duly-qualified voter who presented himself within the place of registration before the hour of 9 o'clock in the evening, and demanded to be sworn, had a right to be registered, and that the inspectors, although the hour of 9 o'clock had arrived, could not refuse after that hour to register such voter. There is some evidence in this case which it may be claimed tends to show that parties were allowed to vote who came into the room after the hour of 11 o'clock, but it is not of such a character as to convince me that any illegality was committed, or that the election in its result did not express the wishes of the majority of those attending the meeting who were legally entitled to vote. See, also, upon this subject, *People v. Railroad Co.*, 7 Abb. Pr. (N. S.) 265, and *In re Railroad Co.*, 19 Wend. 185.

It is claimed, however, that the executive board declared the election in question to have been illegal, and it is asserted that, as the Southern Beneficial League is a voluntary society, the court ought not to interfere in matters relating to its internal and governmental affairs, because those matters are regulated by its constitution and by-laws. While such is the general principle applicable to cases of this nature, it is also true that the courts ought not to be ousted of their jurisdiction where property rights and pecuniary interests are concerned. And where it is sought by the decision of a board or committee, or an appellate tribunal, in a voluntary association, to transfer property and affect pecuniary interests, the courts will not lend their aid to give effect to the decrees of such a tribunal. See *Austin v. Searing*, 16 N. Y. 112; *Lloyd v. Loaring*, 6 Ves. 773. If the courts will not enforce the decisions of such tribunals in the exercise of their equitable powers, they have the right to restrain the enforcement of such decisions where they will operate harshly and unjustly to any individual member or number of members. See Nibl. Mut. Ben. Soc. § 182 *et seq.*, and cases cited. Further, it is to be observed that in the case of this particular society the constitution and by-laws are entirely silent as to the power of any committee or board to set aside an election. It is true that by section 8 of article 5 of the constitution it is provided that "the executive board shall serve as a court of appeals for the league, to which shall be referred for final action all matters of difference that may arise." This language does not, to my mind, import that the executive board may set aside an election, but relates, it seems to me, rather to questions of difference between members of the society, or between the society itself and any of its members. The construction which is claimed for it would make the executive board, in point of fact, the society, and would permit it, from whim or caprice or other motive, to set aside any election, no matter by how large a majority the candidates at that election might have been chosen. I conclude, therefore, that neither in law nor in fact was the election of the 4th of May, 1888, illegal, and that therefore this action was properly brought in the name of Jarrott, as the president of the voluntary association, and continued in the name of the present plaintiff, who has been elected in the place and stead of Mr. Jarrott.

It is furthermore claimed that the action of the executive board in obtaining the certificate of incorporation was ratified by the league at the meetings which were held on the 31st of May, 1888, and on the 6th of June, 1888, at Grand Union Hall. Inasmuch as these meetings were apparently convened on the assumption that the executive board had the power to nullify the action of the society in the matter of the election, it may well be doubted whether, in any aspect, the action taken thereat could affect the legal status as between the corporation and the voluntary association. I prefer, however, to rest my decision in respect to this branch of the case upon the point that there was no such ratification at either of these meetings as would bind the voluntary association, and so operate as to transfer to the incorporation the property and funds of the voluntary association. The meeting of the 6th of June was characterized by riotous and disorderly proceedings; and it is extremely questionable, upon the evidence presented, whether a majority of those present voted to accept the certificate of incorporation. It is furthermore to be observed in respect to those meetings that they do not seem to have been called under competent authority; nor is it clear that the members at large were notified that such meetings would be held, or of the purposes for which they would be convened. Before it should be decided that there has been a ratification of the certificate of incorporation, the clearest evidence should be presented that the society at large, duly convened, with full knowledge of the object for which the meeting was held, has given its assent to the action of the executive committee. The evidence fails to show that at either of the meetings at which a ratification is claimed to have taken place a majority of the members of the society were present, and, as the burden of proof in this respect is upon the defendant, I must hold that it has failed to make out its case.

Finally, it has been held in the case of *Association v. Munday*, 21 Abb. N. C. 99, that the dissatisfied members of a voluntary association cannot by incorporating themselves deprive the voluntary association of the right of using its own name. It has also been held in the case of *McGlynn v. Post*, 21 Abb. N. C. 97, that an action lies on behalf of an unincorporated association to enjoin a part of its members from procuring the incorporation of a society under the name used by the association. For these reasons I think that the plaintiff is entitled to judgment for an injunction restraining "the defendant, its officers, servants, etc., from in any manner interfering with the affairs, work, doings, proceedings, and moneys of the said association, and from using the name 'Southern Beneficial League,'" and for the costs and disbursements of this action. Let findings and a decree be prepared in accordance with these views, and settled on one day's notice.

KRAFT v. COYKENDALL *et al.*

(*Supreme Court, General Term, Third Department. September 21, 1889.*)

1. CONTRACTS—PROOF.

Plaintiff sought the recovery of money which he alleged he had loaned to a corporation through F., its president. The latter claimed that the money was advanced in pursuance of an agreement to purchase of him a controlling interest in the stock of the corporation, and that plaintiff not being able to raise the required amount, the arrangement was abandoned, and a settlement was had. A receipt in full of all plaintiff's claims against the president was shown. Plaintiff denied that the receipt was given for any part of the money sought to be recovered, but he was not corroborated; and, while F.'s character was impeached, his testimony was corroborated by other witnesses. It also appeared that subsequent to the alleged loan a meeting of the trustees of the corporation was held, at which plaintiff, who was a trustee, was present, and negotiations were entered into by a third party to secure control of the corporation, and pay its debts; that a list of the debts of the corporation was handed to such third party, in which no claim was mentioned as

due to plaintiff; that the latter asserted no such claim; and that the negotiations were completed in reliance upon such list. *Held*, that a judgment for plaintiff could not be sustained.

2 SAME.

At the time of the arrangement entered into between plaintiff and F., the latter had pledged more than one-half of the entire stock of the corporation for debts, and it was part of the arrangement, as F. testified, that he should obtain stock enough to enable him to transfer a majority of it to plaintiff. *Held*, that the stock transfer book was admissible to show the date of the transfer of stock to F., which he alleged he had purchased in pursuance of the agreement.

INGALLS, J., dissenting.

Appeal from judgment on report of referee.

Action by John E. Kraft against Samuel D. Coykendall and others. Judgment was given for plaintiff, and defendants appeal.

Argued before LEARNED, P. J., and LANDON and INGALLS, JJ.

Lawton & Stebbins, for appellants. *Willtam Lounsbery*, for respondent.

LANDON, J. I think this judgment should be reversed upon the facts. The action is to recover \$2,175, alleged by the plaintiff to have been loaned by him in June, July, and August, 1876, to the Freeman Printing & Publishing Association, a corporation of which the defendant Haight was then trustee, and of which the two defendants Coykendall became trustees, October 14, 1876. The defendants failed to file in January, 1877, the report required by the statute, and the plaintiff, having failed upon judgment and execution to collect the amount from the association, seeks recovery of the same in this action as a penalty.

The question at issue is whether the \$2,175 which the plaintiff advanced to one Fowks, who was the president of the association, was advanced on its credit or in pursuance of an undertaking on the part of the plaintiff to buy of Fowks a controlling amount of stock of the association. The plaintiff testified that he advanced the money to Fowks upon the credit of the association, and upon Fowks' request in its behalf. Fowks testified that the association was financially embarrassed. That the plaintiff, representing that he desired to obtain control of it, said he could raise money enough from political and other friends to enable him to do it if Fowks would sell him the stock. This Fowks promised to do, and that the money was advanced to him by plaintiff upon that arrangement. That, the plaintiff not raising money enough, the arrangement was abandoned, and Fowks and the plaintiff settled on the 30th of October, 1876, when the plaintiff gave him the receipt in full, of which the following is a copy:

"RONDOUT, N. Y., Oct. 30th, 1876.

"In consideration of the transfer to me of 5 shares of stock in the Freeman Printing and Publishing Association, and the sale to me of 4 shares in the same, now held by me by power of attorney in blank, and the surrender to me of my note for \$1,850 by Horatio Fowks, I hereby acknowledge full satisfaction of all claims that may be due from said Fowks, of any kind whatsoever, to date.

JOHN E. KRAFTS."

The plaintiff denies that the receipt was given for any part of the \$2,175, but alleges it had reference wholly to other transactions. The plaintiff is not corroborated. Fowks' character is impeached, but his testimony is corroborated by that of S. D. Coykendall and Haight, and by the circumstances. The circumstantial corroboration is very full and conclusive. To present the details of this corroboration would be to summarize the defendants' points,—a labor which we omit. Independently of Fowks' testimony, we think it appears, and should have been found as a fact, that on the 14th day of October, 1876, a meeting of the trustees of the association was held. The plaintiff was then a trustee, and was present. The defendant S. D. Coykendall was not a trustee, but was present at the meeting, and was in negotiation with the trustees to

take control of the association, and pay its debts. The plaintiff's co-trustees, in the presence of the plaintiff, there presented said Coykendall with a list purporting to be a full list of all the debts of the association. No claim of the plaintiff, or debt due from the association to him, was contained in said list, and this the plaintiff well knew, and he did not otherwise make any claim. Said Coykendall, relying upon the truth of said list, completed the negotiation aforesaid, and in pursuance of it the plaintiff and another trustee then resigned, and S. D. Coykendall and his appointee, the defendant George Coykendall, were elected trustees in their places. The plaintiff made no claim to the defendants that the association was indebted to him until after the omission to file the annual report in January, 1877. These facts, which we deem clearly established, estop the plaintiff from asserting now the claim which he suppressed then.

We think the defendant was entitled to read from the stock transfer book of the association the entries therein of the transfer of certain stock from D. S. Hasbrouck to Fowks. The fact was not in dispute that at the time of the arrangement between Fowks and the plaintiff, under which plaintiff undertook to raise and advance money to Fowks, Fowks was the owner of about five-sixths of the entire capital stock; that the association was embarrassed; that Fowks had pledged more than one-half of the entire stock to the defendant S. D. Coykendall, to secure him for loans both to the association and to Fowks. Fowks testified that it was part of his arrangement with the plaintiff that Fowks should obtain stock enough to enable him to transfer the majority of it to plaintiff. Fowks testified that he bought \$1,500 of stock of Hasbrouck, in order to have enough to carry out his arrangement with plaintiff, and also procured a release from Coykendall of some of the stock pledged to him. Fowks, upon his cross-examination, was unable to give the date of the transfer of stock from Hasbrouck to himself, or an exact account of other transfers made about the same time. The defendant, in order to corroborate Fowks, and show the exact dates and transfers, offered to read from the stock transfer book of the association. The offer was overruled, and the evidence excluded. This book was not simply a narrative of the transaction, but was the transaction itself in writing, and hence admissible. Krafts was made a trustee of the association and its general manager, on the 8th day of July, 1876, after he had advanced \$1,525 of the \$2,175 in question. This fact corroborates Fowks' version. The transfer book shows that Hasbrouck transferred \$1,500 of stock to Fowks four days later. Hasbrouck resigned as trustee, to make the vacancy which was filled by the election of the plaintiff. The transfer and its date, the resignation and election, all fitted in with Fowks' version of the arrangement. Other transfers of stock appeared upon the book, consistent with Fowks' version. As a record of the business of the corporation it was presumably known to a trustee and stockholder who had the right of access to the book, and opportunity to examine it. *Blake v. Griswold*, 103 N. Y. 429, 9 N. E. Rep. 434. The judgment is reversed, referee discharged, and a new trial granted; costs to abide the event.

LEARNED, P. J., concurs. INGALLS, J., dissents.

MAHR *et al.* v. BARTLETT *et al.*

(Supreme Court, General Term, First Department. July 9, 1889.)

1. EQUITY—JURISDICTION—CONFLICTING CLAIMS TO INSURANCE POLICY.

A suit in equity may be brought against an insurance company and the claimant under a policy to establish the right of plaintiff, as against the claimant, to whatever may be due on the policy, leaving the liability of the company to be determined in a subsequent action at law.

2. SAME—EFFECT OF DECREE.

A decree that an insurance company shall pay plaintiffs "such moneys as shall be found due and payable under and by virtue of the policy" does not determine that any moneys are due under the policy.

3. ASSIGNMENT—VALIDITY—JURISDICTION OF EQUITY COURT.

Where it appears that a debt owing by a defendant has been assigned to a non-resident co-defendant, who has not appeared, but has been served by publication, the court has jurisdiction to pass on the validity of the assignment.

4. INSURANCE—ASSIGNMENT OF POLICY—PLEDGE.

A policy of insurance is not avoided by an assignment of it as a pledge.

Appeal from special term, New York county.

Action by John C. Mahr and others against Charles H. Bartlett and the Norwich Union Fire Insurance Company. Judgment was rendered for plaintiff, and the insurance company appeals.

Argued before VAN BRUNT, P. J., and CULLEN, J.

F. P. Foster, for appellant. *David Welch*, for respondents.

CULLEN, J. This is an appeal from a judgment in favor of the plaintiffs, entered upon a decision of the special term. The action is a peculiar one, and we have been somewhat at a loss to determine in what character it is to be considered. The plaintiffs claimed to hold a policy of fire insurance, issued by the defendant company in favor of the defendant Bartlett on the latter's stock, as security for a loan made to Bartlett. A loss occurred. Bartlett denied the pledge of the policy to the plaintiffs. This action was thereupon brought, and the relief sought was not to recover the amount of the loss, but to have plaintiffs declared entitled to receive the moneys due on the policy, and to restrain the defendants from paying such moneys to Bartlett or to any one else than the plaintiffs. Bartlett answered, denying the pledge. The company answered, denying knowledge of the pledge, and alleged that one Kelly, of Iowa, was the owner of a paramount assignment from Bartlett. It further answered that the assignment to the plaintiffs violated one of the conditions of the policy, and for this reason asked, as a counter-claim, that the policy be adjudged void. On the company's motion Kelly was made a party defendant. Being a non-resident, he was served by publication, but he never appeared in the action. On the trial the plaintiffs established their claim against Bartlett, and the pledge of the policy, but no proof was given as to the extent of the loss, nor of its adjustment. The court gave the relief prayed for, and from the judgment the defendant insurance company alone has appealed.

It seems settled by authority that to an action on a pledged policy the pledgor, as well as the pledgee, is a necessary party. *Griffey v. Insurance Co.*, 100 N. Y. 417, 3 N. E. Rep. 309, citing *Simson v. Satterlee*, 64 N. Y. 657; *Bard v. Poole*, 12 N. Y. 495. The cases last mentioned were foreclosures of pledged mortgages. In *Bard v. Poole* the reason of the rule is stated to be that the general owner might be able to show the debt had been paid. The plaintiffs, as pledgees, might have maintained a suit at law on the policy, joining the pledgor as plaintiff, or, if the latter refused to become plaintiff, making him a party defendant. As Bartlett denied the pledge, there would have been two entirely independent issues to be tried,—the pledge by Bartlett, and the liability of the company. A pledgor has always the right

to go into equity to foreclose his pledge. The pledge in this case being a chose in action, it should be collected, not sold, to satisfy the debt. *Wheeler v. Newbould*, 16 N. Y. 392. We therefore see no objection to an action in equity, having its purpose merely to establish the right of the plaintiff to recover any amount due on the chose in action, leaving the liability on the chose in action to be determined in a subsequent suit at law. The defendant insurance company raised no objection to the equitable jurisdiction, but, on the contrary, sought affirmative relief in its own behalf in that jurisdiction. We shall therefore treat the action as merely determining the rights to the benefits of the policy, and not as adjudging any liability of the defendant company, except so far as that defendant by its own action in asking affirmative relief put such liability in issue. In this view of the case, it was not necessary to prove upon the trial the extent of the loss or the presentation of proofs of loss.

The principal objection against the judgment below urged by the defendant company is that the court did not acquire jurisdiction of the defendant Kelly, and that therefore the judgment, so far as it restrains Kelly from collecting the insurance moneys, or suing the company therefor, is void. But Kelly does not appeal from the judgment, and the company have no standing to complain of it in this respect, except so far as it may be entitled by a valid judgment to be protected from any claim on Kelly's part. Had the plaintiffs brought a suit at law on the policy, it would not have been a defense to show that Kelly claimed to own the policy. It would have been necessary for the defendant to go further, and show that Kelly did own it, or, at least, that the plaintiff did not. In a proper case the defendant might have an interpleader; but if one of the claimants was beyond the jurisdiction of the court, the defendant would labor under the same embarrassment as in this case, nor do we see how it would be relieved from it. It would have to show not only the foreign claim, but its validity. Any other rule would defeat the enforcement of liability in our courts, where there was a foreign claimant. The policy was not negotiable, and Kelly could not obtain any greater rights to the policy than his assignor Bartlett. The evidence clearly established the pledge of the policy to the plaintiffs, long anterior to the assignment to Kelly, which latter was not until four days after the commencement of this suit. The rights of the plaintiffs are therefore paramount to those of Kelly, and we must assume that it will be so held in Iowa.

It is next claimed that the policy became void by the assignment to the plaintiffs. That assignment was merely as a pledge to secure the payment of a debt. *Grieffey v. Insurance Co.*, *supra*, is conclusive to the effect that such an assignment does not avoid the policy.

Lastly, it is contended that the decree goes beyond the pleadings in awarding absolute judgment against the company on the policy. We do not so construe the decree. It adjudges that the company pay the plaintiffs "such moneys as shall be found due and payable under and by virtue of the policy." It does not determine what moneys, or that any moneys, are due on the policy. It simply adjudges plaintiffs' rights to the policy at whatever value it may be. We think the case properly determined, and that the judgment appealed from should be affirmed, with costs.

VAN BRUNT, C. J., concurs.

SPENCE v. GRISWOLD.¹

(Common Pleas of New York City and County, Special Term. July, 1899.)

MECHANICS' LIENS—PARTIES—SUBSTITUTION.

Where a person against whose name a mechanic's lien is filed, but who is not the owner of the premises, is made sole defendant to a suit to foreclose such lien, plaintiff will not be allowed to substitute the proper parties either under the mechanic's lien act, providing that a lien shall not be invalid because of a mistake in the name of the owner in the notice of claim, or under Code Civil Proc. N. Y. § 452, authorizing the bringing in of new parties whose presence is necessary to the determination of the controversy between the parties to the action.

John Spence sued Wayne Griswold to foreclose a mechanic's lien. It appeared that Griswold, against whose name the lien was filed, was not the owner of the premises, but that the same were owned by Griswold's wife, Anna L., who during the pendency of this action sold them to Mary Hopkins. Plaintiff moves to substitute Anna L. Griswold and Mary Hopkins as defendants in the stead of Wayne Griswold.

H. D. Sedgwick, for plaintiff. *Ira D. Warren*, for defendant.

VAN HOESEN, J. Wayne Griswold is the sole defendant, and he ought not to have been made a party to the action, as he has no interest in the subject-matter, and as no relief can be obtained against him. The plaintiff has sued the wrong party, and he now wishes to sue the right one, but the difficulty is that he is attempting to use this action as a vehicle for making an exchange of defendants. If he had a defendant before the court who was a proper party to the action, he might well ask that other defendants should be brought in when he had shown that their presence was necessary to the determination of the controversy; but there is no way known to our law by which, when a plaintiff has sued the wrong man, he can cure the error by making the right man a supplementary party. This is well settled. *Davis v. Mayor*, 14 N. Y. Y. 506, 527; *Association v. Agricultural Works*, 89 N. Y. 22. The suggestion that the mechanic's lien act provides that a lien shall not be invalid because of a mistake in the name of the owner in the notice of claim, does not aid the plaintiff. The question here is as to the right of the court to strike out the name of one who ought never to have been made a party, and to insert in its stead the name of another person. Code Civil Proc. § 452, does not provide for such a case. It authorizes the bringing in of new parties whose presence is necessary to the determination of a controversy between parties to the action. But there is no controversy between Wayne Griswold and the plaintiff, and the presence of Mrs. Hopkins and Mrs. Griswold is not necessary for the determination of any such controversy. The plaintiff may attempt to bring a new action, but he cannot in this action substitute Mrs. Hopkins and Mrs. Griswold in place of Wayne Griswold.

Motion denied; \$10 costs.

In re KEMMLER.

(Cayuga County Court. October 9, 1899.)

1. HABEAS CORPUS—CONSTITUTIONAL LAW.

Code Civil Proc. N. Y. § 2032, provides that in *habeas corpus* proceedings the prisoner is to be remanded if it appears that he is detained in custody by virtue of the final judgment or decree of a competent tribunal of civil or criminal jurisdiction, and section 2031 provides for his discharge if no lawful cause for his imprisonment is shown. Section 2034 prohibits the court, on the return of the writ, from inquiring into the legality or justice of any judgment or decree specified in section 2032, except as therein stated. *Held*, that upon the return to a writ of *habeas corpus* the court may inquire into the constitutionality of the statute under which the judgment was rendered; for it is without authority, and not the judgment of a competent tribunal, if based upon an unconstitutional statute.

¹From 35 Abb. N. C. 289.

2. SAME—CRUEL AND UNUSUAL PUNISHMENTS—DEATH BY ELECTRICITY.

Laws N. Y. 1888, c. 489, § 5, provides: "The punishment of death must in every case be inflicted by causing to pass through the body of the convict a current of electricity of sufficient intensity to cause death, and the application of such current must be continued until such convict is dead." *Held*, that where a person sentenced to death under this law assails it on *habeas corpus* as contravening the prohibition by the state constitution of cruel and unusual punishments, the burden is on him to prove beyond doubt that such punishment is cruel and unusual in order to overcome the presumption of the constitutionality of the law.

Petition for writ of *habeas corpus*.

W. Bourke Cockran and Charles S. Hatch, for petitioner. *Atty. Gen. Tabor, Dep. Atty. Gen. Poste, Dist. Atty. Quinby, and Dist. Atty. Rich*, for the People.

DAY, J. At a court of oyer and terminer held at Buffalo, N. Y., on the 10th day of May, 1889, in a criminal action wherein the people of the state of New York were plaintiffs, and William Kemmler, otherwise called John Hort, was defendant, he was convicted of murder in the first degree, in that, on or about March 29th of that year, in that city, he killed Matilda Ziegler, *alias* Matilda Hort, from a deliberate and premeditated design to effect her death, and on the 14th day of May aforesaid he was, for his crime, sentenced by said court to suffer death, to be inflicted by the application of electricity, in the Auburn state-prison, or in the yard or inclosure thereto adjoining, on some day in the week commencing June 24, 1889, and in the mean time to be removed to, and until the infliction of such punishment to be kept in, solitary confinement in said prison, pursuant to the provisions of chapter 489 of the Laws of 1888, amending certain sections of the Code of Criminal Procedure relative to the infliction of the death penalty, and to provide means therefor; and on the 16th day of May aforesaid, a warrant commanding his confinement and execution pursuant to said sentence was issued under the hand of the Hon. HENRY A. CHILDS, the justice presiding at said court, and its seal, directed to Charles F. Durston, Esq., agent and warden of said prison; and thereafter, and on the 11th day of June last, upon the petition of Charles S. Hatch, Esq., attorney for the defendant, setting forth the imprisonment and threatened deprivation of the life of the defendant, pursuant to said judgment, and alleging its invalidity, under the constitution of the United States and that of the state of New York, as imposing cruel and unusual punishment, a writ of *habeas corpus* was allowed by the Hon. CHARLES C. DWIGHT, justice of the supreme court, directed to said agent and warden, returnable on the 18th day of the same month before the county judge of Cayuga county, who, by consent, adjourned the proceedings from time to time, till the 26th day of June, when the agent and warden made return to the writ, in substance, that he was such officer, and that he held the defendant by virtue of said judgment and warrant, averring the punishment aforesaid not to be cruel and unusual, and said act of the legislature not to be violative either of the constitution of the state of New York or that of the United States; and this return the defendant controverted, admitting his confinement by said agent and warden by virtue of said judgment and warrant, but alleging their nullity, as contravening the constitutional inhibition against punishments cruel and unusual; and thereupon, also, the defendant, by his counsel, offered to prove "that the infliction of the penalty named in the sentence, that is to say, the passing of an electrical current through the body of the said William Kemmler, is a cruel and unusual punishment within the meaning of the constitution, and that it cannot, therefore, be lawfully inflicted, and to establish the facts upon which the judge can pass, as to the character of the penalty." The attorney general objected, and, the objection being overruled, the appointment of a referee was agreed upon, for the purpose of taking the testimony, and Tracy C. Becker, Esq., was named such referee accordingly, and

he has now made report, transmitting a large amount of testimony taken by him, and argument has been had.

The primary inquiry is whether, in a proceeding like the present, the constitutionality of the statute under which the prisoner is detained can be impeached. By section 2032 of the Code of Civil Procedure it is provided that in *habeas corpus* proceedings the prisoner is to be remanded, if it appears that he is detained in custody by virtue of the final judgment or decree of a competent tribunal of civil or criminal jurisdiction, or by virtue of an execution or other process issued upon such a judgment. By section 2031 the prisoner's discharge is provided for "if no lawful cause for the imprisonment or restraint, or for the continuance thereof, is shown, whether the same was upon a commitment for an actual or supposed criminal matter, or for some other cause;" and by section 2034 the court or judge, upon the return of the writ, is prohibited from inquiring into the legality or justice of any mandate, judgment, decree, or final order specified in section 2032, except as therein stated. The Revised Statutes regulating proceedings on *habeas corpus*, in force before the adoption of the Code, were to the same effect. In *Re Donohue*, 1 Abb. N. C. 1, it was held by the supreme court that on *habeas corpus* the constitutionality of the law under which the prisoner was committed could not be attacked. The reason assigned was that so to do would be to inquire into the legality of the judgment. But the case of *People v. Liscomb*, 60 N. Y. 559, in the court of appeals, must, I think, be regarded as establishing a different doctrine. It was there said that it is no new feature of the law that inferior magistrates may, when thereunto called, sit in judgment on the jurisdiction of the highest courts; that the prohibition of the *habeas corpus* act, forbidding the inquiry by the court or officer into the legality of the previous judgment, decree, or execution, does not and cannot, without nullifying in good measure the provisions of certain sections of the act, take from the court or officer the power, or relieve from the duty of determining whether the process judgment, decree, or execution emanated from a court of competent jurisdiction, and whether the court making the judgment or issuing the process, had the legal and constitutional power to give such judgment, or send forth such process. It simply prohibits the review of the decision of a court of competent jurisdiction. If the record shows that the judgment is not merely erroneous, but such as could not under any circumstances, or upon any state of facts, have been pronounced, the case is not within the exception of the statute, and the applicant must be discharged. As well at the common law as under the statutes, if the party is detained on process, the existence and validity of the process are the only facts in issue, and the right to inquire into the validity of the process is co-extensive with that which is allowed in an action for false imprisonment. If the process is valid on its face, it will be deemed *prima facie* legal, and the prisoner must assume the burden of impeaching its validity by showing want of jurisdiction. Error, irregularity, or want of form is no objection; nor is any defect which may be amended or remedied by the court from which it issues. If there was no legal power to render the judgment or issue the process, there was no competent court, and consequently no judgment or process. All is *coram non iudice*, and void. It will not answer to say that a court having power to give a particular judgment can give any judgment, and that a judgment not authorized by law is merely voidable, and not void. This would be trifling with the law, the liberty of the citizen, and the protection thrown around his person by the bill of rights and the constitution, and creating a judicial despotism. It would be to defeat justice, nullify the writ of *habeas corpus* by the merest technicality and the most artificial process of reasoning. A sentence not warranted by statute is *ultra vires*, and, like every other act, whether judicial or ministerial, done without legal authority, is void. When the judgment is such as could not, under

any circumstances, or upon any state of facts, have been legally pronounced, the prisoner is entitled to be discharged. *People v. Warden*, 100 N. Y. 24, 2 N. E. Rep. 870; *People v. Nash*, 12 Wkly. Dig. 545; *Ex parte Lange*, 18 Wall. 168; *People v. Kelly*, 82 Hun. 536. There is no authority for this judgment and warrant, unless it be found in the law of 1888. I conclude, therefore, that the constitutionality of that law is a proper subject of inquiry on this application; since, if it is unconstitutional, it is no law, and the judgment of the court based upon it was without authority. It was no judgment of a competent tribunal.

The constitution of the United States and that of the state of New York, in language almost identical, provide against cruel and inhuman punishment; but it may be remarked in passing that with the former we have no present concern, as the prohibition therein contained has no reference to punishments inflicted in state courts for crimes against the state, but is addressed solely to the national government, and operates as a restriction on its power. Story, Const. § 1904. But our own state fundamental law is so benignant that not even he who cruelly murders can be cruelly punished. Section 505 of the Code of Criminal Procedure, in force prior to the enactment of 1888, provided that the punishment of death should in every case be inflicted by hanging the convict by the neck until dead, and was almost a literal transcript of the statute which it superseded. 2 Rev. St. p. 659, § 25. By chapter 489 of the Laws of 1888, § 5, that section of the Code of Criminal Procedure was amended so as to read as follows: "The punishment of death must, in every case, be inflicted by causing to pass through the body of the convict a current of electricity of sufficient intensity to cause death; and the application of such current must be continued until such convict is dead." And it is this attempted change in the mode of inflicting the death penalty as punishment for crime that provokes the present controversy, and it is in these circumstances that I am asked to discharge the prisoner from his present detention; it being contended in his behalf that the legislative enactment under consideration provides punishment both cruel and unusual, the infliction whereof may well result in subjecting its unfortunate victim to the most extreme and protracted vigor and subtlety of cruelty and torture; while, on the other hand, it is insisted that the act is one promotive of reform, a step forward and in keeping with the scientific progress of the age; that the application of electricity as proposed will result in the immediate and painless death of the culprit, so that the unsightly and horrifying spectacles which now not infrequently attend executions by hanging will effectually be prevented; that the question is not whether any particular engine provided or to be provided for use in the attempted enforcement of the law will prove successful in operation, whether the continuous or alternating current is better for the purpose, or whether any certain quantity or force of electricity will kill the condemned, except as that force or quantity is limited by ability to generate it. Paradoxical as it may seem, both of these positions are professedly based on grounds of mercy and humanity.

The question of the constitutionality of this law is of importance, for, apart from any other consideration, should it ultimately be held unconstitutional, not only may the condemned possibly escape his desert for adjudicated guilt, but all other persons committing capital crimes since the beginning of the current year may likewise go unpunished, inasmuch as it is expressly provided in section 10 of said chapter that, after it takes effect, a crime punishable by death must be punished according to its provisions, and not otherwise; and it is clear that any penal act hereafter passed to apply to those cases would necessarily and justly be held void, as *ex post facto*. And it is a question of novelty. There is no precedent for guidance or following. It is the pioneer case, and its final decision is awaited with interest, not only in this state, but in other states and countries. In this connection it is noteworthy that the

questionable chapter became law after much more than ordinary consideration and deliberation. The executive had called the attention of the legislature to the subject of the infliction of the death penalty by hanging, suggesting the question of change, and by an act passed in 1886, and amended in 1887, a commission, consisting of gentlemen of recognized standing, ability, and learning, had been appointed to investigate and report the most humane and practical method known to modern science of carrying into effect the sentence of death in capital cases; and, after having made the subject their special care and study, they made report of their proceedings, and the act whose provisions are now criticised was the outcome of their labors and judgment, and met legislative favor and executive approval. And it is against all this that I am now asked to interpose and hold null that result as counter to the constitution.

The question is also one largely of fact. Section 2031 of the Code of Civil Procedure provides that the court or judge before which or whom a prisoner is brought by virtue of a writ of *habeas corpus* must, immediately after the return of the writ, examine into the facts alleged in the return, and into the cause of the imprisonment or restraint of the prisoner, and, as before said, must make a final order to discharge him therefrom, if no lawful cause for the imprisonment or restraint or for the continuance thereof is shown, whether the same was upon a commitment for an actual or supposed criminal matter, or for some other cause. And it was because the burden of satisfying the judicial mind of the cruel and unusual, and therefore unconstitutional, character of the law in question was upon the defendant (*People v. Liscomb, supra*,) and to afford him opportunity to present the facts as he claimed them to be, that, as the better course, the reference was ordered, notwithstanding what was said by EARL, J., in *Re Railroad Co.*, 70 N. Y. 327, to the effect that proof could not be taken for the purpose of showing a statute, valid and regular on its face, to be unconstitutional, because it was considered that this case widely differed from that, inasmuch as in this, as not in that, scientific questions were involved; that an intelligent decision of the question would seem to require that there be furnished to those called upon to decide all the light that scientists, experts, and others having large experience in electrical matters should be able to give, matters which could not be said to be of common knowledge, and concerning which judges could not be supposed to have any better understanding than legislators; and, generally, upon the grounds and for the reasons usually assigned for the admission of so-called expert testimony on ordinary trials of questions of fact; and upon the further consideration that, if the reference should be held, on appeal, to have been rightfully ordered, the testimony would be at hand for use, and otherwise it might be disregarded, and the error would be harmless. It was, however, to be expected, as the result is, that the testimony would prove to be conflicting, and, of necessity, in great degree speculative and hypothetical, for on no person has the experiment yet been tried, and no endeavor to take human life by means of electricity has been made, under the circumstances and conditions, and with the appliances, indicated by scientific knowledge as those most favorable to produce a fatal result.

Although the phrase "cruel and unusual punishments" has a history of 200 years, it is not an easy task to define it. It was said in *Wilkerson v. Utah*, 99 U. S. 130, that "difficulty would attend the effort to define with exactness the extent of the constitutional provision." Courts have rarely been called upon to construe it. Nor is it now at all needful, in the view which I entertain of the present case, and of my duty in regard to it, to attempt any accurate and comprehensive definition. Beyond doubt, many of the methods used for the infliction of the death penalty in other times and countries would to-day and in our land be held illegal. As among these may be mentioned crucifixion, boiling in water, oil, or lead, blowing from cannon's mouth, burning, break-

ing on the wheel, dismemberment, burying alive. But not death itself is a cruel and unusual punishment, nor is death by gunshot or by hanging, though there seems to be an element of cruelty inseparable from any taking of human life as punishment for crime; but it is clearly not against this that the constitutional prohibition is directed. It was held by the supreme court of the United States in the *Wilkerson Case* above cited, that a sentence to death by shooting was not illegal in Utah. Death was the penalty for murder at the common law, and of its infliction, Blackstone said: "If upon judgment to be hanged by the neck till he is dead the criminal be not thoroughly killed, but revives, the sheriff must hang him again; for the former hanging was no execution of the sentence. And if a false tenderness were to be indulged in such cases, a multitude of collusions might ensue. Nay, even while abjurations were in force, such a criminal, so reviving, was not allowed to take sanctuary, and abjure the realm, but his fleeing to sanctuary was held an escape in the officer." 4 Comm. 406. "Any punishment declared by statute for an offense which was punishable in the same way at the common law could not be regarded as cruel or unusual in the constitutional sense." Cooley, Const. Lim. 329. The common-law rule applied in this state when the constitutional provision under consideration was adopted, and long before and after, until the act of 1888 took effect; and no question was made as to the legality of death by hanging. That statute but changed the means whereby to produce death. And can it be said that in this case it has been plainly and beyond doubt established that electricity as a death-dealing agent is likely to prove less quick and sure in operation than the rope? I believe not.

But, back of all other questions mooted on the argument lies another, and it is, what is the duty of courts and judicial officers when called upon to declare, in a case like this, a legislative act void as against the constitution, and by what rule should they be governed? "The power of the state over crimes is committed by the constitution to the legislature, without a definition of any crime, without a description of any punishment to be adopted. * * * It is, then, a power to produce the end by adequate means, a power to establish a criminal code, with competent sanctions, a power to define crimes and prescribe punishments by laws, in the discretion of the legislature." *Barker v. People*, 3 Cow. 705. Every presumption is in favor of the act. *People v. Comstock*, 78 N. Y. 361. Every statute is presumed to be constitutional, and every intendment is in favor of its validity. When a statute is challenged as in conflict with the fundamental law, a clear and substantial conflict must be found to exist to justify its condemnation; but, when found, courts must not hesitate to condemn. The constitution is the voice of the people speaking in their sovereign capacity, and it must be heeded. *In re Railroad Co.*, 70 N. Y. 342; *Warner v. Beers*, 23 Wend. 166. Courts do not sit in review of the discretion of the legislature, or to determine upon the expediency, wisdom, or propriety of legislative action in matters within the powers of the legislature. *People v. Albertson*, 55 N. Y. 54. "It is a solemn act in any case to declare that that body of men to whom the people have committed the sovereign function of making the laws for the commonwealth have deliberately disregarded the limitations imposed upon this delegated authority, and usurped power which the people have been careful to withhold; and it is almost equally so when the act which is adjudged to be unconstitutional appears to be chargeable rather to careless and improvident action or error in judgment than to intentional disregard of obligation. Courts ought never to declare a statute void unless its nullity and invalidity are placed, in their judgment, beyond reasonable doubt. Such a ruling ought not to rest on vague conjecture." Cooley, Const. Lim. 159, 182, 183. The validity of an act is to be presumed until its invalidity is proved beyond a reasonable doubt. *Ogden v. Saunders*, 12 Wheat. 213. The opposition between the constitution and the law should be such that the judge feels a clear

and strong conviction of their incompatibility with each other. *Fletcher v. Peck*, 6 Cranch, 87, 128. A legislative act is not to be declared void upon a mere conflict of interpretation between the legislative and judicial power. Before proceeding to annul by judicial sentence what has been enacted by the law-making power, it should clearly appear that the act cannot be supported by any reasonable intendment or allowable presumption. *People v. Supervisors*, 17 N. Y. 241. The judicial power in declaring an act of the legislature void does not proceed upon the theory that it has superiority over the legislative, or that laws, to be valid, must conform to its notions of wisdom or propriety. The duty and responsibility is upon the courts to decide, when the question is presented to them, whether an act the constitutionality whereof is assailed transgresses the inhibitions of the fundamental law; and, if found so to do, it is no law, and is to be so declared. It is manifest that the duty should be proceeded upon with great caution and hesitation, since one co-ordinate branch of the government—the judicial—is thus asked to determine that another branch—the legislative—has erred. That this should be fearlessly done in a proper case is undoubtedly true, but it is as true that the power is not to be exercised unless the necessity for so doing is clearly apparent.

All the authorities are, I believe, to the effect that in a doubtful case a statute assailed as unconstitutional should not be judicially declared so to be. The grounds and reasonableness of the rule appear in the citations already made, and no reason is perceived why it should not have application in every case, whether civil or criminal, in whatever manner the doubt may arise, and whether it be on a question of law or fact. And all of these considerations apply with peculiar force when the question is presented on a motion before a single judicial officer. *Macomber v. Mayor*, 17 Abb. Pr. 35. In several jurisdictions it is the constant practice not to allow a case involving a constitutional question to be heard until every member of the court is present. Indeed, in one state (Rhode Island) it is provided by statute that whenever the constitutionality of any legislative act is called in question in any other than the supreme court, such court shall rule the act to be constitutional, and, if its judgment is rendered against the party raising the question, it shall certify the cause to the supreme court for its decision. A writer has recently said that "a deference to the opinion of the legislature, and a modest consciousness of one's liability to err, would naturally prevent a single judge from declaring an act to be unconstitutional, except in a clear case." It was declared in *Re Donohue, supra*, that it is safe and better, when a judgment has been rendered, which an express statute authorizes, to leave its review to the regular and more deliberate process of the higher courts than to make of every court and officer authorized to issue this writ a tribunal summarily to decide such grave and momentous questions.

From the foregoing authorities three rules appear, and they are: *First*, that to every legislative act there attaches a presumption of constitutionality, and the burden of showing it to be unconstitutional is upon him who assails it; *second*, that no such act should be annulled by the judiciary as opposed to the fundamental law in a doubtful case; and, *third*, that when a constitutional question arises before a single magistrate he should only declare the law invalid when his duty so to do is entirely clear, and that in any case of grave import he is justified, if not by propriety required, to leave the matter to the deliberation and determination of appellate tribunals. Applying, then, these principles to the present case, the questions are whether the prisoner has overcome that presumption; whether he has made it appear, by proofs or otherwise, beyond doubt, that the statute of 1888, in regard to the infliction of the death penalty, provides a cruel and unusual, and therefore unconstitutional, punishment; and that a force of electricity sufficient to kill any human subject with celerity and certainty when scientifically applied, cannot be gen-

erated. In my judgment these questions must be answered negatively. The utmost that can justly be said in his favor is that there is diversity of opinion on the principal question. Before the statute can rightfully be abrogated, there should be judicial knowledge that the punishment therein provided is cruel and unusual. There is no such knowledge, and his contention fails. In any case, the gravity of the matter demands that it be left to the courts for their determination. If these views are correct, the claim so earnestly and eloquently pressed by the learned counsel for the prisoner to the effect that, if it is doubtful that electricity will kill at once, and therefore painlessly, in every instance in which it may be administered to take the life of a culprit as condign punishment, his client should be discharged, as there is and can be no valid law in this state whereby even a convicted murderer can be delivered over to an experiment, and that to hold otherwise is a rule against at least the spirit of the constitution, cannot be here allowed.

I do not discuss the testimony, for, in view of the understanding that the matter is to engage the attention of the intermediate and ultimate courts of appeal, it would be a work of supererogation so to do, inexpedient and profitless.

There is still another factor in the case, to which no allusion has been made, but which has no little weight in determining my course of action, and it is that the court of over and terminer, in passing sentence upon the defendant, by implication at least must be deemed to have pronounced in favor of the constitutionality of the disputed law. Judicial comity and a decent respect for that tribunal would seem to require that I follow that ruling. *People v. Fancher*, 2 Hun, 226, 235.

Having thus sufficiently indicated the grounds of my decision, consideration of the other questions suggested on the argument is unnecessary. An order will be made remanding the prisoner.

RONALD v. MUTUAL RESERVE FUND LIFE ASS'N.¹

(Circuit Court, New York County. April, 1889.)

1. LIFE INSURANCE—CONDITIONS OF POLICY—ACCEPTANCE OF OVERDUE PREMIUM.

A policy of life insurance stipulated that upon a failure to pay any premium when due the policy should become void. There was such a failure, and, upon a tender of the amount thereafter, the insurer accepted it, and gave a receipt, which stated that it was accepted upon condition that the insured was of temperate habits, and in as good health as when the policy was issued; otherwise the payment and receipt and the original policy should be void. Such acceptance and receipt were provided for in the constitution and by-laws of the insurance company, which were made a part of the original contract of insurance. *Held*, that such payment and receipt constituted a new contract, by which insured was bound, whether he read the receipt or not; and, it appearing that he was not at that time of temperate habits, nor in as good health as when he was originally insured, the receipt was of no effect, and the policy remained void.

2. SAME—WAIVER.

The insurer does not waive such forfeiture by requesting proofs of the death of the insured and giving instructions in regard thereto.

Agnes Ronald sued upon a certificate of insurance issued by the Mutual Reserve Fund Life Association upon the life of George Ronald, and made payable to plaintiff, which contained a stipulation that upon failure to make the payments thereon when they were due the certificate should be void, and all payments made thereon be forfeited to the company. One Hardenburg presented to defendant on September 26, 1884, the amount due August 21, 1884, for which defendant gave a receipt, stating that, the payment not having been made when it was due, it was accepted only on condition that the insured was at that time in as good health as when the certificate was issued; otherwise such certificate should be void, as therein provided. It was not, at the time of payment, disclosed to defendant that the insured was ill. He died

¹From 23 Abb. N. C. 271.

the next day, and defendant, upon being informed of his death, delivered to plaintiff's representative blank proofs of loss, with instructions as to filling up the same, and subsequently resisted payment on the ground of forfeiture, whereupon plaintiff brought this action. At the close of plaintiff's case defendant moved to dismiss the complaint.

Charles B. Meyer, for plaintiff. *Taylor & Parker*, for defendant.

BARRETT, J. By the failure to pay the dues, \$10, on or about August 21, 1884, the policy became null and void, and all previous payments made thereon were forfeited to the company. The contract of life insurance was then at an end. This was the situation when Mr. Hardenburg went to the office of the company on September 26, 1884, and paid the \$10 so due on the 21st of the preceding August. Mr. Hardenburg was bound to know that a reinstatement of the policy on September 26th depended upon the will of the company, and accordingly he should have examined the instrument given to him at the time of payment. Such instrument could not, in the nature of things, have been understood to be an ordinary receipt of dues. It would naturally express the terms of waiver, or the conditions of reinstatement, or whatever else was essential to give renewed life to the old policy or to create a new contract. The receipting clerk had no authority in law to contract afresh for the company, except upon the terms and conditions to which he was limited by the instructions given to him pursuant to the constitution and by-laws, which constitution and by-laws were made part and parcel of the original contract of insurance. Accordingly the payment of the \$10, and the delivery, contemporaneously therewith, of the receipt, together constitute the fresh contract. The insured thereupon became bound by the terms and conditions embodied in the receipt, and he so became bound whether he or Mr. Hardenburg read it or not. He was as much bound by the terms of the receipt as he was by the terms of the original policy. Now, this is a conditional receipt. It specifies the fact that the time for the payment of the dues had expired; that such payment was tendered after the expiration of the contract period; and that the receipt was given and accepted upon certain conditions. These conditions read as follows: "That the said member is now living, and of temperate habits, and is in as good health as when originally received as a member of the association under the certificate." And it further provides that otherwise the payment and the receipt and the original certificate should be null and void. It is clear, upon the evidence, that the insured was not, on September 26, 1884, a man of temperate habits, nor in as good health as when originally received as a member of the association under the certificate. It would seem to follow, therefore, that the payment at that date of the August dues was null and void, and that the original certificate received no fresh life. It remained just as it was at the time of payment,—null and void.

It is also contended that there was a waiver resulting from the request for proofs of death, and from the instructions given in regard to them. In my judgment this request and these instructions did not amount to a waiver of an existing forfeiture. The plaintiff was not thereby injured to her prejudice. Her rights depended upon the facts existing at the death of her husband. The question of waiver might subsequently arise with respect to conditions as to the proofs of death, but the insurer is not bound to abandon its claim of forfeiture if it would insist upon a compliance with the terms of the policy as to the proof of death. The case of *Insurance Co. v. Stevenson*, 8 Ins. Law J. 922, is in point. The principle which I have stated was there maintained by the court of appeals of Kentucky, and the learned editor of the journal adds a very copious and instructive note, citing all the cases upon the subject, and making the following clear and correct statement of the results: "If the mere demand for formal proof of loss, with a knowledge that the insured had violated a policy stipulation, were liable to operate as a waiver of such stipula-

tion, it would follow that the insurer must surrender his right to demand such proof, if he would avail himself of the breach; or, at any rate, he could not safely demand proof without at the same time being careful to notify the insured of his proposed future line of defense." There are cases which hold that there may possibly be an election between the claim of forfeiture, because of acts antecedent to the death of the insured and the demand for proofs of death, but those are cases where, upon the facts, there was a clear election; cases where the plaintiff had been subjected to expensive and burdensome efforts to supply elaborate details in the proofs required by the company; cases where the facts otherwise indicated clear abandonment of any position inconsistent with the demand for such elaborate and expensive proofs. It is needless to say that nothing of the kind exists in the present case. The defendant asked for nothing more than the ordinary proofs required under ordinary circumstances, and just as soon as it was clear to the mind of those who were acting for the company that there was no just claim against it, owing to the facts existing at the time of death, that position was promptly asserted. For these reasons I feel constrained to dismiss the complaint; and I think it fair to say that it is one of those cases where a well-regulated company, desiring to do justice to all those whom it represents, might fairly, and with a due sense of equity, make the defense it has here. It certainly was a very peculiar case, where, after a policy had lapsed for over a month, and the insured was within one day of his death,—suffering from fatty degeneration of the heart,—the dues have been tendered without full disclosure of the then existing facts. I do not suppose there is the slightest doubt that if the whole truth had been known to the officers of the company they would scarcely have felt justified in acceding to the request that the insurance be kept alive. I am satisfied, therefore, that in this case the application of the rules of law do not work any real hardship. Complaint dismissed.

RHINELANDER v. MARTIN.¹

(City Court of New York, Special Term. April, 1889.)

ACTIONS FOR RENT—COUNTER-CLAIMS.

In an action for rent, the answer admitted the rent due, but set up as a counter-claim that, notwithstanding a covenant for quiet enjoyment in the lease, plaintiff brought suit against defendant for the forfeiture of the lease, without probable cause; that defendant recovered judgment; and that by reason of the action defendant was greatly damaged in his business. *Held*, that such counter-claim was demurrable, because it alleged neither a breach of the covenant, nor a malicious prosecution, and also because it sounded in tort, and did not arise out of plaintiff's cause of action.

On motion to amend demurrer, and on demurrer to counter-claim.

Action for rent by William Rhinelander against George S. Martin. Defendant answering, admitted the rent due, and counter-claimed. Plaintiff demurred to the counter-claim on the ground that it did not state facts sufficient to constitute a cause of action, and subsequently moved for leave to amend the demurrer by adding that the counter-claim was not one of those specified in Code Civil Proc. N. Y. § 501. Both the motion to amend and the demurrer now come on to be heard.

Young & Vanplanck, for plaintiff. *John F. McIntyre*, for defendant.

NEHRBAS, J. The motion to amend the demurrer was returnable April 1st, inst. The papers thereon, together with the pleadings upon the demurrer, were submitted to me on the 8th inst. The motion to amend was referred to me by the chief justice, on the ground that I had the question of the demurrer under advisement. This was not strictly correct. No papers whatever had been submitted to me, nor were they handed in until the 8th inst., as stated. I therefore consider the motion to amend and the argument of

¹ From 23 Abb. N. C. 267.

the demurrer as presented to me at the same time for decision. The motion to amend the demurrer will be granted; but, in view of the fact that it was made so late, terms must, under the circumstances, be imposed. Twenty-five dollars will be awarded to the defendant upon the motion, to be offset to the costs on the demurrer in plaintiff's favor, as will hereafter appear. Now, as to the demurrer as amended. This action is for rent under a written lease. The answer admits the rent, but sets up as a counter-claim that, although the lease contained a covenant for quiet enjoyment, the plaintiff, without probable cause, brought a suit against the defendant in the superior court of this city for the forfeiture of the lease, based on certain violations of covenants contained in the lease; that the suit was prosecuted without just cause, a trial had, and judgment duly rendered thereon in favor of the defendant; "that by reason of the institution of said action, and its unjust prosecution, the defendant, who at the time of the commencement thereof was carrying on a large livery and boarding stable business in the said premises, lost many of his customers and boarders, who withdrew their trade and patronage from him, lest their property should be disturbed summarily on the premises; and that by reason thereof defendant suffered great loss, and was compelled to defend said action at great expense, to his damage \$1,500."

Plaintiff demurs to the counter-claim "on the ground that the counter-claim does not state facts sufficient to constitute a cause of action, and that the counter-claim is not of the character specified in section 501 of the Code of Civil Procedure." The counter-claim is based either on a breach of the covenant of quiet enjoyment, or else it is for malicious prosecution, and in neither case will it constitute a legal defense to the plaintiff's action. In order to maintain an action for breach of the covenant for quiet enjoyment, an actual eviction, accompanied by a complete ouster from the premises, must be alleged and proved. *Edgerton v. Page*, 20 N. Y. 281; *Whitbeck v. Cook*, 15 Johns. 483; *Boreel v. Lawton*, 90 N. Y. 297. If the landlord's acts be of such a character as to justify the tenant in leaving and abandoning the premises, the latter has been evicted; but a tenant cannot remain in possession, and claim an eviction. See cases cited. No eviction is alleged, hence none can be proven, and, if the counter-claim be intended to be claimed for a breach of the covenant referred to, it must fail. If the counter-claim is for malicious prosecution, it is fatally defective in failing to allege malice, the essential feature in that class of actions. Want of probable cause is not sufficient. Malice must be alleged and proven. *Besson v. Southard*, 10 N. Y. 236. Besides, such a counter-claim is open to the further objection that it sounds in tort, and cannot be set up as against an action upon contract. Nor does the counter-claim arise out of the plaintiff's cause of action. Surely a malicious prosecution has nothing to do with the lease sued upon. It is in no way connected with the subject of the action. The acts complained of must amount to a breach of the landlord's contract of letting, to be the subject of a counter-claim arising out of the same transaction. *Edgerton v. Page*, *supra*; *Walker v. Shoemaker*, 4 Hun, 581; *Mayor, etc., v. Steam-Ship Co.*, 12 Abb. Pr. 300.

The answer discloses no valid defense to plaintiff's action for rent. There must therefore be judgment in favor of the plaintiff upon the demurrer, with costs.

BOWMAN v. PERINE.

(City Court of New York, Special Term. July, 1889.)

ATTACHMENT—CITY COURT OF NEW YORK.

Where it appears that defendant owns a store in New York city, which is managed by her husband under a power of attorney, that she seldom visits the store, and there is no evidence that she takes an active part in the business, she is within Code Civil Proc. N. Y. § 3169, subd. 3, which provides for an attachment in the city

court of New York where defendant, "being a resident of the state, is not a resident of the city of New York, and has not an office within that city where he regularly transacts business in person."

On motion to vacate an attachment.

Sampter & Bloomfield, for plaintiff. *Charles A. B. Pratt*, for defendant.

HOLME, J. The attachment in this case was granted upon an affidavit showing that the defendant is not a resident of the city of New York, and has not an office within that city where she regularly transacts business in person. She moves to vacate the attachment on the ground that, while it is true she is not a resident of this city, it is not true that she has not an office here where she regularly transacts business in person. It appears from the affidavits presented that she has a place of business at No. 350 Canal street, New York, where she is engaged in woolen business. Her husband, prior to 1884, had been engaged in the same business, and in that year failed. Since then he has been acting as the agent of the defendant, conducting the woolen business for her, at the store in Canal street, under a power of attorney, which authorizes him to sign checks and notes for her, without indicating that he signed as attorney, but with power to use her name the same as she might use it herself. The affidavits of the clerks engaged in that business show that she occasionally comes to the store. One of them, examined before a referee, was not willing to swear that he had seen her at the store half a dozen times last January. He could say that he had seen her at the store four times talking with her husband. It nowhere appears from any affidavit presented by the defendant that she took an active part in the business, that she bought or sold, or gave directions to the clerks, or attended to any department of the business. She resides at Staten island, and appears to have given to her husband the same control of the business as he would have had if it were his own. The affidavit presented by the plaintiff in opposition to the motion was that notwithstanding the plaintiff had been at the store three or four times a week, and lately every day, he never saw the defendant there.

I am constrained to take the view of this case that, although the defendant owns the business at No. 350 Canal street, it cannot be stated that she regularly transacts business there in person. I think that something more than having a business in New York under the control and management of an agent is meant by the language of the Code, providing that if a person against whose property an attachment is sought has an office for the regular transaction of business in person an attachment cannot be granted.¹ If that or anything similar was intended it could have been so stated in plain language, free from doubt. If, for instance, it was intended to be sufficient that a defendant had a place of business here, where business was done for him on his capital, and at his risk, by persons employed by him, although he resided elsewhere himself, and never, or but seldom, personally appears at his place of business, it is obvious that the Code would not require that it should appear that the defendant has not an office for the regular transaction of business in person, but it should be sufficient that he did business here through others, though in his own name. I do not see how it can be reasonably maintained on the affidavits on this motion that the defendant regularly transacts business in person in New York, unless by giving to the Code a meaning which cannot be implied from its language. The language is plain, and I, at any rate, do not see any reason for distorting it into a meaning beyond its literal sense; nor have I been able to find an authority that would justify me in holding that under the circumstances here presented the property of the defendant is not liable to attachment. Motion denied, with costs.

¹ Section 8169, subd. 3, provides that an attachment may be granted in the city court of New York where "the defendant, being a resident of the state, is not a resident of the city of New York, and has not an office within that city where he regularly transacts business in person."

LONGUEMARE v. NICHOLS.

(City Court of New York, Special Term. July, 1889.)

1. EXECUTION—AGAINST THE PERSON—RELEASE OF DEBTOR.

Under Code Civil Proc. N. Y. § 572, amended by Laws 1886, c. 672, providing that, if plaintiff neglects to issue execution against the person of defendant within 10 days after the return of the execution against his property, or whenever it shall appear to the satisfaction of the court that plaintiff is endeavoring to use the mandate for the purpose of oppressing the debtor, defendant must, on his application, with notice to plaintiff, be discharged from custody, if already taken under the mandate; or, if he has not yet been imprisoned, be relieved from imprisonment by virtue of the mandate, unless reasonable cause is shown why the application should not be granted, failure to issue execution is not excused by the engagements of plaintiff's attorney.

2. SAME—SUPERSEDEAS—APPLICATION.

Under the statute, as amended, defendant need not be in actual custody in order to make the application for *supersedeas* of the execution.

3. SAME—DISCRETION OF COURT.

The power of the court being discretionary, the application for *supersedeas* will be denied when it appears that the adverse party has been vigilant in asserting his rights.

4. SAME—RIGHT TO SUPERSEDEAS.

The remedy is afforded by the statute to defendant alone, and relief cannot be granted to a plaintiff against whom costs have been decreed.

On motion for the issue of a *supersedeas*, and for a perpetual stay of execution.

George Bell, for plaintiff. *Henry S. Snow*, for defendant.

HOLME, J. This is a motion for the issue of a *supersedeas*, and for an order perpetually staying the issue or enforcement of an execution against the person of plaintiff in this action. The ground of the motion is that an execution against the body of plaintiff, against whom a judgment for costs in an action of tort was recovered by defendant, was not issued within 10 days after the return, unsatisfied, of an execution against plaintiff's property. The defendant resists the motion on various grounds; admits that the execution was not issued within the 10 days, but seeks to excuse his delay by various reasons, among others by the engagements of his attorney, which last reason is of no avail, (*Kelly v. Brownlow*, 54 N. Y. Super. Ct. 129;) and claims that the granting or denial of the motion is, under section 572 of the Code of Civil Procedure, discretionary.

The objection of the defendant that plaintiff cannot make the motion because he is not in actual custody is, since the amendment of section 572, in the year 1886,¹ without merit, as it is no longer required that the party applying for the *supersedeas* must be in actual custody. *De Silva v. Holden*, 11 Civil Proc.

¹ Section 572, amended by Laws 1886, c. 672: "Except in a case where an order of arrest can be granted only by the court, if the plaintiff unreasonably delays the trial of the action, or neglects to enter judgment therein, within ten days after it is in his power to do so, or neglects to issue execution against the person of the defendant within ten days after the return of the execution against the property, and, in any event, neglects to issue the same within three months after the entry of the judgment, or whenever it shall appear to the satisfaction of the court that the plaintiff in an action, or a judgment creditor in a judgment, delays the enforcement of his remedies therein, by collusion, or for the purpose of allowing the debtor to remain in prison under the mandate in any other action, before the issuing of the mandate in favor of such creditor, so as to produce a continued and extended imprisonment by virtue of the separate mandates in the different actions, the defendant must, upon his application, made upon notice to the plaintiff, be discharged from custody, if he has already been taken under the mandate against him in such action; or, if he has not yet been imprisoned therein, be relieved from imprisonment by virtue of such mandate, by the court in which the action was commenced, unless reasonable cause is shown why the application should not be granted. A defendant discharged as prescribed in this section shall not be arrested upon an execution issued upon the judgment in the action."

R. 404, 54 N. Y. Super. Ct. 1; *Gellar v. Baer*, 12 Civil Proc. R. 493; *Refining Co. v. Taussig*, 44 Hun, 475.

It has been held in numerous cases that the requirements of section 572, Code Civil Proc., as amended in 1886, requiring the discharge of a judgment debtor, are not peremptory, but that they authorize a denial of the application for a *supersedeas*, whenever reasonable cause is shown why such application should not be granted. *De Silva v. Holden*, *supra*; *Hobbs v. Bashford*, 45 Hun, 592; *Kelly v. Brownlow*, 54 N. Y. Super. Ct. 129; *People v. Grant*, 13 Civil Proc. R. 209. The test is, has the judgment creditor been vigilant? If he has, the court has discretion to deny the application for a *supersedeas*. In my opinion, in the present case, no neglect has been shown by the judgment creditor which would entitle the plaintiff to the relief asked for.

In addition to this, there is a ground, not touched upon by either party upon the motion, which seems to me to be fatal to the application. An examination of section 572, under which this motion is made, shows that it applies only to cases where the neglect or delay is that of the plaintiff. It will be seen that every provision of the section has reference to the discharge of the defendant, and does not apply to the case of the plaintiff, against whose body an execution has been issued by defendant. If this reading of the section is correct, the plaintiff cannot succeed in the present application. The motion must be denied.

TIMLIN v. STANDARD OIL Co. et al.

(Supreme Court, General Term, Third Department. September 21, 1889.)

1. NEGLIGENCE—DANGEROUS PREMISES—LIABILITY UNDER LEASE.

Both the lessor and the lessee are liable for injuries caused by the fall of the demised building, if it was obviously unsafe at the time of the execution of the lease; and the lessee's liability is not affected by the fact that he did not covenant with the lessor to make substantial repairs.

2. SAME—KNOWLEDGE OF LESSOR.

The refusal of the court to charge that the occupation of a part of the building by the lessor is not ground for recovery against him for injuries received from another part occupied by the lessee, is not prejudicial to the lessor when the jury has been instructed that he is not liable unless he knew the building to be unsafe at the time of making the lease.

3. SAME—INSTRUCTIONS—HARMLESS ERROR.

When the jury has been so instructed, it is harmless error to refuse to charge that a notice of the dangerous condition of the building, given after the making of the lease, is immaterial.

Appeal from circuit court, Albany county.

Action by Mary Timlin, as administratrix of John Timlin, deceased, against the Standard Oil Company, the Acme Oil Company, Elijah W. Murphy, and Orlando P. Liscomb. Judgment was rendered for plaintiff, and defendants appeal. The plaintiff complained that John Timlin, her husband and intestate, was, on the 12th day of September, 1885, killed by the falling of a brick wall upon him; that the fall of the wall was due to the negligence of the defendants. The testimony tended to show that the portion of the wall which fell was the easterly brick wall of a one-story shed standing along-side and about six feet westerly of the westernmost tracks of the Delaware & Hudson Canal Company's railroad in the city of Albany. The wall was 11 feet high, 1 foot thick, 111 feet long, and had been built 40 years before; and at the time of its fall, and for years prior thereto, portions of it had been noticeably in a dangerous condition. The shed was the property of the New York Central & Hudson River Railroad Company. On September 12, 1885, John Timlin, then in the employ of the Delaware & Hudson Canal Company, was engaged in driving spikes along the rails of the canal company's track nearest the wall, when a large portion of it suddenly fell, and killed him. The portion which fell was 34 feet 6 inches long at its base, and 47 feet 6 inches long at

its top. In July, 1884, the defendant the Standard Oil Company procured a lease of the shed in the name of the defendant the Acme Oil Company for five years, subject to termination by the railroad company by giving a written notice of sixty days. The Standard Oil Company was the owner of the majority of the stock of the Acme Oil Company, and the lease was for the benefit of the Standard Oil Company. It was stipulated that the liability of the Standard Oil Company was the same as if the lease had been to it. The Standard Oil Company occupied a portion of the shed, but not the portion directly opposite the place where Timlin was killed. The defendants Murphy & Liscomb had been under-tenants of a part of the shed of Strain & Reynolds for a number of years prior to 1884. Strain & Reynolds were tenants of the New York Central Railroad Company, and also agents of the Standard Oil Company, and Murphy & Liscomb continued as tenants nominally under Strain & Reynolds, but really under the Standard Oil Company, at the time the wall fell. Their lease was renewed on the 1st of May of each year. They occupied that part of the shed the wall of which killed Timlin. Their lease was subject to the same termination as that to the Acme Oil Company. Strain & Reynolds, as agents of the Standard Oil Company, occupied the portion of the shed not leased to Murphy & Liscomb. The court charged the jury that if the wall was a nuisance as against the adjoining owner at the time the Acme Oil Company became the lessee of the premises in 1884, and continued in that condition until it fell, all the defendants were liable, provided the jury should find that Timlin was free from contributory negligence.

Argued before LEARNED, P. J., and LANDON and INGALLS, JJ.

M. Hale, for appellants the Standard and Acme Oil Companies. *N. C. Moak*, for appellants Murphy & Liscomb. *E. Countryman*, for respondent.

LANDON, J. The jury found that the deceased was rightfully at work at the place where the wall fell upon him, and was free from negligence. The court charged the jury that if the wall was a nuisance as against the adjoining owner at the time the Acme Oil Company became the lessee of the premises in 1884, and continued in that condition until it fell, all the defendants were liable. The court defined the sense in which it employed the term "nuisance" as follows: A man has no right to maintain a building which is inherently weak and in a ruined condition, and liable to fall and do injury to the adjoining owner or the public. Such a building is a private nuisance to those owning property adjoining it, and, if it falls and inflicts injury upon any one lawfully in its vicinity, the owner is liable for all the consequences. The court further said, in substance, that no recovery could be had against the Acme Company, unless the wall was in an apparently ruinous condition when it leased it from the railroad company, or against the Standard Company, unless it was dangerous before it renewed its lease to Murphy & Liscomb, in May, 1885. The charge was sufficiently favorable to the defendants. A private nuisance is defined in *Swords v. Edgar*, 59 N. Y. 34, as "anything unlawfully or tortiously done to the hurt or annoyance of the person, as well as the lands, tenements, and hereditaments of another." The gist of the action is negligence, and whether by wrongful act or wrongful omission is not material in this case. The defendants are liable if they owed a duty to the plaintiff's intestate respecting this wall, which they failed to perform, and because of such failure the wall fell and killed him. That duty was, the moment they discovered the wall to be dangerous, to cease maintaining it in that condition, or contributing to such maintenance by act or by omission to act, they possessing the power of remedial action. The defendant the Acme Oil Company was the immediate lessee of the owner. The Standard Oil Company assumed control under the Acme Oil Company's lease, and has ever since occupied a portion of the building. What relations these two companies sustain to each other does not clearly appear. The Standard

Oil Company admits that it is the real owner of the lease, and has been since its date; and it stipulates that its liability is the same as if it was named lessee in the lease. But no assignment or lease is shown. The admission of the Standard Oil Company is effective against itself, but not exculpatory of the actual lessee, whose agent or partner it may be, for aught that appears. The Acme Oil Company took the lease in its own name, and then permitted the Standard Company to control the premises thenceforth. The transaction implies a co-operation of the two companies, in which one is the lessee for the benefit of the other. Murphy & Liscomb are under-tenants of the Standard Oil Company. They had long been in possession of the part of the premises from which the wall fell, and their lease was renewed in the May previous to the accident in September, 1885. The deceased was not a party to any of these leases, and the plaintiff only examines them in order to ascertain who was maintaining the wall at the date of its fall, and whether several leases were executed after its dangerous condition existed and was manifest. If the wall was really and apparently in a dangerous condition when one defendant leased it, or the dangerous part of it, to the others, then the case stands in this wise: that, notwithstanding the dangerous condition of the wall, the defendant the lessor undertook to prolong the receipt of rent for it, and the defendants the lessees undertook to prolong its profitable occupancy, and neither took any precaution to prevent its doing injury to the innocent. Clearly they thus maintained the dangerous structure, and prolonged the continuance of it as a peril. They did this for gain, in reckless disregard of the rule *sic utere tuo ut alienum non ledas*, and of their duty to those to whom the structure was a peril. The landlords, the oil companies, in such case, are liable for the reason stated in *Swords v. Edgar*, 59 N. Y. 28, and also in the main case upon which their counsel rely, *Edwards v. Railroad Co.*, 98 N. Y. 245, and as cited from *Nelson v. Brewery Co.*, L. R. 2 C. P. Div. 811, because they were guilty of misfeasance in letting the premises in a ruinous condition. In *Swords v. Edgar* the deceased was killed by the fall of a pier on which he was engaged in unloading a vessel. The pier was private property, but devoted to the use of those having proper occasion to go upon it. It was in an unsafe condition when the defendant leased it to the tenant; and the lease contained a covenant that the tenant should keep the pier in repair. The landlord was held liable. The quasi public use of the pier amounted to a license to the deceased to engage in his work there. Surely, in the present case, the canal company, whose servant the plaintiff's intestate was, needed no license from the defendants to work upon his employer's premises. *Todd v. Flight*, 9 C. B. (N. S.) 377, is cited with approval in *Swords v. Edgar*. It was there held that the owner of premises who lets them to a tenant in a dangerous condition, who permits them to remain so until by reason of want of reparation they fall upon and injure the house of an adjoining owner, is liable to an action. *Davenport v. Ruckman*, 37 N. Y. 568, is to the like effect.

In this case the Acme Oil Company is the lessor or assignor of the Standard Company, and the latter the lessor of the other defendants. The case in this respect is like *Clancy v. Byrne*, 56 N. Y. 129, in which the defendant, who was the immediate lessee of the owner, sublet the premises, without himself ever taking possession. There the defendant escaped liability because it did not appear that the premises were in an unsafe condition when he sublet them. The Acme Company was not in possession. Neither was the defendant in *Clancy v. Byrne*, but his liability was tested by the condition of the premises when he passed their possession to his under-tenant. The case cited holds that the Acme Company cannot escape liability because of its non-possession if the premises were a nuisance when it allowed the Standard Company to take possession in its stead. It cannot close its eyes to the condition of the premises and claim that its self-imposed blindness re-

lieves it from duty. It is by its acts and its negligence a co-contributor with the Standard Company. The Standard Oil Company, by its stipulation, consents that its liability is to be determined in like manner as if it were named as a lessee in the lease to the Acme Company. Whether co-lessee with the Acme Company or sole lessee, its liability is established by the cases cited. Within the cases above cited the defendants Murphy & Liscomb, as the actual occupants of the premises and constant maintainers of the dangerous structure, are liable. *Irvine v. Wood*, 51 N. Y. 224. Murphy & Liscomb urge that, as they had not covenanted to make substantial repairs, they are not liable for the omission. That may be so between themselves and their landlord, but their liability to the plaintiff is because they continued a nuisance until it killed the deceased. *Wasmer v. Railroad Co.*, 80 N. Y. 212.

The Standard Oil Company requested the court to charge the jury that the occupation of a portion of the building by the company at the time the wall fell was not a ground of recovery against it. The court declined to charge as requested.

The theory upon which the trial court submitted the case to the jury made the liability of this defendant to depend upon the question whether this wall was a nuisance at the date of the removal of this defendant's lease to Murphy & Liscomb, in May previous to the accident. This was distinctly stated in the charges, and was repeated after the denial of the request now under consideration. Assuming that this request might have been properly granted, we cannot think that its denial in any way prejudiced this defendant's case. This defendant's possession was the same after as before this renewal. The previous possession was evidence of its knowledge at the date of the renewal. The possession continued to the date of the accident; but as the court explicitly instructed that the defendant's liability depended upon the facts at the date of the renewal, we do not think we ought to hold that the mere denial of this request was an instruction that its previous and subsequent explicit instructions were not to govern the jury.

The refusal of the request to charge the jury that the notice given by the policeman to the foreman of the agents of the Standard Oil Company, shortly before the accident, of the condition of the wall, was entirely immaterial upon the question of the Standard Oil Company's liability, is urged as error. These agents were the persons in possession in behalf of the company, before the renewal of the lease as well as afterwards. If oral or written notice had been necessary to establish the liability of this company, then the defendant would have reason to complain of this particular notice. But the case was tried and submitted to the jury upon the question whether the defendant had had ocular notice; in other words, whether its agents in the building daily for years had not seen the patent defect in this wall. The rule undoubtedly is that where one hires or buys land upon which there is an existing nuisance, which may prove injurious to others, notice of it ought to be brought to him, before suit will lie against him. This notice may be given by others or acquired by himself. The manner of it is not important, if the facts justify the inference that he acquired it. Where the nuisance is not obvious,—as, where a culvert constructed by his predecessor in title is too small to pass the high waters of a freshet,—the grantee, in the absence of notice received from others or through his own observation, has been excused in the first instance. *Stone Road v. Railroad Co.*, 51 N. Y. 573. So, in the case of an overhanging gutter. *Haggerty v. Thomson*, 45 Hun, 398. Also in a case of a conductor on the front of his house, not used by him, through which the water from his neighbor's roof discharged upon the sidewalk and formed ice. *Wenzlick v. McCotter*, 87 N. Y. 122. But if he had made or repaired it the case would be different, for he would be an active participant and upholder. Actual notice, however acquired, is enough to charge him. *Brown v. Railroad Co.*, 12 N. Y. 486; *Irvine v. Wood*, 51 N.

Y. 225; *Swords v. Edgar*, 59 N. Y. 39; *Wasmer v. Railroad Co.*, 80 N. Y. 212.

The court instructed the jury that no recovery could be had against this defendant unless it knew, or ought to have known, or had notice, before the 1st of May, 1885, that the wall was in a dangerous condition. In view of this charge and of the evidence of opportunity to acquire notice, the refusal to charge that the notice given by the policeman after that date was immaterial could not be expected to prejudice the defendant. We have examined all the other exceptions, and find none require a reversal. Judgment affirmed, with costs. All concur.

BENSON v. TOWNSEND *et al.*¹

(*Supreme Court, General Term, Second Department. September, 1889.*)

1. TRIAL—REQUEST TO DIRECT VERDICT.

When a party asks the direction of the verdict in his favor, and on a denial requests the submission of only one fact to the jury, he submits the determination of all other facts involved to the court.

2. SAME—SUBMISSION TO JURY.

The refusal of a request to submit a single question of fact to a jury is not erroneous, unless a finding of that fact in the party's favor would conclusively determine his right to a verdict.

3. DEED—DESCRIPTION—LAND ON TIDE-WATER.

The owner of land on a bay conveyed an acre at the end of the tract nearest the bay, described as follows: "Beginning * * * by the beach, running * * * along the beach to," etc. In the general description of the tract it was bounded "easterly by the said beach." The grantee was given the privilege of a road from the middle of the front of the lot to the bay, and also half the drift coming on shore in front of the lot, and all the other privileges of the beach were reserved by the grantor, who bound himself not to build any house in front of the lot. The courses and distances would not carry the boundary to high-water mark. *Held*, that the beach did not pass by the deed.

4. ACTION TO QUIET TITLE—DISMISSAL.

In an action to determine the right to land, when plaintiff fails to prove possession or title, his complaint should be dismissed, and a general verdict should not be found in favor of defendant, unless he has established his own title.

Appeal from circuit court, Richmond county.

Action by Constantine W. Benson against Henry D. Townsend and others. Judgment was rendered for defendants, and plaintiff appeals.

McFarland, Boardman & Platt, for appellant. *George J. Greenfield, Winson & Marsh*, and *George S. Scofield*, for respondents.

CULLEN, J. This is an action, brought under the statute, to determine claims to real property. The complaint alleged possession in the plaintiff and his grantors of the premises described in the complaint for more than three years. The answers of the defendants put in issue the possession of the plaintiff or his grantors, and set up title in themselves. At the close of the plaintiff's case the defendants asked for a dismissal of the complaint upon the ground that the plaintiff had failed to prove an actual possession of the land in controversy. This application was denied. At the close of the evidence both parties moved for a direction of the verdict. The defendants' request was granted, and a verdict directed in their favor. The plaintiff then asked to go to the jury on the question whether in 1807 there was a strip of upland between the lot of Perrine (plaintiff's remote grantor) and the waters of the bay. This request was denied. Judgment was entered upon the verdict, and from that judgment this appeal was taken.

As the plaintiff asked a direction of the verdict in his own favor, and upon a denial requested the submission of only one fact to the jury, it submitted the determination of all questions involved save that one to the court. *Kirts*

¹ Modifying 4 N. Y. Supp. 860.

v. *Peck*, 113 N. Y. 222, 21 N. E. Rep. 130. It is therefore only necessary for us upon this appeal to decide—*First*, whether the evidence adduced on the trial would have justified a verdict for the defendants; and, *second*, whether a finding of the disputed question of fact in plaintiff's favor would have conclusively determined his right to the verdict. The lands in dispute are a narrow tract of shore or beach lands between the bluff and the waters of the New York bay and a tract of land under water adjacent to and in front of such strip. The common source of the title of both parties is concededly Margaretta Cripps and Elisha, her husband. Prior to the year 1795 these persons owned a farm, which included the premises in question, extending down to high-water mark. In 1805, Cripps and his wife conveyed to Cornelius Perrine one acre of land. It is through this conveyance that the plaintiff traces his title, and it is as to its construction that the principal question in this case arises. This deed conveys a plot "beginning at the north corner of a smoke-house now standing by the beach, running north, 55° west, 2 chains 75 links, along the beach, to the line between the lands and salt meadows of said Cripps and Cornelius Corsen;" thence by various courses to the place of beginning; "bounded northerly by the meadow of Cornelius Corsen, southerly and westerly by other land of said Cripps, and easterly by the beach." After this description and the ordinary covenants as to title, follows this covenant: "And it is further covenanted and agreed by and between the parties to these presents that it may and shall be lawful to and for the said party of the second part to have the privilege of a road from the middle of the front of said acre lot of 20 feet broad down to the bay or water, to take off or put on whatever he sees fit, without incumbering the road or shore; and also to allow the said party of the second part, his heirs and assigns, one-half the profit arising from the drift that comes on the shore in front of said lot, and to pass and re-pass to get the said drift, and no other right of the beach or shore; and the said party of the first part, for himself, his heirs and assigns, doth further covenant that they will not build any house in front of said lot. All other privileges of said beach and shore the said party of the first part doth reserve to himself and to his heirs and assigns." The plaintiff contends that this description carried the grant to high-water mark on the bay. The judge at circuit held to the contrary. We think that ruling was correct. We think it not possible to distinguish in principle this case from that of *People v. Jones*, 112 N. Y. 597, 20 N. E. Rep. 577. The question in the case cited, as in the present one, was whether the grant extended to the water or not. In the description then before the court the boundary ran to the beach, and thence in a line at right angles to the previous course. In this deed the boundary begins by the beach, and runs along the beach. This description, it must be conceded, much better supports a claim to extend to high-water mark than that in the other case. But the decisive point on the interpretation of the deed was held by the court of appeals to be the grant of the easement in the beach, which was deemed inconsistent with a previous grant of the beach. In this respect the deed before us is far stronger than that in *People v. Jones*. The grantor gives a road 20 feet wide over the beach to the bay, and half of the drift that may be cast on the shore. He covenants not to build in front of the granted premises, and expressly reserves all other privileges of the beach or shore to himself. This is plainly inconsistent with the claim that the grant extended to the water. The evidence shows that a bluff rises some distance from the high-water mark; this distance varying from time to time as the water makes inroads on the shore or recedes. Such a strip between a bluff and the water is commonly called the "beach." That term in the deed can therefore be well satisfied by giving it its ordinary, instead of its technical, legal interpretation, when it is palpable that such was the signification intended. This construction is further supported by the fact that exact dimensions of the plot were given, and that the dimensions of the plot as occupied

under the grant do not extend to the water. Though the plaintiff failed to show title, this would not authorize the verdict in favor of the defendants, for, the plaintiff's possession being proved, the defendants were bound to show a paramount title.

The examination of the deed to Perrine has shown that there remained in Cripps, after that conveyance, a strip of land between the acre lot and the waters of the bay. The defendants trace their title by a regular chain from Cripps, and if they have shown succession to all that was held and possessed by the Crippses, their title is established. The plaintiff assails but one link in that chain. After the death of Cripps and wife their heirs brought proceedings for the partition of their property, and a sale was held. It is contended that the deed on such sale did not convey the lands in dispute. The petition by which the proceedings were instituted avers that the parties are tenants in common of a certain farm in Southfield, whereof Elisha Cripps died seised, "bounded easterly by the bay or narrows, southerly by land of John Seguine, westerly by land of Richard Silve, and northerly by land of Cornelius Perrine and Cornelius Corsen, containing twenty-five acres, more or less." The commissioners reported that they had been appointed to make partition of "the farm of which Elisha Cripps died seised," and that partition could not be made without prejudice to the interests of the parties. On this an order for sale was made. The deed from the commissioners recites the petition for the partition of "the farm of which Elisha Cripps and Margaretta, his wife, died seised, bounded," etc.; the proceedings thereon; the sale and the confirmation; and then grants and conveys the right and title of the parties to the proceedings "to the premises last above described." Plaintiff claims that this description excludes the strip between the Perrine lot and the bay. We think not. The lands sold were the farm of which the Crippses died seised. This should be construed to pass the whole farm, unless the boundaries subsequently mentioned necessarily exclude any part of it. The boundaries named are subject to criticism as to technical accuracy in either view that may be taken as to the extent of the grant. But the inaccuracy is greater if we suppose the beach strip to be excluded. In such case the ordinary and natural way would be to bound the premises on the east by lands of Perrine and the bay. But the sole easterly boundary given is the bay or narrows. This boundary is correct if the beach strip is included, but incorrect if it be excluded. The boundaries named, therefore, do not tend to limit the previous general description of the farm of which the Crippses died seised. Hence we think the defendants established their title to the upland.

We do not see how the question on which the plaintiff asked to go to the jury would have affected the result at which we have arrived. If in 1807 the upland in front of the Perrine lot had entirely disappeared, when it was again restored the title of the former owner would attach. *Mulry v. Norton*, 100 N. Y. 424, 3 N. E. Rep. 581. Complaint is made as to the boundaries of the upland given in the judgment. There was no request to submit this question to the jury. The boundaries are those fixed by the map of the water grant to plaintiff's grantor, and their correctness is established by the evidence of the surveyor, Mr. Root.

The verdict directed was a general one in favor of the defendants. The judgment entered thereon was not only for the recovery of upland, but declared that the grant from the state of the land under water was void. Assuming that the grant to Cook was void in such a sense that it might be attacked collaterally, as we believe to be the law, still the defendants were not in a position to attack it. In an action of this character, if the plaintiff fails to prove possession, the defendants may have the complaint dismissed; but to have a judgment in their favor they must prove their own title. The want of title in the plaintiff is not sufficient for that purpose. The defendants, having obtained no grant from the state of the lands under water, have no

title to such lands. The title still remains in the state. The provisions of the judgment in this respect were unauthorized. The direction of a general verdict in favor of the defendants was probably erroneous for the same reasons. But no question of the kind seems to have been raised on the trial. After the refusal of the request for the direction of a general verdict in his favor, no request was made by plaintiff for a direction as to the land under water. We also think that the plaintiff had failed to prove such possession of the land under water as would warrant the maintenance of the action, and that the complaint should have been dismissed as to such lands. As no exception raises the exact point as to defendants' lack of title to the land under water, we do not feel compelled to reverse the judgment and order a new trial upon that ground. The rights of all parties will be preserved by reversing the portion of the judgment relative to the lands under water, and dismissing the complaint as to such lands. The remainder of the judgment should be affirmed, without costs of this appeal to either party.

In re TOWN BOARD OF LLOYD.

(*Supreme Court, Special Term, Albany County. October 15, 1889.*)

TOWNS—TOWN BOARD—MANDAMUS.

Under Laws N. Y. 1869, c. 855, amended by Laws 1874, c. 260, providing that the town board shall meet on the first Monday of September, to determine what amount, if any, shall be borrowed on the credit of the town, and for what roads or bridges such amount shall be borrowed or appropriated, an adjournment of the board without determining the amount is equivalent to a refusal—which is within their discretion—to borrow any amount, and they cannot be compelled by *mandamus* to meet and come to a formal conclusion.

On application for a peremptory *mandamus*.

D. W. Ostrander, for petitioners. *A. D. Lent*, for town board. *S. G. Carpenter*, for highway commissioner.

LEARNED, P. J. On the application of Daniel J. Donaldson and others to the commissioner of highways, in January, 1889, for the laying out of a new highway, such proceedings were had that such new highway was laid out by the order of the commissioner in February, 1889, and subsequently the owners of the land through which the road was to run released the same. Whether the proceedings were in all respects regular I need not say at present.

At a meeting of the town board, July 27, 1889, the commissioner of highways was authorized to advertise for proposals for building the road. On the first Monday (the 2d) of September, 1889, there was a meeting of the town board, viz., the supervisor, the town-clerk, four justices, and the commissioner of highways. The bids for building the highway were opened by the commissioner of highways at the meeting. One of the residents of the town urged that the board make an appropriation to build said road. One of the board opposed, claiming that the former proceedings were void, and that the board could not legally vote the funds. The meeting then adjourned, without taking any action. The original applicants for the laying out of the road now apply for a peremptory *mandamus* to require the town board to convene and determine what amount, if any, shall be borrowed on the credit of said town to build said road. This motion came on to be heard on the last Tuesday of September. The full examination of the case was not completed by the court until after the 7th of October.

The motion is made to compel action under chapter 855, Laws 1869, as amended by chapter 260, Laws 1874. The first section requires the town officers aforesaid—sometimes called the “town board”—to meet on the first Monday of September, to determine what amount, if any, shall be borrowed on the credit of the town for the purposes mentioned in that section, and for what roads or bridges such amount shall be borrowed or appropriated. The

previous part of the section authorizes the boards of supervisors to authorize the supervisor of any town, with the consent of the commissioner of highways, justices, and town-clerk, to borrow on the credit of the town such money as they may deem necessary, among other things, to build a road. Another provision of the section is that the board may adjourn, but no meeting shall be held subsequent to the first Monday of October. This provision would seem to prevent the court from granting the writ, since that day has passed. But I think there are other objections. The board is not required to borrow any money. They are to determine what amount, if any, shall be borrowed. Now, it is true that there are certain cases where the court will by *mandamus* compel a board to act, without directing how it should act. And it is probably in this view that this motion is made. The petitioners desire that the board should act in some way, and not merely neglect to act. When, however, the statute permits the board to determine what amount, if any, shall be borrowed, and the board does not determine to borrow any, this appears to be a refusal to borrow. And this refusal is within their discretion. They may think it advisable that the town should not borrow, but that any needed money should be raised by tax. Borrowing money is not the only, nor is it the best, way of making public improvements. I do not think that the statute requires the town board to borrow the money needed, even if they are of the opinion that the road has been legally laid out. The general rule is that towns should pay by tax in every year the proper expenses incurred, or to be incurred, within the year. And while the provisions of this statute may be occasionally useful where an unusually large expenditure is required, the court cannot compel the town board, against its own judgment, to run the town into a bonded debt. Chapter 615, Laws 1857, seems to give the commissioner of highways the opportunity to bring before the town-meeting the necessity of a larger sum of money. Should the town raise the money, the need of a loan will not exist. Of course I express no opinion as to the desirableness of the proposed highway, or as to the regularity and legality of the proceedings to open it. The motion for a peremptory *mandamus* is denied, with \$10 costs.

PORTER v. SEWALL SAFETY CAR-HEATING CO.

AMERICAN LIGHTING CO. v. SAME.

(*Supreme Court, Special Term, New York County. August 5, 1889.*)

FOREIGN CORPORATIONS—SERVICE OF PROCESS.

Under Code Civil Proc. N. Y. § 432, subd. 3, providing that in the absence of the principal officers of a foreign corporation service may be made on a managing agent "within the state," service on the general manager of a foreign corporation, while within the state temporarily, and not performing the duties of his office, is sufficient.

At chambers. On motion to set aside service of summons.

John S. Moulton, for plaintiffs. *James McKeen*, for defendant.

O'BRIEN, J. The service of the summons in both of the above-entitled actions was made upon the vice-president and manager of a foreign corporation, while he was visiting at Saratoga, which it is claimed is void under section 432 of the Code, for the reason that he was not temporarily or permanently performing the functions of vice-president or general manager within the state. The contention presented is to be determined by the construction or meaning of the words "within the state," as found at the end of subdivision 3 of said section. The first subdivision of section 432 of the Code, relating to service upon a foreign corporation, provides that it must be made by delivering a copy thereof, within the state, to the president, treasurer, or secretary. If such officer cannot be found, and the corporation has property within the state, or the cause of action arose therein, service must be made by delivering

a copy of the summons to the cashier and director, or a managing agent of the corporation within the state.

It is claimed that the words "within the state," as used in this subdivision 3, must be upon persons thus designated, who are performing the functions of their office within the state. In this construction I do not concur, for the reasons that it will be noticed that the words "within the state" are used in the paragraph preceding subdivision 1 of section 432, and in fact throughout the section, so as to relate, not to the person, but to the place where the service is to be made. The case of *Pope v. Car Co.*, 87 N. Y. 137, decides that it is not needful that the officer served should be here in his official capacity, or engaged in the business of the corporation. *Hiller v. Railroad Co.*, 70 N. Y. 223, states that "as a general rule, any service will be deemed sufficient which renders it reasonably probable that the party proceeded against will be apprised of the action against him, and have an opportunity to defend." It being conceded for the purposes of this motion that the cause of action arose within the state, and service having been made upon one of the officers designated by subdivision 3, within the state, and my conclusion being that the words "within the state" relate to the place where the service should be made, the motions to set aside the service in these actions must be denied.

BROKAW v. CULVER *et al.*¹

(*Supreme Court, Special Term, New York County. July, 1889.*)

EXAMINATION OF PARTY BEFORE TRIAL—SERVICE OF ORDER.

When a copy of an order for examination of defendant before trial has not been served on him but on his attorney, the order will not be vacated, since he cannot be compelled to attend or be punished for non-attendance, but his examination may be taken if he does appear.

At chambers. On motion to vacate order for examination.

Action by Isaac V. Brokaw against Delos E. Culver, Ann L. Culver, and Benjamin B. Kirkland, to recover damages for the alleged fraud of the defendants in inducing the plaintiff to purchase alleged worthless securities. The plaintiff obtained an order for the examination of the defendants, for the purpose of enabling the plaintiff to frame his complaint. The defendant Delos E. Culver was not personally served with the copy of the order. The motion to vacate the order as to him was made upon that ground; and as to the other defendants, on the ground of lack of necessity and materiality of the examination.

Philip Carpenter, for plaintiff. *Clarke & Culver*, for defendants Delos E. Culver and Benjamin B. Kirkland. *Appleton L. Clark*, for defendant Ann L. Culver.

O'BRIEN, J. As to defendant Delos E. Culver, no copy of the order and the papers upon which the same was granted having been served upon him, if he should not appear, his attendance cannot be compelled. In this connection, I am inclined to the view expressed in *Riddle v. Cram*, 3 Abb. N. C. 117, note, that service upon the attorney alone furnishes the court with no authority to compel the defendant's attendance by attachment, or to punish him for his non-attendance. No necessity exists for setting aside the order, therefore, as to Culver. If he should appear, his examination can be taken. If he should neglect or refuse to appear, an order for his examination must be served personally upon him.

As to the other defendants, I am of opinion that the papers disclosed sufficient grounds to warrant an examination, which, however, in view of the character of the alleged cause of action, should be restricted to such matters as are material and necessary. The motion to vacate the order as to defendants Kirkland and Ann L. Culver is denied, the examination to be limited to

¹From 23 Abb. N. C. 224.

the following queries, namely: *First*, to show whether or not the plaintiffs were original subscribers to the securities, or whether the same at that time were the property of the defendants; *second*, the facts as to the contracts between the construction company and the railway company, and the relation of the defendants thereto; *third*, as to whether the money paid by plaintiffs for the bonds were applied to the construction of the road, or were retained by them.

Ordered accordingly.

HARBECK v. PUPIN *et al.*¹

(*Supreme Court, Special Term, New York County. June, 1889.*)

EQUITY—INADEQUATE REMEDY AT LAW—PARTNERSHIP.

In an action in equity on a partnership note against the estate of a deceased partner, a complaint, alleging that judgment has been confessed by all members of the firm except the deceased partner, that after its dissolution two members were released, under Code Civil Proc. N. Y. § 1942, providing that a member of a firm after its dissolution may make a composition with a creditor, without releasing the other partners, and that execution against the only other surviving partner has been returned unsatisfied, and he is totally insolvent, shows that plaintiff has exhausted his remedy at law, and presents a sufficient case in equity.

Action by Henry Harbeck against Sarah Catharine Pupin and others, executors of one Agate, to charge his estate with a debt of a copartnership of which he was a member on a promissory note made by the copartnership before his death. The complaint alleged the making of the note; the entry of a judgment by confession in favor of the plaintiff and against the members of the firm except Agate; the issue of an execution on the judgment; and the return of the same unsatisfied. That on March 13, 1886, the said copartnership having previously been dissolved, Grainger and Battershall, two of the partners, made a separate composition with the plaintiff, and paid on account of the judgment the sum of \$3,000, and the plaintiff executed to said compounding debtors a release under seal, whereby the plaintiff released the said debtors of and from all individual liability, claim, and demand whatever for or in respect to the said indebtedness existing by virtue of the said judgment, that being the only indebtedness or liability incurred by the said Grainger and Battershall to the plaintiff by reason of their connection with the said copartnership. That said release contained no clause stating in terms that the said Harbeck released the said Grainger and Battershall from all liability incurred by reason of their connection with the partnership. The complaint further alleges that Whitaker, the remaining partner at the time of the said confession of judgment, and at the time of the death of said Agate, was, and ever since has been, and is now, wholly insolvent, and unable to pay his debts, or to pay the balance upon said promissory note, and that the amount due on the said note could not be collected from said Whitaker by legal proceedings or process. There was no allegation in the complaint that the defendants Battershall and Grainger were insolvent, or that the defendant had exhausted his legal remedy as against them, there being no allegation that the execution on the confessed judgment had been issued to the counties in which said judgment debtors resided. Defendants demurred for insufficiency.

Richards & Brown, for plaintiff. *George C. Holt*, for defendants.

INGRAHAM, J. It is clear that the complaint is demurrable on the ground that the plaintiff has not alleged that the legal remedies against the surviving partners have been exhausted, unless the allegations of the complaint bring the case within section 1942 of the Code. By that section the joint debtor may make a separate composition with his creditors as therein prescribed. Such a composition discharges the debtor making it, and him only. A member of a partnership cannot thus compound for a partnership debt until the partnership is dissolved by consent, or otherwise. In that case the instru-

¹ From 28 Abb. N. C. 190.

ment must release or exonerate him from all liability incurred by reason of his connection with the partnership. I think the release, as pleaded, is sufficient, under section 1942 of the Code referred to. It does not in that section provide that the instrument must contain a clause releasing or exonerating the debtor from all liability incurred by reason of his connection with the partnership, but that the instrument must, as matter of fact, so release or exonerate the debtor; but when it is alleged that there was but one obligation upon which the joint debtors were liable to the creditor, and that there was no other liability to the creditor incurred by reason of the debtor's connection with the partnership, and the instrument releases him from all liability for and in respect to the said indebtedness, the legal effect of the instrument is that the compounding debtor is released or exonerated from all liability incurred by reason of his connection with the copartnership, and such release does not, under the provisions of the section, impair the creditor's right of action against any other joint debtor. After that release was executed, the plaintiff had a demand against Whitaker and Agate, but, in consequence of the release, had lost his right of action against the other members of the firm. Agate died. By his death, at common law, the plaintiff lost his right to proceed against Agate's estate. The remedy at law could only be had against the survivor, and this was irrespective of the question whether there was, at the time of the death of the joint debtor, joint property owned by the debtors which vested in the survivor.

The plaintiff's case then stood thus: he had his legal remedy against Whitaker for the collection of his debt, but he had also a lien in equity upon the estate of the deceased debtor. Courts of equity, however, would not entertain an action against the estate of the deceased partner where there was an adequate legal remedy by which full redress could be obtained; hence it followed, to enable a creditor to collect his debt in equity from the estate of the deceased joint debtor, he must show that he could not collect it by a proceeding at law against the survivor. It was sufficient for this purpose to aver and prove the insolvency of the survivor. *Pope v. Cole*, 55 N. Y. 127. In that case it was held that, although the executor proved that the survivor had property of the firm from which, had the sheriff discovered it, the execution might have been satisfied, the plaintiff was entitled to recover from the estate of the deceased partner, because the plaintiff was not in fault for the failure of the sheriff to discover the property. They had done all that was required of them when they delivered the execution to the sheriff. It was also held that where the plaintiff could prove the insolvency of the survivor, and thus show that he had no legal remedy for the collection of his debt against him, he may proceed to enforce payment from the estate of the deceased partner, or other joint debtor, without bringing an action against the survivor, or that he must exhaust his legal remedy against the survivor and then proceed against the estate of the deceased debtor.

The plaintiff alleges in this action that both of the conditions required by the case last cited, as a condition of the maintenance of this action, exist. He alleges that the execution upon the judgment against Whitaker was issued to the sheriff of the city and county of New York, where Whitaker resided, and was returned unsatisfied, and that Whitaker was, at the time of the confession of judgment, and at the time of the death of Agate, and ever since has been, and now is, totally insolvent, and unable to pay his debts, or to pay the balance due upon the said promissory note. These allegations show that the plaintiff has no legal remedy; for, by the release, he has lost his remedy against Grainger and Battershall, and Whitaker is insolvent. He is, therefore, entitled to maintain his action in equity to charge the estate of the deceased partner with the payment of the debt. The entry of the judgment on the confession was not a bar, by express provision of the Code, to an action against all the joint debtors upon the same demand. Plaintiff could, therefore, prior to

the death of Agate, have commenced an action against the joint debtors. Agate being dead, he can maintain his action against his estate on showing that he has no remedy at law against the survivors, and this the complaint alleges. I think, therefore, the demurrer must be overruled, and judgment ordered for plaintiff, with costs, with leave to defendant to withdraw the demurrer, and answer on payment of costs.

COCKEFAIR v. COCKEFAIR.¹

(*Supreme Court, Special Term, New York County. July, 1889.*)

DIVORCE—FAILURE TO PAY COSTS—CONTEMPT.

Code Civil Proc. N. Y. § 1773, provides that when the husband, in a proceeding for a divorce, fails to pay any money required to be paid by an order, and it appears to the court that payment cannot be enforced by execution, sequestration, or resorting to his security, he may be punished for contempt. *Held* that, in the absence of affidavits showing that payment cannot be enforced by the other means, the husband will not be punished for contempt in failing to pay costs decreed against him.

At chambers. On motion to punish defendant for contempt.

Action for a divorce by Margaret J. Cockefair against William F. Cockefair. Plaintiff recovered, and a judgment was entered against defendant for costs, which he failed to pay. Plaintiff now moves to punish defendant for contempt.

Charles E. Lansing, for plaintiff. *Howe & Hummel*, for defendant.

O'BRIEN, J. Section 1772 of the Code provides that where a husband fails to give security, or to make payments required by the terms of a judgment or order, or to pay any sum of money which he is required to pay by an order as prescribed in section 1769 of this act, the court may cause his personal property to be sequestered. Section 1769 provides that final judgment may award costs in favor of or against either party, and an execution may be issued for the collection thereof, as in an ordinary case, or direct the costs to be paid out of any property sequestered, or otherwise in the power of the court. Section 1773¹ determines when and under what circumstances default in paying money as required by a judgment or order can be enforced by punishment for contempt. The note of the codifiers, as it appears in Throop's Code, states that this section is new, and was added for the purpose of settling the question whether non-payment of costs or alimony in an action for divorce can be punished as a contempt. In the absence of any authority brought to my notice holding to the contrary, I am inclined, from a reading of the sections quoted, to conclude that in a proper case, where costs are awarded and directed to be paid by a judgment, they can be enforced by proceedings to punish for contempt; but, upon such a proceeding, either to pay money for maintenance or education of the children, or for the support of the wife, or for costs directed to be paid by a judgment, section 1773 requires that it must appear presumptively to the satisfaction of the court that payment cannot be enforced by means of resorting to any security given, or by sequestration proceedings, or by issuing an execution. No affidavit having

¹Section 1773. "Where the husband makes default in paying any sum of money specified in the last section, as required by the judgment or order directing the payment thereof, and it appears presumptively to the satisfaction of the court that payment cannot be enforced by means of the proceedings prescribed in the last section, or by resorting to the security, if any, given as therein prescribed, the court may, in its discretion, make an order requiring the husband to show cause before it, at a time and place therein specified, why he should not be punished for his failure to make the payment; and thereupon proceedings may be taken to punish him, as prescribed in title 3, c. 17, of this act. Such an order to show cause may also be made without any previous sequestration or direction to give security, where the court is satisfied they would prove ineffectual."

¹From 23 Abb. N. C. 219.

been furnished upon this application from which it is made to appear that payment cannot be enforced by the means enumerated, the motion, for that reason, must be denied; but without costs, and with leave to renew on proper papers.

VAN LOAN v. SQUIRES *et al.*¹

(Supreme Court, Special Term, New York County. July, 1889.)

1. FORECLOSURE—SUBSTITUTION OF PARTIES.

Where plaintiff in a suit for foreclosure assigns the bond and mortgage, his assignee may on motion be substituted as plaintiff.

2. SAME—INTERPLEADER.

In such action, where both the plaintiff and one of the defendants claim ownership of the mortgage, the defendant who owns the equity of redemption may be granted leave to pay into court the money due on the mortgage, and have the same discharged, such leave being warranted by the general equitable power vested in the court, together with Code Civil Proc. N. Y. § 820, providing that a defendant in an action on a contract against whom another person makes a demand for the same debt may apply for an order to substitute such person in his place, and discharge defendant from all liability upon his paying into court the amount of the debt; and that the court may in its discretion make such order.

At chambers. On motions to make a new party plaintiff, and to interplead. Bronk Van Loan sued Mary J. Squires and others to foreclose a mortgage. A sale was had, which was subsequently set aside, and Mary E. McKinley and M. Louise Jarvis were made new defendants. Simon Stern now moves to be substituted as plaintiff, claiming to be the assignee of the bond and mortgage, of which M. Louise Jarvis also claims to be the owner. Mary E. McKinley, the owner of the equity of redemption, moves to be allowed to pay into court the amount due on the bond and mortgage, so that the contention between Stern and Jarvis may be settled in this action. Code Civil Proc. N. Y. § 820, provides that any defendant in an action on a contract against whom another person makes a demand for the same debt may apply for an order to substitute such person in his place, and discharge defendant from all liability upon his paying into court the amount of the debt; and the court may in its discretion make such order.

John Alex. Beall, for Simon Stern. *Anderson Price*, for M. Louise Jarvis. *Joseph O. Brown*, for Mary E. McKinley.

O'BRIEN, J. Mr. Stern moves to be made the party plaintiff in place of Van Loan. The defendant McKinley moves for leave to pay the money secured to be paid and due under the mortgage in court, and to have the mortgage discharged. Both these motions can be considered together. As stated upon the argument, in view of the fact that the present plaintiff has no interest in the controversy and Mr. Stern has, no good reason has been shown why the motion to substitute should not be granted.

It seems to me equally clear that the motion of Mrs. McKinley, the owner of the equity of redemption, should be granted, allowing her to pay the money into court. It must be remembered that this court, by order made on June 26th, permitted Mrs. Jarvis to come in as party defendant, upon her statement that she was entitled to the amount due on the mortgage, or some part thereof. The only persons, therefore, who claim any interest are now before the court,—Mr. Stern, by motion now granted, being made party plaintiff, and Mrs. Jarvis, by the order formerly entered, being made party defendant. They are the only persons entitled to the fund, and purpose contesting each other's right thereto. It would certainly, therefore, be inequitable to compel the owner of the equity, who is ready and willing to pay what is claimed in the complaint, to first either tender to one who may not be authorized or entitled to receive the money, or to be subjected to further interest or to costs of further proceedings, to determine the ownership of the fund, in which mat-

¹From 23 Abb. N. C. 230.

ter she is not interested. Section 820 of the Code provides in what cases an interpleader may be made. This section, together with the general equitable power vested in the court, is sufficient to warrant in a proper case the granting of leave to pay into court moneys due upon a mortgage, the title and ownership of which are claimed by two different persons, who desire to proceed in the action, and litigate their rights. Motions, therefore, are granted.

BROWNE v. PERRIS *et al.*¹

(*Supreme Court, Special Term, New York County. June, 1899.*)

MORTGAGES—ASSIGNMENT—MUNIMENT OF TITLE.

When the owner of an equity of redemption pays the mortgage debt, and takes an assignment of the mortgage, with the provision that it shall not merge, but remain alive, as a muniment of his title, on his death the mortgage will not be regarded as an existing lien on the premises, and an asset in the hands of his administrator.

William G. Perris became the owner of premises subject to a mortgage, which was subsequently assigned to him, with a provision therein that the same was sold to him "as a muniment of title, and not to merge in the fee of the land covered thereby, which is now owned by the said party of the second part." It was alleged by the plaintiff in his complaint that Perris "entertained a feeling of doubt and uncertainty in respect to the fact whether or not any defect existed in his title to the said real property so acquired by him; and that, at the time of the payment by him of the amount of the said bond and mortgage, in manner aforesaid, he, the said William G. Perris, believed that his said title was subject to a cloud or defect; and that there was some outstanding right or title adverse to the title so acquired by him;" and that, by reason of his belief as to the uncertainty of his title, and for the purpose of protecting and defending it, he purchased the bond and mortgage as a muniment of title. Subsequently, Perris died intestate, leaving him surviving his widow, Maria R. Perris, and Jane E. Perris, his mother, and Frances M. Browne, his sister, his only heirs at law; and thereafter the widow took out letters of administration, and became possessed of the bond and mortgage. Frances M. Browne conveyed her interest in the premises in trust to the plaintiff, Arthur E. Browne, who now sued the widow, individually and as administratrix, joining as a defendant the mother of the intestate, praying for relief that the bond and mortgage be declared to be a muniment of title of William G. Perris and his heirs and assigns; and that the mortgage cease to be a lien upon the premises except as against persons who might claim or assert title adverse to the title of William G. Perris in the premises; and that the plaintiff be adjudged entitled to the possession and custody of the bond and mortgage and the instrument of assignment. The relief asked for by the defendants was that the bond and mortgage be declared a valid and existing lien on the premises, and an asset of the estate of William G. Perris, excepting that Frances M. Browne or the plaintiff might have an assignment thereof upon paying the inventoried value thereof to the administratrix.

John Aitken, for plaintiff. *William W. Niles*, for defendants.

LAWRENCE, J. It has been held that where the equity of redemption is conveyed to a mortgagee, under an express written agreement between the parties that the deed shall not operate as a merger, except at the election of the mortgagee, equity will preserve the two estates distinct, unless the mortgagee appears to have elected that they should be merged. *Spencer v. Ayrault*, 10 N. Y. 202; *Compton v. Oxenden*, 2 Ves. Jr. 264; *James v. Morey*, 2 Cow. 246; *Abbott v. Curran*, 98 N. Y. 665. But in all such cases equity will look to the real and actual intention of the parties. Applying this principle to the case at bar, it seems to me that the disposition which should be

¹ From 28 Abb. N. C. 226.

made of it is clear. When William G. Perris took an assignment of the mortgage in question from the New York Life Insurance Company, and paid \$4,000 therefor, he took the same as a muniment of title, and it was expressly declared in the instrument of assignment that such was the object thereof, and that the mortgage was "not to merge in the fee of the land covered thereby, which is now owned by the said party of the second part." "Muniments of title" is a general expression for all the means of evidence by which an owner, corporate or individual, may defend title to real property. Abb. Law Dict.; Bouv. Law Dict. It must be held, therefore, that Mr. Perris kept the mortgage alive for the purpose of protecting and defending his title to the property upon which it has been a lien. He had paid the money secured by it to the life insurance company, but kept it outstanding as a means of defending his title, if, for any reason, that title should be attacked. It cannot, in the face of the language of the assignment, be held that he meant to keep the mortgage alive for the purpose of impairing or defeating his interest in the fee to the extent of the consideration expressed in the mortgage. I do not regard section 4, tit. 5, c. 1, pt. 2, Rev. St., as affecting this case, because that section refers to a mortgage which is an actual lien upon the property, and which it was the intention of the owner of the fee to keep outstanding as such. It does not refer to a mortgage which is simply kept outstanding as a muniment of title. The cases of *Spencer v. Ayrault*, 10 N. Y. 202, and *Abbott v. Curran*, 98 N. Y. 665, do not aid the defendant, because in each of those cases the money had not been, in fact, paid by the mortgagor. Here it was paid by Perris, the owner of the fee, subject to its lien, and the instrument was kept alive, as before stated, for the sole purpose of aiding him in defending his title. To sustain the position of the defendant it must be decreed that the estate of Perris should twice pay the amount of the mortgage, which would not be consonant with equity. I am therefore of the opinion that there should be judgment for the plaintiff, as prayed for in the complaint. Findings may be settled on two days' notice.

WEDGE v. SPENCER.

(Supreme Court, General Term, Fifth Department. October 19, 1889.)

TRESPASS—EVIDENCE—SUFFICIENCY.

In an action for trespass for cutting timber on plaintiff's land, one witness testified that he had pointed out to plaintiff the place where he cut the timber, and another testified that he had pointed out to plaintiff the place whence he drew the timber. Plaintiff himself testified that the places so pointed out were on his land. The first witness also testified that in cutting the timber he did not cross the line separating defendant's land from plaintiff's, and defendant testified that after the timber was cut it was drawn to plaintiff's land for more convenient removal. *Held*, that a verdict for plaintiff was contrary to the evidence.

Appeal from circuit court, Cattaraugus county.

Action by Henry W. Wedge against Thomas Spencer. Defendant appeals from an order denying his motion for a new trial on the minutes.

Argued before BARKER, P. J., and DWIGHT and MACOMBER, JJ.

William H. Henderson, for appellant. Nash & Lincoln, for respondent.

MACOMBER, J. The action is for trespass for the cutting and removal from the plaintiff's lands of 1,014 forest trees, of the value of \$50 each. One Leach had made a contract with McMahon by which the former sold to the latter the sawing timber in question, and McMahon in turn let the contract to the defendant to cut and remove the timber for him. The defendant removed what was supposed to be the timber belonging to Leach, and the same was paid for in full. The boundary line between the premises of the plaintiff and Mr. Leach was not accurately defined, and resort was had, in order to

prevent mistakes and accidental trespasses, to the practice of blazing the trees to indicate the line beyond which the workmen should not go. If there was any trespass, it was accidental and unintentional. There was no purpose disclosed either on the part of McMahon or of this defendant to commit larceny of this timber. No motive for taking the plaintiff's timber is disclosed, for they have paid Mr. Leach all that they bargained for. Yet, if the defendant did actually remove the timber from the plaintiff's land, whether designedly or accidentally, he is liable therefor. The evidence in behalf of the plaintiff consists largely of the testimony of two witnesses by the names of Barstow and Fellows. The witness Barstow was permitted to testify, apparently without objection, that after the controversy had arisen between the parties to this action he, with the plaintiff and others, was upon the premises, when he pointed out to the plaintiff the place where he cut the timber. The plaintiff afterwards testifies that the place which Barstow so pointed out to him was his (the plaintiff's) lands. The witness Fellows was also permitted to testify without objection that he went upon the ground about the same time that Barstow did, in company with others, and pointed out to the plaintiff the place which he drew the timber from, which the plaintiff in turn testifies was his land. So far as the testimony of this witness is concerned, it is shown by some witnesses that the timber may have been drawn from the plaintiff's lands, though the same was not cut thereon. The defendant's explanation is that after this timber was cut they drew it up the hill, and skidded it onto the plaintiff's land for the purpose of more convenient removal. The witness Barstow, when called to the stand as to the actual place where he, with others, cut the timber now claimed to belong to the plaintiff, failed to give any intelligent description that would locate it upon the plaintiff's premises. He was aware of the blazing of the trees, and claims that he did not pass beyond the line of such blazing. The testimony in behalf of the defendant tended to show quite conclusively that there was no actual trespass upon the plaintiff's land, yet the case was submitted to the jury mainly upon the evidence of Barstow and Fellows to the effect that they pointed out to the plaintiff and others where they had previously cut the timber, and the plaintiff's testimony to the effect that those places so pointed out were upon the plaintiff's lands. This is not such testimony as should overcome the positive assertions of the witnesses, who speak of facts with which they are acquainted, and who give something beyond mere hearsay testimony.

Under these circumstances we think that the jury erred in their verdict, and that a new trial should be granted upon the ground that the verdict was against the weight of the evidence, and that the question was properly presented on the motion for a new trial. It is so ordered, upon the payment by the defendant of the costs of the circuit at which the case was tried.

All concur.

AYRES v. VILLAGE OF HAMMONDSPORT.

(*Supreme Court, General Term, Fifth Department. October 19, 1889.*)

MUNICIPAL CORPORATIONS—NEGLIGENCE—ICY STREETS.

In an action for personal injuries resulting from the negligent construction and maintenance of a sidewalk, and suffering ice to accumulate thereon, it was shown that the sidewalk in front of a certain building had a greater slant towards the street than it had elsewhere, and a part of it had settled so that water ran towards the end of the walk, where ice frequently accumulated, while the walk was otherwise dry; and it was recognized by residents as a dangerous spot. Nothing was disclosed that should have put plaintiff on his guard as to the danger, and he did not see the ice until he slipped and fell. *Held*, that a verdict for plaintiff was warranted.

Appeal from circuit court, Stueben county.

Action by Romeyn B. Ayres against the village of Hammondsport. De-

fendant appeals from a judgment on a verdict for plaintiff and from an order denying a motion for a new trial upon the minutes.

Argued before BARKER, P. J., and MACOMBER, J.

James H. Stevens, Jr., for appellant. J. F. Parkhurst, for respondent.

MACOMBER, J. A subtle attempt has been made in the argument in behalf of the appellant to bring this case within the decision of *Taylor v. City of Yonkers*, 105 N. Y. 202, 11 N. E. Rep. 642. The facts, however, disclosed upon the trial, do not, in our judgment, make applicable this and other like authorities. The action is to recover damages for personal injuries resulting from negligent construction and maintenance of a sidewalk in the village of Hammondsport, and the negligent suffering of ice to accumulate and remain thereon so as to render it unsafe for public travel. The place of the accident was on Sheather street, running east and west through the village, and at a point by the St. James Hotel, the southerly line of the sidewalk being the front wall of the hotel building. The sidewalk in front of the hotel was ten feet and two inches wide, though the other portion of the walk west of the hotel was only about four feet wide. There were two irregular steps in the sidewalk by the east end of the hotel. In traveling eastward the first step down was to a tread of thirteen and one-half inches wide and seven feet seven inches long, and the distance down to the next tread was four inches to a tread which was three feet wide and seven feet seven inches long, and the distance down from that tread to the level of the adjoining building, known as the "Beck Building," was eight inches. The pitch or grade of the sidewalk by the hotel was much greater than that of the rest of the street. While the walk westerly of the hotel had generally only the usual pitch towards the street of about one inch in three feet, and about the same pitch at the westerly end and front of the hotel, there was a slope of seven inches at the westerly part of the walk in front of the hotel, wheresome of the witness say the walk gradually tilted down. The hotel had a mansard roof without eave-troughs, and the drip was directly upon the sidewalk. The easterly portion of the sidewalk had so settled as to cause a crack in it down the center of the hotel, making the east side lower than the west, so that both from the settling and the gradual tilting of the walk towards the east the tendency of the dripping water was towards the easterly end of the walk where the steps were. Ice frequently accumulated at this point when the walk was otherwise dry. A ridge of ice had formed from the drip two or three feet from the wall, and pedestrians naturally crowded towards the building on account of the slope in the walk. There was much evidence given to the effect that the walk had been covered with thick ice, in some places ridged, for a period of three or four weeks preceding the injuries. The place seems to have been generally recognized by the residents as a dangerous spot. At the spot where the plaintiff fell, which was the easterly plank of the St. James walk, a little to the right of the middle of the plank, the walk had a slope, as some witnesses say, of about eleven inches when the accumulation of the ice is added to the slant of the walk itself. Other testimony showed that the accumulation of ice was greater towards the middle than at the edge, for near the outer edge the same had been worn or melted off. The whole of this place was smooth. The plaintiff, while walking towards the place, did not discover that there was any ice on the walk until he was near the steps, when his foot slipped towards the street. There is no fact disclosed that put him especially upon his guard as to this dangerous place in the sidewalk; indeed, he seems to have been ignorant of its actual condition until the instant of receiving the injuries.

These facts, which were established by the evidence adduced in behalf of the plaintiff, rendered it incumbent upon the court to submit the whole question of the liability of the village, as well as the alleged contributing negli-

gence of the plaintiff, to the consideration of the jury. Their verdict, being supported, as it is, by a clear preponderance of the evidence, cannot be disturbed by us.

We have examined the several exceptions taken by the defendant during the trial, and find in none of them any matter which would justify us in sending the case back for another trial. The judgment and order should be affirmed.

VOLTZ v. WILSON et al.

(Supreme Court, General Term, Fifth Department. October 19, 1886.)

TRIAL—OBJECTIONS TO EVIDENCE.

An objection to the testimony of a witness as to a statement made to him by another witness, because the latter was not asked if he had made such a statement, is properly overruled where the questions asked both witnesses were directed to the same subject-matter.

Appeal from Erie county court.

Action by Anthony W. Voltz against Benton H. Wilson and Homer Van Buskirk. From a judgment on a verdict for plaintiff, defendants appeal.

Argued before BARKER, P. J., and DWIGHT and MACOMBER, JJ.

Frank M. Loomis, for appellants. Charles F. Whitcher and John T. Joyce, for respondent.

MACOMBER, J. The action was brought to recover damages, on account of the fraudulent representations made by the defendants upon a sale to the plaintiff of two chattel mortgages held by them, and which they had received from a man by the name of James Ives. The evidence in behalf of the plaintiff was directed to show that the defendants, by the mouth of Wilson mainly, had represented before the sale of the chattel mortgages to the plaintiff that the same were good or all right, and that Wilson knew or had been notified that Ives did not own the property so purporting to be covered by the mortgages. This was the question at issue. Presumably, it was fairly presented to the jury, and their verdict, in the absence of any exceptions to the instructions, would be conclusive. The charge of the learned court does not appear in the case, and no complaint is made in regard thereto by the appellants.

We have examined the several exceptions to the reception and rejection of evidence, and find in them nothing worthy of comment save those arising upon the evidence of the witness Whitcher. The competency of this evidence is to be determined by the previous testimony given by the witness Root. Whitcher was asked as follows: "*Question.* Did Root say to you that Wilson told him that he sold these mortgages as being all right? *Answer.* Not in exactly those words. *Q.* Give me the words exactly. *A.* Root said that Wilson told him that, while he didn't guaranty the mortgages,—the payment of them,—he sold them as being good and all right, and, as mortgages, they were good and all right." These questions were respectively objected to, and their answers excepted to, upon the ground, solely, that Root had not been asked whether he made a like statement to Whitcher. Recurring now to the witness Root, the following evidence was given by him: "*Q.* Did Wilson tell you at that time, that when he sold those mortgages they were all right? *A.* I cannot swear to that. I will tell you what he did tell me. *Q.* Did he make use of the expression 'all right' in connection with these mortgages? *A.* Yes, sir. *By the Court:* *Q.* Who? *A.* Wilson." It will be seen that the questions asked of Whitcher were substantially directed to the same subject-matter as those addressed to the witness Root, and that, consequently, the objection as made was untenable, and was properly overruled by the county judge. The judgment should be affirmed. All concur.

BURRELL v. PRESTON.

(Supreme Court, General Term, Fifth Department. October 19, 1889.)

LIMITATION OF ACTIONS—NEGLIGENCE—PHYSICIANS.

An action against a physician for negligent treatment of a patient is "an action to recover damages for a personal injury resulting from negligence," within Code Civil Proc. N. Y. § 383, subd. 5, providing that such actions must be brought within three years, though the physician was treating the patient under a contract.

Appeal from circuit court, Livingston county.

Action by Mary Burrell against Wooster B. Preston. A nonsuit was directed, and plaintiff appeals.

Argued before BARKER, P. J., and DWIGHT and MACOMBER, JJ.

J. A. VanDerlip, for appellant. Fred W. Noyes, for respondent.

MACOMBER, J. The case contains a judgment and notice of appeal therefrom, although it is also stated that the exceptions taken at the trial were ordered to be heard at the general term in the first instance. Under these circumstances we must treat as controlling in respect to the practice the judgment and the notice of appeal. The action is for damages for personal injuries received by the plaintiff through the negligence of the defendant. The answer, among other things, alleges that the action was not brought within the three years next succeeding the alleged injuries, which were received in the month of November, 1881, and that consequently the action is barred by the three-year statute of limitations. The counsel for the appellant argues, quite against the plain utterances of the Code of Civil Procedure, as it seems to us, that, inasmuch as the relation existing between the patient and the doctor was by virtue of a contract existing between them, on the one side to render services, and on the other to pay for the same, the six-year statute of limitations is alone applicable. It is true that negligence in this, as in all other cases arising incidentally between parties who have contract relations with each other, is in some sort a breach of contract; but this by no means relieves the parties from the operation of the provisions of the statutes of limitations, which are designed to limit the right of action in case of negligence to three years, whether the negligence was caused by a party having any duty to perform to the other or not. Subdivision 5 of the three-year statute (Code, § 383) is: "An action to recover damages for a personal injury resulting from negligence." It contains no qualification or limitation of cases where the negligence is caused by a person who has agreed by contract to do a certain thing in behalf of the party injured. The judgment should be affirmed. All concur.

YATES v. GUTHRIE.

(Supreme Court, General Term, Fifth Department. October 19, 1889.)

JUDGMENT—DEFAULT—SERVICE OF ANSWER.

On a motion to set aside a judgment by default it was insisted that on the last day for answering, March 26th, the answer addressed to plaintiff's attorney was served as authorized by Code Civil Proc. N. Y. § 797, by being placed in the post-office at Caledonia directed to plaintiff's attorney at Rochester, and affidavits of defendant and his attorney stating that such was their recollection were filed. The envelope in which the answer was sent was postmarked at Caledonia "March 26." The postmaster at Rochester testified that it could not have been mailed on March 26th, as it appeared by the postmark, of his office, that it was not received there until March 28th. Plaintiff's attorney made affidavit that early in the morning of March 27th he received mail matter postmarked at Caledonia on March 26th. Held, that an order refusing to set the judgment aside would not be disturbed.

Appeal from special term, Monroe county.

Action by Arthur G. Yates against James J. Guthrie. A judgment was entered against defendant by default, and from an order denying a motion to set the judgment aside defendant appeals.

v.7N.Y.s.no.6—12

Argued before BARKER, P. J., and DWIGHT and MACOMBER, JJ.
William J. Byam, for appellant. *Earl B. Putnam*, for respondent.

MACOMBER, J. The learned judge at the special term, while denying the defendant's motion to set aside the judgment and execution, opened the case so as to permit the defendant's proposed answer to stand, and the case to be tried upon the merits; and, apparently, by consent of both sides, so far as this part of the order is concerned, granted an order of reference. The last day for answering was the 26th day of March, 1889. The affidavits of the defendant and his attorney are measurably positive that the answer which had been prepared was mailed upon that day by the attorney at the village of Caledonia, properly addressed to the plaintiff's attorneys. In corroboration of this, the envelope thereof with the postmark clearly indicating the words and figures, "March 26," is produced. In opposition to these facts there appears a strong affidavit by the assistant postmaster at Rochester to the effect that such mailing could not have taken place on the 26th of March, inasmuch as it was equally clear by the postmark at Rochester that the letter was not received at Rochester until the 28th. One of the plaintiff's attorneys also testifies that he received, early in the morning of the 27th, mail matter from Caledonia that was mailed on the 26th. The rule is unquestioned that the party addressed takes the hazards of the mail, and that, if an answer is actually deposited in the post-office within the time limited by the statute, the service is sufficient. Yet we are not bound by the appearance of the postmark upon an envelope; for it is not incredible that in the small uncommercial districts there is not that carefulness in changing the stamps that prevails in larger towns. The affidavits of the defendant and his attorney cannot be deemed to be conclusive upon this matter, for the reason that they speak only from recollection; hence it is that the judge at special term might well entertain doubts as to the principal fact involved in the motion, and, so entertaining them, he seems to have made a proper disposition of the motion. The order should be affirmed with \$10 costs, and disbursements. All concur.

OPDYKE v. WHITING *et al.*

(Supreme Court, General Term, Fifth Department. October 19, 1889.)

REFERENCE—REPORT—REVIEW ON APPEAL.

Where there is evidence to sustain a referee's findings, and there are no exceptions to his findings, or requests to find differently on the evidence, a judgment entered on the report of the referee will not be disturbed on appeal.

Appeal from judgment on report of referee.

Action by Zachariah Opdyke against W. Fred Whiting and others. Judgment was entered in Cayuga county on the report of a referee in favor of plaintiff, and defendants appeal.

Argued before DWIGHT, MACOMBER, and CHILDS, JJ.

James Lyon, for appellants. *E. C. Atkin*, for respondent.

MACOMBER, J. If there is evidence to sustain the conclusions of the referee the judgment must be affirmed, because there are no exceptions to his findings, and no requests were made to him to find differently than he has upon the evidence before him. The action is brought to recover for services from the 3d day of May, 1886, for a period of one year, and for damages for an unlawful dismissal of the plaintiff as salesman at a time prior to the expiration of the term of the service. The plaintiff was employed by the defendants, who are in the milling business, to make sales for them of flour and feed, on the 3d day of May, 1886, and was dismissed from such employment on the 15th day of September of that year. The referee has found in favor of the defendants in respect to any claim for damages or compensation for time after

September 15th. He has, however, allowed the plaintiff a certain sum as a balance for his services remaining unpaid. There is no dispute in the case in regard to the right of the plaintiff to the compensation claimed by him for the selling of feed, except that it is contended by the defendant that the plaintiff was fully paid for such sales. The referee has found that the plaintiff was to receive 15 cents per barrel for flour upon every first order of 100 barrels or less, and 10 cents per barrel upon every other order thereafter from the same customer, and 10 cents on all orders above 100 barrels, and 40 cents per ton for all feed sold by him. He has found that, during the period mentioned, the plaintiff sold 450 barrels upon which he was entitled to a commission of 15 cents; 1,200 barrels upon which he was entitled to a commission of 10 cents; 67½ tons of feed, upon which he was entitled to a commission of 40 cents,—making, in all, \$240.15, for sales personally and actually made by himself. He has also found that the defendants effected sales of 500 barrels of flour to customers which the plaintiff himself had secured, and to whom he had introduced the defendants, for which he has given the plaintiff an allowance of \$50, or 10 cents per barrel. *Taylor v. Enoch Morgan's Sons' Co.*, 1 N. Y. Supp. 293. After deducting the payments which were made by the defendants, there is found to be due the plaintiff a balance of \$85.99, with interest from the date of the beginning of the action, for which judgment was given.

The question before the referee was solely one of fact, and his decision is based upon the testimony of apparently reliable witnesses. There being no requests to the referee to make findings different from those appearing in the case, and no exceptions to the findings so made, the judgment ought not to be disturbed. We have examined the several exceptions taken during the trial to the refusal and rejection of evidence, and find in them nothing which requires comment, or which would affect the conclusion of the referee upon the questions in chief. The judgment should be affirmed. All concur.

KOKOMO STRAW-BOARD CO. v. SACHS.

(*Supreme Court, General Term, Fifth Department. October 19, 1899.*)

APPEAL—REVIEW—COSTS.

Where an appeal has been taken in a case tried before a referee under a stipulation, and appellant's affidavit states that the appeal is taken in good faith, but neither the pleadings, the proceedings before the referee, nor the findings and judgment are before the appellate court, an order of the special term, pending the appeal, directing the county treasurer to repay to plaintiff money deposited by it as security for costs under an order of court will not be disturbed on appeal.

Appeal from special term, Monroe county.

Action by the Kokomo Straw-Board Company against Louis Sachs. Pending an appeal from a judgment for plaintiff, defendant appealed from an order directing the treasurer of that county to pay to the plaintiff the sum of \$250, previously deposited with such treasurer, in pursuance of an order of this court, as security for costs in this action.

Argued before BARKER, P. J., and DWIGHT and MACOMBER, JJ.

H. G. Danforth, for appellant. George F. Yeoman, for respondent.

MACOMBER, J. This action, which was upon a contract for goods sold and delivered by the plaintiff to the defendant, has been tried before a referee, in pursuance of a stipulation, and has resulted in a judgment in favor of the plaintiff. An appeal has been taken to the general term from such judgment, and the affidavit in behalf of the appellant states that the same was taken in good faith. Neither the pleadings, nor the proceedings before the referee, nor the findings and judgment, have been laid before us. The affidavit of the ap-

pellant, under these circumstances, cannot be deemed sufficient to defeat the strong legal presumption which arises in favor of the validity and correctness of the judgment. The application to the special term was addressed to its sound discretion, and we are unable to say from the papers before us that there has been any abuse of such discretion. The deposit belongs, not to the defendant, but to the party who placed it in the hands of the treasurer, and it ought not longer to be withheld by this court from its owner, inasmuch as the condition upon which it was so deposited has been satisfied by the recovery of a judgment by the plaintiff upon its demand. The order should be affirmed, with \$10 costs and disbursements.

GLENN v. BURROWS *et al.*

(*Supreme Court, General Term, Fifth Department. October 19, 1889.*)

EXECUTORS AND ADMINISTRATORS—LOANS—POWER TO BIND ESTATE.

Loans made to executors or trustees are not valid claims against the testator's estate. Following *Glenn v. Burrows*, 87 Hun, 602.

Appeal from special term, Erie county.

Appeal by Eliza Glenn, Louisa C. Burrows, and others, from an order confirming the report of the referee touching the allowance and disallowance of certain claims against the estate of Roswell S. Burrows.

Argued before BARKER, P. J., and DWIGHT and MACOMBER, JJ.

Shuart & Sutherland, Signor & Wages, John H. White, and E. L. Pitts, for appellants. *John Cunneen*, for respondent.

MACOMBER, J. There are two classes of appellants in this action, namely: Those whose claims were wholly rejected by the referee, and those whose claims were in part allowed, and rejected in part, by him. The special term has confirmed the report of the referee in all respects excepting a slight modification thereof, permitting certain claimants to withdraw their claims, which is not necessary to be considered upon this appeal.

Roswell S. Burrows died in the month of March, 1879, leaving a last will and testament, upon which letters testamentary were issued to the defendants Louisa C. Burrows, William R. Burrows, Albert S. Warner, and Alexander Stewart. Warner and Stewart had the control and management of the estate up to the year 1883, when the same was devolved solely upon Warner. This continued until the month of August, 1884, when Warner, having been discovered to be a defaulter to the estate for a large amount, fled from this state, leaving the estate in a crippled and embarrassed condition, if not totally insolvent. Subsequently a receiver was appointed by the court in this action to take charge of the estate, and administer its affairs in place of the trustees named in the will. This action was brought in behalf of the plaintiff, and all others having claims of a similar nature against the estate. All of the principal questions herein were decided and disposed of, so far as this court is concerned, in the decision in this action reported in 37 Hun, 602. By reference to that decision it is seen that this court held that the claim of the plaintiff was a valid one against Burrows' estate, in so far as it had been incurred during the life-time of the testator, but that loans to the executors or trustees, evidenced by the latter's promissory notes, accompanied by a surrender of the original notes given by Mr. Burrows, were not valid claims against the estate. The referee, in a carefully-considered report, has taken the proofs, which he was directed to take, in pursuance of the last-mentioned decision, and, following the opinion of this court, has allowed to such claimants as have presented their demands payment out of the funds of the estate, so far as the same can be made, of all demands existing against Roswell S. Burrows in his life-time, but has rejected the claims arising subsequently

by loans made by the several claimants to Warner and Stewart, or to Warner alone. It follows that the order appealed from should be affirmed, with costs. All concur.

SALLADE v. GERLACH *et al.*

(*Supreme Court, General Term, Fifth Department. October 19, 1889.*)

WITNESS—COMPETENCY—TRANSACTIONS WITH DECEDENT.

Although a question does not appear to be obnoxious to Code Civil Proc. N. Y. § 829, providing that a party shall not be examined as to transactions had with a decedent, yet it is properly excluded when a previous answer to substantially the same question is incompetent.

Appeal from circuit court, Erie county.

Action by Jacob Sallade against Charles A. Gerlach, T. S. Phillips, and P. Herdic. Defendant Gerlach appeals from a judgment entered on a verdict directed by the court, and also from an order denying his motion for a new trial.

Argued before BARKER, P. J., and DWIGHT and MACOMBER, JJ.

Hamilton R. Squeir, for appellant. *George F. Wardwell*, for respondent.

MACOMBER, J. The complaint is upon a promissory note in the sum of \$1,250, which was executed by the defendant T. S. Phillips, and indorsed by the defendants Charles A. Gerlach and P. Herdic, bearing date December 20, 1881, at Buffalo, payable to the order of Gerlach four months thereafter. Under the pleadings the plaintiff had not devolved upon him any duty of producing evidence, because the fact of the making, execution and the transfer of the note, as alleged in the complaint, was admitted. The only question in the case is whether or not sufficient evidence was given or offered which would shift to the plaintiff the burden of showing, in addition to the presumptions of law, the fact that he was a *bona fide* holder for value before maturity of this piece of commercial paper. The appellant, who is the only one of the defendants who defended the action, takes this appeal upon certain alleged erroneous rulings by the judge at the circuit. Under appropriate allegations in the answer, an effort was made at the trial to show that the appellant was merely an accommodation indorser for the benefit of Peter Herdic. This attempt was made by means of the testimony of the appellant himself, and questions were propounded to him which clearly called for testimony relating to personal transactions between the witness and Peter Herdic. But Peter Herdic was, at the time of the trial, dead. An objection was made to such testimony, under section 829 of the Code of Civil Procedure, which was sustained, and exception taken. This decision is fully warranted by authority of the case of *Benedict v. Driggs*, 34 Hun, 94, where a like proposition and ruling were made.

Much stress is also laid upon the ruling of the court upon the following proceedings, which were had: The appellant's counsel asked his client the following question: "Now, how did it happen that that note was made payable to your order?" This was objected to, and the court said: "That involves his telling what was said on that occasion, does it not?" The witness replied: "No, sir; it does not." It is argued, with some ingenuity, that this ruling was erroneous, because the response to the question might not have been incompetent, under section 829 of the Code. The general rule undoubtedly is, that, when the question necessarily calls for personal transaction or communication of the party with a deceased person, its rejection is required under this section; but that, when the question does not appear to be obnoxious to this provision, the party is required to wait until the answer itself discloses the fact whether or not it is inimical to this rule of evidence. *Denise v. Dentse*, 110 N. Y. 567, 18 N. E. Rep. 368. In this instance, however, the

question necessarily called for incompetent evidence. By the earlier proceedings in the case it is found that substantially the same question was put to the witness, and an answer elicited. The same witness said, in the earlier part of his examination: "When those notes were drawn they were made payable to my order, at the suggestion of Mr. Herdic. Herdic was present then and there." This was a sufficient reason for the existence of the note in the form in which it appears in the case. Though incompetent under this section of the Code, it stands in the case. What more could have been shown under the question put to the appellant is not apparent from any of the circumstances attending the trial. It follows, therefore, that the judgment or order should be affirmed. All concur.

FRANK v. BREWER.

(Supreme Court, General Term, Fifth Department. October 19, 1889.)

1. EVIDENCE—*RES GESTÆ*—LETTERS OF THIRD PERSONS.

Where letters offered in evidence are the declarations of third persons, written long prior to the controversy upon which the action is founded, they are not part of the *res gestæ*, and are properly excluded.

2. LIMITATION OF ACTION—ACCOMMODATION PAPER.

Where an accommodation maker of a note pays the same, or a part thereof, his right of action against the payee accrues at the time of such payment.

Appeal from circuit court, Erie county.

Action by Abraham Frank against Sarah J. Brewer, as executrix of Robert McClure, to recover money paid on a promissory note, whereof plaintiff was an accommodation maker, and defendant's testator was the payee. There was a judgment upon a verdict for the plaintiff, and defendant appeals.

Argued before BARKER, P. J., and DWIGHT and MACOMBER, JJ.

Tracy C. Becker, for appellant. A. C. Calkins, for respondent.

MACOMBER, J. This action is brought to recover the sum of \$125, which was paid by the plaintiff on the 3d day of June, 1880, upon a certain promissory note made by the defendant's testator and one Christian Miller and the plaintiff. The reason for the recovery is stated to be the fact that the plaintiff was an accommodation maker only, for the benefit of the defendant's testator, Robert McClure. These persons, Robert McClure, Christian Miller, and the plaintiff, Abraham Frank, made a promissory note on the 1st day of May, 1877, in the sum of \$350. The holder of the note procured judgment thereon May 10, 1878, against the makers Miller and Frank. On the 29th day of July, 1880, Frank, the plaintiff, paid on such judgment the sum of \$125, being a compromise of his agreement, and was released from the judgment. The matter of contention at the trial was whether the plaintiff had signed the note in question wholly for the benefit of Robert McClure. The evidence upon this question consists of testimony of several witnesses, and the same was submitted to the jury under an elaborate charge. Upon the testimony adduced, the jury were justified in the verdict rendered by them.

The main ground of this appeal consists in the alleged error of the trial court in excluding certain letters which were written by one Conger and Robert McClure in the year 1876. There is evidence to show that at the time the controversy between the parties to this action arose these letters were produced, and their contents urged against the claim of the plaintiff. While it would not have been error to receive these letters as a part of the conversation between the parties, yet, under the circumstances disclosed, their exclusion does not appear to be erroneous. They were the declarations of third persons, written at a time long prior to the controversy, and could not, in any view of the case, be deemed *res gestæ*.

The only other question in the case is that of the statute of limitations.

Though more than six years had elapsed between the time of the making of the note and the time of the beginning of the action, yet it was less than six years between the time of the payment by the plaintiff and the beginning of this action. It is very clear that the cause of action accrued only at the time of the payment by the plaintiff, which was July 29, 1880, and that the statute of limitations ran only from that time. *Barker v. Cassidy*, 16 Barb. 177; *Butler v. Wright*, 20 Johns. 367. In the notice of appeal we observe an attempt is made to review an order of the special term allowing the plaintiff to recover costs and disbursements. The order and the papers upon which it was granted do not appear in the printed case before us; consequently we cannot review the order. In the absence of such papers, a strong presumption arises that the costs which appear in the judgment were properly awarded against the estate represented by the defendant, either upon the ground that she unreasonably resisted or neglected payment of the claim, or that she refused to submit the same to a referee, under the statute. Sections 1835, 1836, Code Civil Proc. The judgment and order should be affirmed, with costs.

HOGAN v. CARROLL *et al.*

(*Supreme Court, General Term, Fifth Department. October 19, 1889.*)

1. CONTRACT—ACTION ON—NEW TRIAL.

Where there is testimony to support the verdict, and the jury has been instructed as to the rights of the parties, the motion for a new trial on the minutes is properly denied.

2. NEW TRIAL—EVIDENCE—NEWLY-DISCOVERED—CUMULATIVE.

Newly-discovered evidence, which is merely cumulative, and of the same general class as that given on the trial, will not justify the court in granting a new trial.

Appeal from Monroe county court.

Action by Michael Hogan against Charles H. Carroll and others, for breach of contract of employment. Trial by jury, and a verdict for plaintiff. From the judgment entered on the verdict, from an order denying a motion for a new trial on the minutes, and from an order denying a motion for a new trial on a case, and affidavits on the ground of newly-discovered evidence, defendants appeal.

Argued before BARKER, P. J., and DWIGHT and MACOMBER, JJ.

C. C. Davy, for appellants. John C. O'Brien and John F. Kinney, for respondent.

MACOMBER, J. The defendants, who are dry-goods merchants, employed the plaintiff on the 21st day of February, 1887, in their cloak department. The plaintiff claimed, and gave evidence to establish the fact, that the employment was for the period of one year, while the defendants' testimony tended to show that the employment was only from week to week. The defendants discharged the plaintiff on the 9th day of July, 1887. For such discharge, and for the inability of the plaintiff to earn wages during a portion of the period,—between the time that he was discharged and the time of the expiration of the employment as he claimed it to be,—this action was brought. It was first tried in the municipal court, where a recovery was had. Upon the appeal to the county court a verdict was rendered for substantially the same amount as was awarded to the plaintiff by the judgment of the municipal court. We have examined the evidence in this action in detail, and find that the jury was warranted, from the testimony, in bringing in the verdict which they have; and that the court was justified in refusing to grant a new trial upon the judge's minutes. The right to dismiss for cause was asserted by the trial judge to the jury; and, had the defendants proper ground to dismiss the plaintiff for disobedience in the respect which they claimed, the jury, doubt-

less, would have so found under the instructions of the county judge; but they have seen fit to take the version given by the plaintiff rather than that given by the defendants, and have held, under competent testimony and under proper instructions, that the dismissal was without cause; and that consequently the defendants were liable to respond in damages to the plaintiff.

The affidavits used upon the motion for a new trial upon the ground of newly-discovered evidence disclosed nothing new in the defense. They simply reiterated the same facts sworn to by witnesses at the trial, and hence come under the familiar rule that newly-discovered evidence, which is merely cumulative, and of the same general class of testimony as that given upon the original trial, is insufficient to justify the court in granting a new trial. The judgment and orders appealed from should be affirmed. All concur.

VALENTINE v. KELLY.

(*Supreme Court, General Term, Fifth Department. October 19, 1889.*)

JURY TRIAL—JUSTICE OF THE PEACE—COERCING VERDICT.

In a civil action tried before a justice of the peace, after the jury had retired, the justice entered their room, and said to them: "It takes a good deal of time and expense to try these lawsuits, and it seems as though you ought to agree." One juror said they stood two to four, and the justice replied: "You are so near together that you had better agree." A verdict was soon after returned. *Held* that, however honest the motives of the justice, his interference with the deliberations of the jury was unwarrantable, and the judgment must be reversed.

Appeal from Erie county court.

Action by Ernest Valentine against Lewis Kelly, to recover for wages. Trial by jury, and verdict for plaintiff in justice's court, on which judgment was entered. From the judgment of the county court, affirming the judgment of the justice of the peace, defendant appeals.

Argued before BARKER, P. J., and DWIGHT and MACOMBER, JJ.

J. M. Congdon, for appellant. *Fred. J. Blackmon*, for respondent.

MACOMBER, J. On account of the death of the justice of the peace before a return was made by him, there exists a lack of the details of the evidence given before him; yet enough is disclosed to show that it was a fair question of fact for the jury whether the wages of the plaintiff were to be paid by the defendant or by one Geiger. Under these circumstances, the verdict, if uninfluenced by other matters than the evidence, must be deemed conclusive. A reversal was also claimed in the county court, and is insisted upon here, on the ground of the misconduct of the justice of the peace in conferring with the jury after they had retired to deliberate upon their verdict. Three of the six jurors, and the constable who was in charge of them, have made affidavits to the effect that after the jury had retired for deliberation the justice entered their room, and had a conversation with them about the case, in the absence of parties and counsel, and without their consent. The jury had then been out nearly four hours. Eliminating from the case the affidavits of the jurors upon the ground taken by the respondent's counsel, that they cannot be heard to impeach the integrity of their own verdict, but without giving our assent to the correctness of the proposition as applied to the facts of this case, there remains the uncontradicted affidavit of the constable, as follows: "That the said jury failed to agree for nearly four hours, and the foreman of the jury asked deponent to bring in the justice of the peace, and repeated the request once or twice. Deponent thereupon went out and found the justice, William Peacock, and the said Peacock then went into the room with deponent and the jury. That neither of the parties to the action, or either of their counsel, were present, but that the justice came alone, with deponent and the jury. After Peacock came into the room the foreman of the jury stated to

him that they could not agree. Peacock then stated to the jury that 'it takes a good deal of time and a good deal of expense to try these lawsuits, and it seems as though you ought to agree.' One of the jury then said to him that they stood two to four, and Peacock then left the room, and the jury, some time afterwards, agreed on a verdict for the plaintiff." The version of the transaction, as given by the jurors, is not materially different from that related by the constable. They say that, after the constable returned with the justice, the latter went to the stove to fix the fire, and while he was doing so said: "Boys, you had better try and agree; we do not want to try this case over again." One of the jury stated to the justice that they stood two to four, and the said Peacock then said, "You are so near together that you had better agree," and then left the room, and the jury soon afterwards agreed upon a verdict for the plaintiff. There is not, it is true, any evidence that the justice of the peace was partial to the plaintiff, or that he had any motive in coercing a verdict in his favor against the defendant. The objection to the proceeding rests on a higher ground. We think the justice had no right to enter the jury-room and hold conversation with the jury in the absence, or without the consent, of the parties upon the question stated by them, and answered by him. No corrupt motive of the justice need be shown in order to set aside a verdict of a jury which has been brought about by his unwarrantable interference with their deliberations. The jury, after it retires, must remain untrammelled and uninfluenced by any advice which the justice may, though honestly, give in regard to their verdict without the consent of the parties. Any relaxation of the rule as uniformly held (*Taylor v. Bettsford*, 13 Johns. 487; *Bunn v. Croul*, 10 Johns. 239; *Neil v. Abel*, 24 Wend. 185; *Benson v. Clark*, 1 Cow. 258) would seriously impair the confidence of the public, not only in our system of trial by jury in courts of subordinate, but also in those of the highest, jurisdiction. This case is distinguishable from *Vallen v. McGuire*, 49 Hun, 594, 2 N. Y. Supp. 381, in this respect, namely: In the case before us, the justice having died before making a return on appeal to the county court, the minutes left by the justice were agreed upon by counsel, and inserted in the case as the return, and the affidavits above mentioned may be properly treated as supplemental to, and as a part thereof, under section 3056 of the Code of Civil Procedure. It may be presumed that the justice, if living, would have made a return embodying the "other proceedings taken," if so requested. The judgment of the county court and of the justice should be reversed, with costs. All concur.

REED *et al.* v. FARGO.

(*Supreme Court, General Term, Fifth Department. October 19, 1899.*)

CARRIERS—LIMITATION OF LIABILITY—EVIDENCE.

Where a carrier fails to give a receipt or to make any other written contract for the shipment of plaintiff's property, it will not be absolved from liability for the negligent destruction of such property by evidence that plaintiffs or their agent previously knew of conditions in the shipping bills, or receipts given, which would discharge defendant from liability in this instance.

Appeal from Seneca county court.

Action by Alexander C. Reed and another against James C. Fargo, president of the American Express Company, for damages for the breaking of a sewing-machine, which defendant had contracted to transport from Waterloo, N. Y., to Auburn, N. Y. Judgment for plaintiffs, affirming a judgment of a justice of the peace. Defendant appeals.

Argued before BARKER, P. J., and MACOMBER, J.

J. N. Hammond, for appellant. *Frederick L. Manning*, for respondents.

MACOMBER, J. The machine in question was for sewing heavy leather, which was used by the plaintiffs in their manufacture of neck yokes. The

plaintiffs had obtained the same at Auburn, a few months preceding the time in question, and it was transported to them by the defendant. The defendant's agents at Waterloo, being notified that it was the purpose of the plaintiffs to return the machine to Auburn, sent to the shop, and took it to the railway station. It was mounted on an iron table having 4 legs $3\frac{1}{2}$ feet high, the whole of which weighed about 200 pounds. At the station the machine was placed upon its legs at the center of the platform of a hand truck $2\frac{1}{2}$ feet high and 8 feet long. The platform had stakes in front and rear, but no railing at the sides. The truck having upon it the machine so placed was dragged by two of the defendant's men with much effort and labor between the railway tracks, where the ground was quite uneven, towards the express-car where it was to be placed. The machine so placed upon the car was manifestly top-heavy, and was liable, by reason of any obstruction or inequalities in the ground, to topple over. No precaution, however, was taken by the men, so far as appears, to prevent the occurrence of such an accident. From the jolting of the truck the machine was overturned, and so broken as to be utterly worthless. An attempt has been made by the learned counsel for the appellant to show that, by the previous knowledge of the plaintiffs or of their agent, there were conditions in the shipping bills or receipts given which would discharge the company from liability in this instance, but no receipt or other written contract was made for this shipment. The attempt to prove a verbal agreement between the agents of the defendant and the plaintiffs that the company should be absolved from liability by reason of taking the machine at the rates provided for encased or crated merchandise was wholly unsuccessful. The liability of a common carrier cannot be restricted by any vague or inconclusive evidence. In the absence of clear evidence to the contrary, the duty of the defendant was, for a stipulated price paid, to carry safely from the plaintiffs' store this machine, and safely deliver it at the city of Auburn. It failed to do so, and consequently is liable to respond in damages. The amount of the recovery was \$90, which it is shown was the exact value of the machine. The claim of the defendant that its liability was limited to the sum of \$50 is not tenable, for the reason that there is no proof that any contract was made thus limiting its liability. The judgment of the county court should be affirmed.

BARKER, P. J., concurs.

BANK OF COMMERCE OF BUFFALO v. COHEN *et al.*

(*Supreme Court, General Term, Fifth Department. October 19, 1889.*)

NEGOTIABLE INSTRUMENTS—ACCOMMODATION INDORSEMENT—NOTICE—AGENTS.

In an action on a note indorsed "C., Agt. for" defendant, it appeared that C. was defendant's husband, that he transacted all her business, had full authority to indorse notes for her in her business, and had indorsed notes for the maker in suit. *Held*, that the indorsee of such note is not chargeable with constructive notice that it was an accommodation note which her agent had no authority to indorse.

Appeal from circuit court, Erie county.

Action by the Bank of Commerce of Buffalo against Sarah Cohen and another. Judgment for plaintiff, and Sarah Cohen appeals.

Argued before BARKER, P. J., and DWIGHT and MACOMBER, JJ.

Baker & Swartz, for appellant. *George Clinton*, for respondent.

MACOMBER, J. The action was to recover on a promissory note which was executed by one C. G. Ball, as maker, to the order of one J. H. Cohen, agent. This defendant is charged upon the note by reason of the indorsement made upon it, and the subsequent transfer of the paper to the plaintiff before maturity. That indorsement is as follows: "J. H. COHEN, Agt. for Sarah Cohen." The defense interposed by this defendant is that the note was an ac-

commodation note, and that her agent had no right to indorse the same so as to charge her. It was abundantly established at the trial that the plaintiff had no knowledge of any defect in the note other than such as it was chargeable with by mere inspection thereof. J. H. Cohen was shown to be the defendant's husband, who conducted all of her business in her behalf, she not giving the same any personal attention whatever, to have full authority to make and indorse notes for her in her business, and in such business to have indorsed notes for the maker of this paper, Mr. C. G. Ball. Upon this proof of the authority of J. H. Cohen, the defendant was bound by his act, unless the plaintiff had actual or constructive notice that the indorsement was by way of accommodation for other parties, and so actually beyond the scope of the agent's authority. No claim is made that there was any actual notice to the bank of the existence of any such fact. The question therefore is whether, from the appearance of the note, the bank was bound to know that this defendant was not a party to the paper. For the purposes of the decision of this action it is not necessary to reassert, much less to enlarge upon, any of the cases cited by counsel, which tend to show that a person who is not a party to a piece of commercial paper may be charged by an action upon that paper, when it is shown that the person so sought to be charged was the one benefited thereby. From this indorsement of the note the officers of the bank would naturally suppose that, so far as the name "Cohen" was involved, the paper was for the benefit of, or at least the indorsement was made by, Mrs. Cohen, by her agent. The bank took the hazard of being able to show that her name so put upon the back was the real party indorsing it by the hand of her agent; that such person assuming to act as her agent was in truth her agent, having power to bind her. They have sustained that burden of evidence by substantially undisputed testimony, and consequently are entitled to recover under the adjudged cases. *Moore v. McClure*, 8 Hun, 557; *Green v. Skeel*, 2 Hun, 485.

The judgment should be affirmed. All concur.

WILCOX v. CITY OF ROCHESTER.

(*Supreme Court, General Term, Fifth Department. October 19, 1889.*)

TAXATION—SUMMARY SALE OF LAND.

Rochester city charter, § 94, provides that land may be sold summarily when charged with taxes that have been due for a certain time. Section 91 directs a warrant for the collection of personal property taxes, when no personal property is found by the collector holding the warrant, to be returned unsatisfied, and Laws N. Y. 1867, c. 861, and Laws 1842, c. 318, provide for special proceedings in such cases. *Held*, that land cannot be sold summarily in the city of Rochester for personal property taxes.

Appeal from judgment on report of referee.

Action by Fred P. Wilcox against the city of Rochester, to set aside a tax levied against plaintiff. Judgment was entered for plaintiff, and defendant appeals.

Argued before BARKER, P. J., and DWIGHT and MACOMBER, JJ.

Henry J. Sullivan, for appellant. *E. F. Wellington*, for respondent.

MACOMBER, J. The plaintiff resided for a number of years prior to January 1, 1884, in the Seventh ward of the city of Rochester. At about the last-named date he removed into the Fourth ward of that city, and continued there to reside until December of that year, when he removed to the state of Michigan. The assessment against him for personal property was made in the spring of 1884 for the sum of \$50,000. He was also assessed at the same time for the value of a house and lot in Tracy park in the Seventh ward. The fact of the plaintiff's removal from the Seventh ward to the Fourth ward was gen-

erally known by his friends, and no effort was made on his part, apparently, to conceal it from the knowledge of the assessors. The tax as extended against the plaintiff upon the rolls for that year for the assessment upon both the personal and real estate was \$1,656.29. In the month of August, 1884, after the tax became due and payable, and at a time when an additional charge of 1 per cent. was made for the non-payment of the same, the plaintiff tendered to the treasurer of the city of Rochester the sum of \$45.11, being the full amount of the city tax assessed upon the real estate above mentioned, with the interest and percentages thereon, which was refused because the plaintiff did not also offer to pay the tax assessed upon his personal property. Subsequently, and on the 26th day of March, 1885, the city treasurer sold the real estate for the whole amount of the real and personal tax with interest, charges, and expenses added, and the land was struck off to the defendant, and a certificate thereof was made and delivered to the proper officer by the treasurer.

There is no question but that the plaintiff was the owner of personal property of the amount estimated by the assessors in the spring of 1884; but there was no proof that the plaintiff knew that he was assessed for the same in the Seventh ward before the rolls were completed and had been delivered to the city treasurer in the month of July. Irrespective of the question whether the plaintiff can be relieved of this assessment upon the personal property by reason of its being levied in the Seventh ward instead of the Fourth, there appears to be a cogent reason why the judgment entered upon the report of the referee should be affirmed. The power of the city treasurer to sell land for delinquent taxes is derived solely from section 94 of the city charter, which provides that the lands may be sold summarily when charged by taxes which have been due and unpaid for more than 30 days previous to the last Thursday in March. Our attention has been called to no statute, and we know of none, which, in the city of Rochester, makes the imposition of a tax for personal property directly chargeable upon the real estate, so as to enable the city treasurer, without further proceedings, to sell the real estate in order to collect the same. Under section 91 of the city charter the treasurer is authorized to issue warrants for the collection of personal taxes so assessed, and, if no personal property is found by the collector into whose hands the warrant is placed, he shall return the warrant unsatisfied as to the tax in question. There are special proceedings provided by law for the collecting of such taxes, (chapter 318 of the Laws of 1842, and chapter 361 of the Laws of 1867;) but the city treasurer cannot, in the first instance, as has been attempted to be done in this case, add to the charge upon the real estate the tax for personal property, and enforce the same as a charge against the land owned by the person so taxed as though it was an assessment on the land itself. The judgment should be affirmed. All concur.

CHASE *v.* VANDERWERF *et al.*

(*Supreme Court, General Term, Fifth Department. October 19, 1889.*)

PARTNERSHIP—RETIRED PARTNER—LIMITATION OF ACTIONS.

In an action on a debt contracted by a partnership, which was subsequently dissolved, one of the partners assuming all the debts of the firm, the retiring partner pleaded the statute of limitations. The court, at the request of defendant, charged the jury that after the dissolution the surviving partner could not bind the other by promise or part payment of the debt. *Held*, that this was not prejudicial error, where the court finally charged that the only question was whether plaintiff brought his action within six years after he had notice of the dissolution.

Appeal from Monroe county court.

Action by Emery B. Chase against Susan Vanderwerf and John Vanderwerf. From a judgment on a verdict for defendants, and from an order denying plaintiff's motion for a new trial made upon the minutes, plaintiff appeals.

Argued before BARKER, P. J., and DWIGHT and MACOMBER, JJ.
Fanning & Williams, for appellant. *E. F. Wellington*, for respondents.

MACOMBER, J. This action is brought to recover a balance claimed to be due and unpaid owing the plaintiff by the defendants for lumber sold and delivered to the defendants in the month of October, 1880. The whole amount of sales which were made by the plaintiff and his partner Myers was \$2,616. The property was sold to the defendants as copartners, who were doing business under the name of S. Vanderwerf & Son. This firm was dissolved about the 1st of January, 1882, by the retirement therefrom of the defendant Susan Vanderwerf, who left all of the assets of the firm in the hands of the surviving partner, John Vanderwerf, the other defendant, who assumed all the debts and obligations of the firm then outstanding. Prior to the dissolution, the sum of \$1,500 had been paid upon the original indebtedness to the firm of the plaintiff and his then partner. Payments thereon were subsequently made by the defendant John in different sums during the years 1882, 1883, and 1884. The defense interposed is the statute of limitations, and such defense is available to this defendant only upon the ground that the plaintiff had knowledge of the dissolution of the firm at or about the time of such dissolution. This was the principal matter litigated at the trial. Evidence was given in behalf of the defendant, from which the jury could derive intelligently the conclusion that the fact of the dissolution was disclosed to the plaintiff orally, and that he acted upon the same in subsequent dealings with John Vanderwerf. The fact of the communication by word of the dissolution of the firm is denied by the plaintiff, and an attempt was made by him to explain away the force of the circumstances arising from his subsequent dealings with John; but all of these matters made it a case pre-eminently one for the consideration of a jury, and, they having found adversely to the plaintiff, the judgment should be affirmed, unless some error was committed upon the trial which was detrimental to the rights of the plaintiff.

The learned county judge properly charged the rule of law governing the defense. In substance, he charged that if the plaintiff received the several payments from John with previous notice of the retirement of the defendant Susan from the firm, and the assumption by John of the indebtedness, the statute would run from the time of receiving such notice. In his charge he said: "And if six years had expired between the time of receiving such notice and the time of the commencing of the action, the debt would have been outlawed, and the plaintiff could not recover; so this is a simple question for you to consider: Did Mr. Chase have notice of the fact that the firm had dissolved, and, if so, when? If he had notice of the fact at any time before the six years had expired before the commencing of this action, then the statute of limitations had run, and he could not recover; but if he commenced the action at any time within six years, although he had notice then, he is not foreclosed from commencing this action." He also charged "that if this last payment made by John Vanderwerf was received by Mr. Jones without knowledge of the fact that this firm had been dissolved, then the statute of limitations would not run." The original instructions of the county judge to the jury, it is conceded by the learned counsel for the appellant, were correct; but it is claimed that, by a subsequent portion of the charge, made at the instance of the defendants' counsel, a different rule was laid down, misleading to the jury, and for which a new trial should be granted. The defendants' counsel asked the court to charge as follows: "I also ask the court to charge that after the dissolution which took place in December, 1881, the defendant John could not bind the partner by promise or part payment of the debt, and that the dissolution was a revocation of his agency or power to bind her by any promise he might make, or any payment." The judge so charged, to which the plaintiff's counsel properly excepted. This portion of the charge is hardly reconcilable with

the true rule laid down in the charge in chief, and if this was the whole of the case it would be difficult for us to say that it did not prejudice the plaintiff, even though the true rule had previously been stated. Later on, however, the plaintiff's counsel asked the court to charge as follows: "I ask the court to charge that in the making of these payments by John Vanderwerf there was no new contract made, but it was a continuing of the old contract, and payments upon it. *By the Court.* I decline to charge on that subject any further than I have. I think the matter is clearly before the jury now. There is no question of a new contract in the case. The question is merely whether Chase had notice, within the rules I have laid down here." It appears, therefore, that the inadvertent acquiescence to the proposition made by the learned counsel for the defendants in his request to charge was fully cured by the judge's final statement to the jury made in response to the plaintiff's request, and by which he substantially reinstated the case as he had originally placed it before the jury. Under these circumstances, we think that there was no error in that portion of the charge made at the request of the defendants' counsel which prejudiced the jury. The judgment and order, therefore, should be affirmed. All concur.

CHAMBERLAIN v. TOWN OF WHEATLAND.

(*Supreme Court, General Term, Fifth Department. October 12, 1889.*)

1. HIGHWAYS—OBSTRUCTIONS—PROVINCE OF JURY.

In an action for injuries caused by obstructions in a highway, it appeared that, when the vehicle in which plaintiff was traveling started from the hotel, one of the horses balked, and, when finally urged to move by the driver, the whole team went at a brisk gait. About 80 feet from the hotel, in the highway, was a well, on one side of which the traveled track was 15 feet wide, and on the other 57 feet. The driver went through the narrow passage, and struck a heap of frozen snow and ashes near the well, which capsized the vehicle. The obstruction was large enough to upset any vehicle which struck it in rapid motion. *Held*, that the question of negligence was properly submitted to the jury.

2. SAME—CONTRIBUTORY NEGLIGENCE.

Before the vehicle reached the hotel the same horse balked, and, when induced to go by the driver, the team moved forward at a run, whereupon plaintiff's wife became alarmed, and wished to get out of the vehicle, to which plaintiff replied that the driver could manage his team. There was evidence that the balking horse was not commonly used for carrying passengers. *Held*, that the question of contributory negligence was properly submitted to the jury.

3. SAME—INSTRUCTIONS.

It was not error to refuse a charge that "if the horses were either of them balky or otherwise unmanageable it was negligence to drive them in a public vehicle."

Appeal from circuit court, Monroe county.

Action by Jonathan Chamberlain against the town of Wheatland, for injuries caused by the obstruction of a highway. Defendant appeals from a judgment entered on a verdict for plaintiff, and from an order denying a motion for a new trial.

Argued before BARKER, P. J., and DWIGHT and MACOMBER, JJ.

Joseph W. Taylor, for appellant. George W. Forsyth, for respondent.

MACOMBER, J. This action is brought in pursuance of chapter 700 of the Laws of 1881, by which a party is permitted to recover for personal injuries and for loss of property by reason of defective highways or bridges, in the same manner as such actions theretofore could be maintained against highway commissioners. The plaintiff, with his wife and another person, were passengers in a stage, or public vehicle, running from the Rochester & Pittsburg Railroad station, at Mumford, N. Y., for the accommodation of residents of that village, and of those of the village of Caledonia, one mile south therefrom. At about the time of leaving the station the off horse, which is sometimes spoken of in the evidence as a mustang, balked, and was whipped by

the driver, and at last, with a plunge, the team went forward towards the hotel in the village of Mumford, where one of the passengers, one Mr. Tilley, was to alight. The driver pulled up to the platform of the hotel, and, after discharging Mr. Tilley, started on towards Caledonia. The same horse was again disobedient, and refused to go, but shortly moved on at a rate of speed variously estimated by the several witnesses; and, after going a distance of about 60 or 70 feet, the stage was run upon a hummock in the highway, composed of frozen snow and ashes, where it was overturned, and the plaintiff injured.

One of the grounds of the motion for a new trial, which is repeated on the argument upon this appeal, is that the verdict is against the weight of the evidence. From an examination of the testimony the fact is disclosed, as shown by several apparently credible witnesses, that this spot where the stage or wagon was overturned had been suffered to remain in a dangerous condition for a period of about 10 weeks or 3 months. It is further shown that the hummock of ashes and frozen snow was from a foot to 22 inches in height, and was sufficient to overturn any vehicle rapidly going upon it. It was located within a distance of 2 to 4 feet from the rail surrounding a pump and well located within the highway, and near to the west side of Main street, about 20 or 30 feet from the hotel in question. As the driver stood at the platform of the hotel where Mr. Tilley alighted, his horses were faced substantially to the south, in the direction of Caledonia. The traveled space between the inclosure of the well and the hotel was about 15 feet, through which vehicles of this kind could readily pass. The course, also, to the left of the hotel, and to the east thereof, was equally open and available for the passage of vehicles for a distance, between the well and east curb, of 57 feet. There was no imprudence on the part of the driver in passing to the left of the well rather than to the right. The speed at which the team was at last started from the hotel southward was not by any means excessive. It was no faster than the gait which would naturally be taken by a team where one of the horses had balked, and at last had started forward somewhat impetuously. In any event, all of these matters were proper subjects for the consideration of the jury, and were submitted to them under an impartial charge, leaving the whole case to their judgment.

It is also claimed on the part of the appellant's counsel that the plaintiff himself was guilty of negligence which contributed to the commission of the injury. It is shown, as above mentioned, that while at the railway station the off horse had balked, and had received a severe whipping, and when the team went forward towards the hotel at Mumford it went on a run for some portion of the distance. Evidence was given that the wife of the plaintiff became a little nervous, and wished to get out of the wagon, but that the plaintiff himself reassured her, saying, in substance, that the driver was capable of managing, or was competent to manage, the team. Whatever the appearances were in the ride from the railway station to the hotel, the same must be considered in the light of the fact that this was a public conveyance running for the accommodation of citizens regularly between these two villages, over which the plaintiff had no control. There is no sufficient evidence that would have warranted the jury in finding that the plaintiff himself had reason to believe either that this horse was vicious, unruly, and unmanageable, or that the driver was incompetent. Testimony was given by some witnesses to the effect that the animal which balked was not the regular stage horse, and was not commonly used for the conveyance of passengers. Under all of these circumstances it was a fair question for the jury to say whether the plaintiff riding in a public conveyance without previous knowledge of the vicious character of the horse, and without notice of any incompetency on the part of the driver, should be chargeable with any misconduct or want of care for his own safety which contributed to the injury, and their determination of that ques-

tion, which was submitted to them as fairly as the defendant could properly ask the same to be, should be deemed to be conclusive. Upon the principal questions, therefore, involved in this appeal, there seems to be no legal error committed at the trial.

Much stress, however, is placed by the counsel for the appellant upon the exceptions taken to the rulings of the learned judge at the circuit in receiving and rejecting evidence, and in refusing to charge certain requests made by him. The learned counsel for the appellant says, in his brief, that the court "was asked to charge that if the driver was unskillful or incompetent, and his manner of driving contributed to the injury, then the plaintiff cannot recover, provided he either knew, or the circumstances were such that he ought to have known, of the driver's incompetency." An answer to this proposition is that no such request was made by the counsel to the court. What the counsel actually requested the court to charge was as follows: "Also, if the driver was unskillful or incompetent, and his manner of driving contributed to the injury, the plaintiff cannot recover, provided he either knew or ought to have known that the driver was incompetent." This is a materially different proposition from the one discussed in the brief, and the court was wholly justified in refusing to charge it.

The counsel also asked the court to charge "that if the horses were either of them balky, or otherwise unmanageable, it was negligence to drive them in a public vehicle." This was declined and an exception taken. There was no error in this refusal. There is no principle that would justify a trial court in instructing a jury that it was negligence to undertake to drive a balky horse in the public streets. It is also argued that it was error for the court to permit the witness William H. Adams, the driver of the stage, to say what it was that tipped the vehicle over. It is true that it was the province of the jury to determine what tipped the wagon over; but, after giving the facts, it was not error for the witness to be permitted to say that it was the pile of ashes that worked the mischief. It would not have been legal error to have sustained the objection to the question put to this witness; but, on the whole, we do not think that the question and answer were ground of error, inasmuch as the facts were stated by the witness from which the jury could draw the proper inference. We have examined the other exceptions in the case, and do not find in them any matter which would lead to a reversal of the judgment. By the answer interposed by the defendant, the fact that the plaintiff was a passenger in a public stage-coach, and was being conveyed as a passenger for hire, is not only conceded, but affirmatively alleged. This averment renders quite unnecessary any extended discussion of the question whether any supposed negligence of the driver of the stage could be imputed to the plaintiff. *Dyer v. Railway Co.*, 71 N. Y. 228; *Masterson v. Railroad Co.*, 84 N. Y. 247, and the cases there cited. The judgment and order should be affirmed. All concur.

BRINKMAN v. EISLER.

(City Court of New York, Trial Term. October 2, 1889.)

CONTRACTS—ACTION ON ILLEGAL CONTRACT.

Consolidation act N. Y. § 85, provides that any person violating a city ordinance shall be deemed guilty of a misdemeanor. An ordinance of the city of New York prohibits the erection of an awning across the sidewalk. *Held*, that plaintiff, who had erected an awning for defendant in violation of the ordinance, could not recover either on the illegal contract or on a *quantum meruit*.

Motion for new trial on the minutes.

Sebastian G. Brinkman sued H. S. Eisler on a contract. Verdict for plaintiff, and motion for a new trial by defendant.

Benno Loewy, for defendant.

NEHRBAS, J. The contract sued upon was for the erection of an awning on the Bowery, a public street, highway, and thoroughfare in the city of New York, and across the sidewalk thereof. The erection of such awnings is expressly prohibited by an ordinance of the mayor, aldermen, and commonalty of this city, which was read in evidence. By section 85 of the consolidation act "all persons offending against any ordinance passed by the common council shall be deemed guilty of a misdemeanor, and be punished upon conviction by a fine," etc. Hence any attempted erection of an awning across the sidewalk of the Bowery is an illegal act. The plaintiff did attempt to erect such an awning, and was several times interrupted by the police, and it was never, in fact, completed. Upon the trial the case was allowed to go to the jury, who found a verdict in plaintiff's favor for the amount claimed, with several deductions. I think it was error to permit the jury to pass upon the case, and I am of opinion that the plaintiff should have been nonsuited. Where a person agrees to do an unlawful act, and incurs expense, he cannot recover either on the illegal contract or for a *quantum meruit*. The law leaves the parties where they have placed themselves. *Materne v. Horwitz*, 101 N. Y. 469, 5 N. E. Rep. 331; — v. —, 1 City Ct. Rep., at page 167, and cases cited. For these reasons the verdict will be set aside and a new trial granted, with costs to abide the event. Plaintiff may have a stay of 30 days after notice of entry of judgment, and 30 days to make a case upon appeal.

SMITH *et al.* v. SMITH.

(City Court of Brooklyn, General Term. October 23, 1889.)

TRIAL—FINDINGS OF FACT—SUFFICIENCY.

A finding of fact that "defendant by false and fraudulent representations of law and fact induced the plaintiffs to execute" a deed, states a mere conclusion of law, and is not sufficient to justify a judgment setting the deed aside.

Appeal from special term.

Action by Robert J. Smith and Thomas H. Smith against Margaret Smith, to cancel a deed of land. Judgment was rendered for plaintiffs, and defendant appeals.

Argued before CLEMENT, C. J., and VAN WYCK, J.

Louis Johnson, for appellant. *Horace Graves*, for respondents.

CLEMENT, C. J. The plaintiffs and the defendant in this action were, prior to April 24, 1880, with two other parties, owners, as tenants in common, of certain real property in this city, and on that day said plaintiffs conveyed to the defendant, by deed of bargain and sale, their interest in such real estate. This action was brought to cancel the deed so given, on the ground that it was obtained by false representations on the part of the defendant. Judgment was rendered at special term in favor of the plaintiffs, and from such judgment this appeal is taken by the defendant.

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In the complaint plaintiffs alleged that the deed was presented to them by an attorney who represented the defendant, and that the attorney falsely stated that the said deed was an instrument which gave the defendant only the power to collect the rents of the property, and that, by said representations, he prevented them from reading the same. The above was clearly an allegation that the plaintiff supposed that they were signing simply a power of attorney or written authority to collect the rents, and not a deed, and that they were induced to sign the paper without reading it, because they relied on the false representation. Testimony was given on the trial tending to show that the allegations in the complaint were true, and testimony was also given in behalf of the defendant tending to show the contrary; and a finding either way at special term, on the allegations, would not be disturbed on appeal as against the weight of evidence. The difficulty in this case is in the findings. The finding of fact "that the defendant by false and fraudulent representations of law and fact induced the plaintiffs to execute a deed conveying said property to the defendant" is insufficient in itself to justify a judgment in favor of plaintiffs in this case. If the plaintiffs were induced to sign the deed by false representations of the law, then they signed knowing what it was, but were deceived as to its legal effect; and if they signed by false representations of fact, then they did not know that it was a deed. In the first case, they supposed that a deed would not carry the property, and in the second case they did not intend to give a deed. We think that there should have been a finding of the words used by defendant or her agent to induce the plaintiffs to sign, and that the finding that the defendant by false representations of law and fact obtained the deed is a conclusion of law, and that therefore no fact is found which establishes any false representations. For the reasons above set forth the judgment appealed from must be reversed, and a new trial granted; costs to abide the event.

MAGINNIS v. CITY OF BROOKLYN.

(City Court of Brooklyn, General Term. October 20, 1889.)

NEGLIGENCE—DANGEROUS PREMISES.

Plaintiff, a boy six years old, got on defendant's draw-bridge, when open, by crawling under the gates, and when the bridge was closed his foot was crushed. The gates were 20½ inches from the ground when closed, but were sufficient to protect foot passengers. It did not appear that the gates could have been so arranged as to prevent boys from crawling under them when closed. *Held*, that defendant was not liable for negligence in failing to provide safe gates.

Appeal from trial term.

Action by John H. Maginnis, an infant, by his guardian *ad litem*, against the city of Brooklyn. Judgment for defendant, and plaintiff appeals. For former report, see 1 N. Y. Supp. 522.

Argued before CLEMENT, C. J., and OSBORNE, J.

William G. Cooke, for appellant. *Almet F. Jenks*, for respondent.

CLEMENT, C. J. We have carefully examined the record in this case, and conclude that the facts are substantially the same as on the former appeal. 1 N. Y. Supp. 522. It now appears that the plaintiff crawled under the gate, and in that way got upon the bridge; but our decision was not placed solely on the ground that there was no proof on that point, for we then said: "If we assume that the boy did get upon the bridge by reason of the fact that there was a space of sixteen inches between the gates and the surface of the street, even then we think that the complaint should have been dismissed." The proof in the present case is that the space between the gates and the street was 20½ inches, and that they could have been constructed so that such space would have been 8 or 9 inches less. On the first hearing we held that, if the distance was 16 inches, as it then appeared, plaintiff could not recover,

for the reason that there was no proof that the city could have provided a safer gate; and on this hearing we are asked to hold that the city is liable because they did not provide gates that could be lowered so as to leave only a distance of 11 or 12 inches. If the gates had been constructed in the manner in which the counsel for the appellant contends they should have been, the plaintiff, or any other child, would not have been prevented from creeping under them. There is no proof in the case that the gates are not those ordinarily used. We think also that our decision can be placed on another and broader ground. The gates were amply sufficient to protect foot travelers on the highway, and the city was not bound to put up such an obstruction that a boy could not climb over or creep under it. The authorities cited by the corporation counsel seem in point on this question. *Bridge Co. v. Jackson*, 59 Amer. Rep. 104, note; *Gavin v. Chicago*, 97 Ill. 66; *Gregory v. Inhabitants*, 14 Gray, 242. If boys were in the habit of getting on the bridge when it was about to be turned, and were permitted so to do by the keepers, then it may be that the keepers should have exercised a higher degree of care in closing the bridge than otherwise the law would exact of them, so as to avoid injury to those on the bridge, and, if a child was injured, a cause of action might exist against the city for negligence of the keepers; but no such claim was made in the complaint or on the trial of this action. There was no negligence on the part of the city "in providing an insufficient barrier or safeguard to keep children and others off said bridge while the bridge was being swung," as alleged in the complaint. For the reasons above set forth and on our former opinion, we decide that the judgment appealed from must be affirmed, with costs.

JUCHT v. BEHRENS.

(City Court of Brooklyn, General Term. October 28, 1889.)

NEGLECT—DANGEROUS PREMISES—LIABILITY OF LANDLORD.

In an action for injuries resulting from a fall down the stairway leading from the hall to the cellar in a tenement house owned by defendant, it appeared that plaintiff went to the house on the night in question to deliver the washing of one W., a tenant on the first floor. The hall was not lighted, and when plaintiff came out of W.'s room she walked through the cellar door, which had been left open, and fell down the steps. The occupants of the house used the cellar in common. W. testified that at defendant's request she furnished a lamp for the hall, and agreed to keep it lighted. It did not appear that the hall or cellar stair was faulty or different from the common tenement-house plan. *Held*, that the evidence did not show negligence on defendant's part.

Appeal from trial term.

Action by Louisa Jucht against Dorothea Behrens for personal injuries. The complaint was dismissed, and plaintiff appeals.

Argued before OSBORNE and VAN WYCK, JJ.

M. L. Towns, for appellant. *Jerry A. Wernberg*, for respondent.

OSBORNE, J. Plaintiff brought this action to recover damages for injuries sustained by her in falling down the cellar stairs of a tenement house owned by defendant, which injuries she claims were caused by the negligence of the defendant in permitting the hallways of said house to be unlighted, and dark and unsafe, and the opening, or door-way, from the hallway to the cellar to be open and unguarded. It appears from the evidence that the premises in question consisted of a three-story double house containing six families. The stairway was built in the recess of the hall, and the door leading to the cellar was under the stair. All the tenants had the right of access to the cellar, and there kept their fuel. On the evening of April 20, 1888, between 6 and 7 o'clock, plaintiff went to the apartments of one Mrs. Weisberger on the first floor to deliver her washing. She started to leave between 7 and 8 o'clock, went out into the hall, which was dark and unlighted, took a couple of steps,

she testifies, and, the door leading to the cellar being open, fell down the cellar stairs, and suffered the injuries of which she complains. Mrs. Weisberger testifies that she furnished a lamp for the hall, at defendant's request, and was to keep it lighted, at her request. The complaint was dismissed at the trial on the ground that no negligence was shown on the part of the defendant, and from the judgment entered thereon this appeal is taken.

The only question left for us to consider on this appeal is whether the defendant was shown to be negligent in any duty that she owed the plaintiff. We can find no evidence in this case that defendant was negligent. There is no proof that the construction of the hallways and the cellar stair was in any respect faulty or differing from the ordinary plan of tenement houses. The accident was occasioned by some one leaving the cellar door open. If that had been closed the accident would not have happened. That some one was negligent in leaving the cellar door open is doubtless true, but it nowhere appears that the defendant or her servants left the door open. We cannot say that it was the duty of the owner to light the halls of the premises. The fact that the hall was dark entailed on the plaintiff the duty of moving carefully, and if she had done so, or asked for a light, she would have discovered the open door, and so have avoided the accident that befell her. To say that because some one (presumably one of the tenants) carelessly left the cellar door open it constituted negligence on the part of the defendant is a proposition that cannot be entertained. The case of *Camp v. Wood*, 76 N. Y. 98, relied on by appellant's counsel, is not in point. In that case the court substantially held that it was the duty of the landlord to provide safe arrangements for the entrance and departure of those invited to his premises. There, however, it will be noted the construction of the stairway and the exit therefrom was peculiar, and calculated to mislead. In the case at bar there was no faulty or peculiar construction shown to exist. The cellar stairway was properly guarded by a door, and no negligence was shown on the part of the defendant. *Kaiser v. Hirth*, 86 N. Y. Super. Ct. 344. For the reasons stated, we think that the learned trial judge was right in dismissing the complaint. Judgment affirmed, with costs.

PICKETT v. GOLLNER.

(City Court of Brooklyn, General Term. October 28, 1889.)

MECHANICS' LIENS—FOR WHAT OBTAINED—SODDING LOT.

Laws N. Y. 1885, c. 342, § 1, providing that any one who shall perform any labor, or furnish any materials to be used in altering or repairing any "building or building lot, including fences, sidewalks, paving, fountains, fish-ponds, fruit and ornamental trees," shall have a lien, includes a claim for terracing and sodding a building lot.

Appeal from special term.

Action by William P. Pickett, as assignee, against Ada F. M. Gollner to enforce a mechanic's lien. Judgment for plaintiff, and defendant appeals.

Laws N. Y. 1885, c. 342, § 1, provides that "any person * * * who shall hereafter perform any labor or services, or furnish any materials which have been used, or which are to be used in erecting, altering, or repairing any house, * * * building, or building lot, including fences, sidewalks, paving, fountains, fish-ponds, fruit and ornamental trees, * * * may, upon filing the notice of lien prescribed in the fourth section of this act, have a lien," etc.

Argued before CLEMENT, C. J., and VAN WYCK, J.

Alfred R. Page, for appellant. H. B. Koepke, for respondent.

VAN WYCK, J. In our opinion the language of this mechanic's lien statute (Laws 1885, c. 342, § 1) is broad enough to include a claim for terracing

and sodding the yard of a building lot. *Moran v. Chase*, 52 N. Y. 846; *Kenney v. Appgar*, 93 N. Y. 549. The form of the judgment is substantially correct. *Lawson v. Reilly*, 13 Civ. Proc. R. 290. The other questions raised by appellant have been disposed of adversely to him by the court of appeals in *Kenney v. Appgar*, 93 N. Y. 539. Judgment must be affirmed, with costs.

In re O'NEIL'S ESTATE.

(Surrogate's Court, New York County. October 5, 1889.)

1. WITNESS—PRIVILEGED COMMUNICATIONS.

Under Code Civil Proc. N. Y. § 835, prohibiting attorneys from testifying as to communications by clients in the course of business, an attorney cannot testify as to any act or word of his client on the subject of his will or its execution.

2. SAME—COMMUNICATIONS TO PHYSICIAN.

The same rule applies to an attending physician, but he can testify as to the declarations of the testator as to making a will, and his advice on that subject.¹

Application for the probate of the will of James O'Neil, deceased.

John Hardy, for proponent.

RANSOM, S. The contest in this proceeding cannot be sustained upon the evidence lawfully before the court. The testimony of the attorney who drew the paper propounded is largely incompetent. Any act or word of the testator to his attorney, on the subject of his will or its execution, I hold to be improperly proved by the attorney himself. Communications from client to attorney, necessary for the business in hand, are inadmissible. Section 835, Code Civil Proc. Such communications may be the acts of the client as well as words spoken by him. Practically, all that a man may say to an attorney who is employed by him to draw his will and to superintend its execution, upon that subject, and all he may say to anybody else in the attorney's presence and hearing at the time, cannot be lawfully disclosed by the attorney. The only exception is when the attorney is a subscribing witness to the will. The same rule, precisely, governs the attending physician. An inspection of the record of the testimony in this case will show that much of the evidence of the doctor is admissible, because it proves facts not necessary for him to know to enable him to prescribe for his patient. For example, the declarations of the testator as to making a will, and the doctor's advice to him on that subject. Under this rule, which is exactly stated, as will be seen by the letter and spirit of the statute itself, and under the authority of numerous cases decided by this court and by courts of appellate jurisdiction, I have disregarded very much of the testimony of the attorney and of the doctor. I find also in the testimony submitted some evidence by the contestants themselves, and on behalf of the proponent, which is incompetent, and is not therefore considered by me, it being violative of the express provisions of section 829, Id. I refer in this connection especially to the testimony of Mrs. Swan and Peter O'Neil, contestants, and to Mrs. Cahill, one of the beneficiaries under the will, a witness for the proponent. The qualifications of witnesses in all cases, whether they be those referred to in sections 834 and 835, or 829, of the Code of Civil Procedure, ought by this time, it seems to me, to be well understood by bench and bar, considering repeated decisions by our own general term and by the court of appeals construing those sections. The statute requires the surrogate to satisfy himself that the paper propounded is the last will and testament of a competent decedent, that is, a person competent to make a will; that it was lawfully executed by him; and that it was his voluntary act, without restraint or fraud. The contestants here seem to have abandoned their

¹Concerning the competency of physicians to testify with regard to communications from their patients, see *Jones v. Railroad Co.*, 3 N. Y. Supp. 253, and note; *In re Dargh's Estate*, 5 N. Y. Supp. 58.

case after the closing of the evidence, as their attorney neglected to avail himself of leave granted to submit a brief. The paper propounded is admitted to probate.

In re THORNE'S ESTATE.

(Surrogate's Court, New York County. September 28, 1889.)

WILLS—UNDUE INFLUENCE.

Where a testator's love for his wife and her children by a former marriage was strong, it is no evidence of undue influence on their part that by his will he made ample provision for their support.

Application for revocation of probate of will.

William G. Low, for petitioner. *Stickney & Shepard*, for respondents.

RANSOM, S. The clear impression made by the argument in this proceeding on my mind—that the will of this decedent, probate of which is sought to be revoked, was lawfully executed by a competent testator, without fraud, restraint, or undue influence—has become, after a careful reading of several hundred pages of testimony, and attentive study of the able briefs of counsel, a settled conviction that such impression was sound. On the trial the learned counsel for the contestants abandoned every allegation of the petition, except that of undue influence. This action on his part was fully warranted by the testimony, as no lack of testamentary capacity had been shown; but, on the contrary, it had been proved by contestants' own witnesses that the testator was, at the time he executed the will, a man of unusual mental strength, and of undoubted testamentary capacity. The earnest argument of learned counsel for contestants, both oral and written, has not persuaded me of the existence of any fact or circumstance, sworn to by any witness entitled to credit, which will tend to establish undue influence on the part of any person over the mind of the testator. If the evidence of Michael Conklin is to be believed,—and I have considered it all; overruling, for that purpose, all the rulings of the learned assistant,—the testator does not seem to have been affected at all by his advice. It does not appear to me, from Conklin's own story, that he had any influence whatever upon the testator's testamentary intentions.

To my mind, the will was a most natural one and a very just one. The testator's love for his wife and her children by a former marriage was strong and abiding, and, beyond question, was worthily bestowed. It may be true—I should be surprised if it were not—that his wife and her children wielded an influence over him far greater than that of any other person on earth. The contrary of this would be most unnatural and regretful. The influence of the wife should be paramount to that of all the rest of the world; and human experience proves that it is so. There is no direct evidence in this case that testator's wife or children attempted in any way to warp his judgment or sway his will, although they had an undoubted right to do both, by appealing to his love for them, and tender solicitude for their welfare after his death, to the extent of making ample provision for them out of his estate, even to bestowing it all upon them.

The court of appeals has again and again defined undue influence which will avoid a will. The rule of decision there laid down not only controls this court, but it is entirely in accord with the simplest principles of sense and reason. The court says in one case, which is but one of many holding the same doctrine, that, in order to avoid a will upon the ground of undue influence, it must be shown that the influence exercised amounted to moral coercion which restrained independent action, and destroyed free agency, or that, by importunity which he was unable to resist, the testator was constrained to do that which was against his free will and desire. *Society v. Loveridge*, 70 N. Y. 394. It is true that undue influence cannot be proved in the great ma-

majority of cases by direct evidence; that it can only be made out by circumstances, from which the conclusion, however, must be inevitable that the testator was reduced in his mentality to practical helplessness, and succumbed to an influence which made the will that of some other person, and not his own. The circumstances disclosed in this case are very far from establishing any such condition of the mind of the testator. Presiding Justice VAN BRUNT (*In re Lyddy's Will*, 5 N. Y. Supp. 689) states the law on the point with that precision and vigor so characteristic of all his opinions. He says: "Undue influence, fraud, and duress must be proven as any other part of the contestant's case. The mere fact that a wife has exercised influence upon her husband in relation to the disposition of his property, by will or otherwise, in no way supports the proposition that undue influence has been exercised. Influence may always be exercised, and it is proper that it should be exercised; but it only becomes improper when it becomes undue, and it becomes undue when it substitutes the will of the person exercising the influence for the will of the person who is to do the act. Arguments, persuasions, and suggestions may be made, so long as the person who is to do the act can weigh the suggestion, and has the ability, if so minded, to resist the influence. Then there is nothing undue in regard to it, although he may yield to it. And even if there was proof in this case that the proponent had requested the testator to make this will in her favor, and urged him to do it, it would have been no ground for finding that the influence which she exercised in the making of the will was such as to impeach the integrity of the instrument, and it would seem that the relations of the parties go to show beyond all question that no such influence was necessary in order that this will should be executed." The opinion of the learned justice quoted is appropriate to the facts in the case at bar. In all essential particulars the two cases are alike. Revocation of probate is denied.

In re KEELER'S WILL.

(*Surrogate's Court, Cayuga County. September 25, 1889.*)

1. COSTS—JURISDICTION TO AWARD—PROBATE OF WILL—CONSENT OF PARTIES.

Since Code Civil Proc. N. Y. § 2553, provides that costs shall not be allowed out of the estate to an unsuccessful contestant of a will, a stipulation by the parties that costs shall be so awarded will not be enforced, as the court is without jurisdiction to so decree, and consent of parties cannot confer jurisdiction.

2. SAME—STIPULATION.

Correspondence between counsel as to the manner in which costs shall be decreed, containing propositions not accepted, will not, though the propositions are afterwards orally agreed to, constitute a valid stipulation "in writing," as required by rule of court.

3. SAME.

When a contest is apparently made in good faith, and on substantial grounds, and, owing to a misunderstanding of counsel as to a stipulation for a compromise, the contestants do not appear at the trial, and a verdict is rendered against them without opposition, the court will, in the exercise of the discretion conferred in such cases by Code Civil Proc. N. Y. § 2553, direct the proponent's costs to be paid out of the estate, and not by the contestants personally.

This controversy grows out of the probate of the will of Morris Keeler, deceased; it being contested by his heirs. Probate was refused, and the proponent appealed to the supreme court, where judgment was reversed. 3 N. Y. Supp. 629. On a new trial being had, the will was admitted to probate, and only the question of costs is now presented.

W. D. Shuart and Frank S. Curtis, for proponent. *S. Edwin Day*, for contestants. *W. E. Hughitt*, special guardian, for infant.

TELLER, S. This is an application for costs by the proponent of the will of the decedent, asking that costs be allowed as against the contestants personally. The contestants also ask an allowance of costs from the testator's

estate; claiming the right thereto by virtue of an alleged stipulation of counsel. The proceedings for probate of the will resulted in a decree of this court denying probate, and awarding costs to both parties from the estate. An appeal was taken to the general term of the supreme court, where the decision of this court was reversed, and a trial upon questions of fact before a jury ordered. Upon the second trial, no opposition was made to probate, and a verdict was rendered in favor of the proponent upon all the issues submitted. After the decision upon appeal, and prior to the second trial, correspondence was had between William E. Hughitt, Esq.,—who had appeared in the proceeding as special guardian for one of the contestants, (a minor,) and for no other party to the proceeding, as he states in his affidavit now presented,—and William D. Shuart, Esq., counsel for proponent, in regard to a settlement of the litigation. There had been an interview between these parties relating to this subject, and on April 11, 1889, the special guardian wrote Mr. Shuart as follows: "Dear Judge: I saw Judge Day, Tuesday, and further conferred with him about the matter of my talk with you at your office. We suggest as follows: We to be allowed our costs as per judgment of surrogate's court of Dec. 27th, 1887; in like manner, our costs and disbursements since; in addition, that there be paid our side, say \$3,000. It seemed to us that you would think this much better than to litigate further," etc. April 15th, Mr. Shuart replied: "I feel that I could not advise my client to accept your proposition. Of course, the costs of the special guardian will be allowed all through the proceedings, whatever may be the result, but not quite so with regard to the other costs. Yet I feel that, if the litigation could be terminated without the labor of a protracted and hard-fought trial, it would be to the advantage of our client to pay all of the contestants' costs, that allowed by the surrogate's court, and referred to by you, and all other costs; and we should make no opposition to the old bill of Judge Day to which you refer.

* * * We think, if the contestants' costs are allowed, and the bill of Judge Day, that they ought to claim nothing further of the old lady." A letter of explanation was written in reply on the 17th of April, to which proponent's counsel on the 18th of April answered: "We do not see how we can vary our proposition sent the other day." On April 20, 1889, the special guardian wrote: "You have left me in a hole. I thought I was warranted, from our personal interview, in reporting to clients that you would advise the payment of something. 'Judge Day's old bill' was only mentioned in my letter so that it might not appear to be confounded. He does not regard its payment as any concession. * * * I cannot think taxable costs only were in your mind at our interview. I certainly did not so think. I hope you will let me out by offering something beside taxable costs." April 23d, Mr. Shuart replied: "I did have in mind the propriety of paying your people something besides taxable costs when we had our interview. * * * I will talk the matter over with my client, and ascertain just what her feelings are in the matter. Do not let this prevent you from making such arrangements as you may deem necessary for the trial of the action at the next circuit; although I shall be quite pleased if, after a conference with my client, we find some way to help you out." On April 29th, he again wrote: "I was at Moravia last Friday, and had an interview with my client, the result of which is to leave no other way than for us to try the case, unless you are willing to accept the proposition contained in our letter of April 15th." On the 4th of May, the special guardian wrote, in reply: "I have little doubt but that your offer will be accepted. * * * Assume that the best way will be to await your arrival on Monday, or later, if you desire. Under all the circumstances, we expect you will allow the costs at a liberal rate."

The foregoing are all the contents of the letters between these parties which it is deemed material to quote. Upon the following Monday, the first day of the Cayuga circuit, the parties to the correspondence met at Auburn, and had

an interview, as to the details of which there is now a dispute. Mr. Hughitt presents his affidavit, in which he says he was then told by Mr. Shuart that some of the Keelers would not consent to said settlement, and he replied the arrangement must be carried out, that Judge Day so understood it, and he had authority from him for it; that Mr. Shuart, after some further conversation, said proponent would do as he had proposed, if there would be no contest before the jury; that he (deponent) assented, and that said arrangement was fully carried out on contestants' part, relying on said promises of said Shuart. Mr. Shuart presents his affidavit, in which he states that he did not say to said Hughitt that the proponent would do as he proposed, if there should be no contest before the jury; that he did say that William E. Keeler, one of the contestants, declined to accept the proposition which had been made by him, and that therefore there could be no settlement as proposed; that he had been definitely informed by said Keeler that the other contestants declined to make any compromise or settlement, unless proponent would pay them, in addition to their costs, the sum of \$200; that such proposition was rejected by him, and no agreement to compromise or settle was consummated; and that he did not understand Judge Hughitt as accepting any proposition of settlement. He also says, in his affidavit, that, just before coming into court, he had been told by William E. Keeler that there could be no settlement, unless \$200 was paid in addition to all costs, and that he (Keeler) had received instructions from Judge Day to have the matter appealed, and to have the papers prepared by William E. Hughitt, and that the papers would be served upon proponent's attorney before the case could be tried. Judge S. Edwin Day was attorney of record, and represented all the contestants, except the one for whom Judge Hughitt appeared as special guardian. He took no part in the correspondence, so far as is shown, and did not appear upon the second trial, (at the circuit.) His affidavit is read, in which he states that he relied on the arrangement stated in the affidavit and letters, (except that of May 3d,) and that, in consequence, he did not appear at the May Cayuga circuit; and none of the contestants, so far as he knows, then appeared. Since the trial, each party has served a bill of costs upon the attorney for the other party, and the question of allowance is presented upon the cross-applications.

I do not think there has been shown to be such a stipulation as would authorize this court to allow costs to the unsuccessful contestants. Prior to the letter of May 3d, above referred to, there certainly was no agreement between the parties. The contestants asked, as a condition of withdrawing their objections, an allowance of money, in addition to taxable costs. The letter of Mr. Hughitt of May 3d does not contain a positive acceptance of the offer of proponent's counsel, but merely a statement that he had "little doubt but that your offer will be accepted." Certainly, the minds of the parties had not met prior to the interview at the court-house the day of the trial. I am convinced that, before any agreement was made, the counsel for the proponent was told by one of the contestants that the proposed settlement would not be accepted; and that the counsel notified Judge Hughitt that, in consequence of this contestant's declining to accept the proposition, there could be no settlement. Whether it was thereupon agreed between counsel that the proposition contained in the letter of April 15th should be carried out may not be necessary to determine, for the reason that any agreement then to be made required the assent of both parties, and to be binding should have been reduced to writing, and subscribed by the party against whom it is alleged, or by his attorney or counsel. Rule 11. I do not think a letter of an attorney, proposing terms of settlement, which are withdrawn before acceptance, can be held to be such evidence of a subsequent agreement as this rule requires. The object of the rule was to avoid the unpleasant duty of a court, in weighing conflicting affidavits, to determine the truth of statements made by attorneys in proceedings like the present.

As to whether counsel promised that the proponent would do as he proposed, if there should be no contest before the jury, there is a flat contradiction in the affidavits. That the contestants consider it necessary to prove there was such a promise is confirmatory of the position that the assent of both parties at that time was deemed essential. Such agreement, not appearing by written evidence, cannot be held to have been binding. If the alleged agreement had been made, and properly evidenced, I do not think this court would be at liberty to enforce it, in view of the statute upon the subject of costs. Section 2558 of the Code provides that, when a decree is made upon a contested application for probate or revocation of probate of a will, costs payable out of the estate or otherwise shall not be awarded to an unsuccessful contestant of the will, unless he is a special guardian for an infant. It is a well-established principle of law that jurisdiction of the subject-matter involved in an action or legal proceeding cannot be conferred by stipulation; and, when the law-making power prescribes limits or conditions to the authority of a court, they cannot be dispensed with by litigants. *Griswold v. Sheldon*, 4 N. Y. 581; *McMahon v. Rauhr*, 47 N. Y. 67; *Davidsburgh v. Insurance Co.*, 90 N. Y. 526. This court has no jurisdiction of the subject-matter,—the thing in dispute; the allowance of costs to unsuccessful contestants upon the probate of a will,—and consent of the parties would not confer such authority. As to the matter of an allowance of costs to the proponent, it lies within the discretion of this court to determine whether they shall be paid out of the testator's estate, or be decreed to be paid by the contestants personally. Code, § 2558. There is not proof to vary the impression formed upon the first trial, that the contest was made in absolutely good faith, and with sufficient grounds. The imposition of the burden of the payment of costs upon the contestants, in these circumstances, simply because the will has been finally adjudged to be valid, would be contrary to precedent, and unjust. Moreover, I am satisfied that the attorney for the contestants failed to appear at the circuit, at which this case was tried, for the reason that he relied upon the arrangement, proposed by the counsel for the proponent, being carried into effect. The conclusion is also unavoidable that the proponent's counsel must have known that fact, when proceeding with the trial; and, although the proponent may not be bound by any stipulation, the facts, which are uncontroverted, are sufficient to require the court to direct the payment of the costs of the proponent out of the testator's estate. The costs of the special guardian prior to the appeal to the general term are allowed at the amount originally taxed. Subsequent costs are denied, for the reason that the ward became of full age prior to the appeal, and had no further need of a guardian.

In re CRISE'S ESTATE.

(*Surrogate's Court, Cayuga County. September 24, 1889.*)

1. TRUSTS—DECLARATION—EVIDENCE.

C. delivered to A. \$1,210, taking the latter's acknowledgment, which stipulated that the money was to be invested for the benefit of C.'s daughter H., and the interest thereof paid to her for the support of herself and children when C. should decide that she needed it. *Held*, not a declaration of trust such as to prevent C. from thereafter collecting and using the money; as, to constitute a trust, the language used must be clear and unequivocal.

2. SAME.

It was shown that C. had given his other children advancements, and had expressed the intention to advance H. equally, and that on the day that he delivered the money to A. he took a receipt from H. for the same amount, in which the sum was called an "advancement." H. for some time retained the paper signed by A., but at C.'s request delivered it to him, and at C.'s death the receipt given him by H. was in the latter's possession, but when she obtained it did not appear. A. opened an account with H. as her trustee, as he did with C.'s other children, for whom money had been deposited with A., but it was not shown that C. knew that

fact. H. never made use of principal or interest, and C. himself appropriated the money. *Held*, that the evidence did not establish a gift to or trust for H. in the money, and C.'s executors were therefore not liable to her therefor.

3. SAME—RES ADJUDICATA.

The failure of H. and her children, who were beneficiaries under C.'s will, to file their claim against the executors in a settlement to which they were cited as parties, would estop them from afterwards claiming the money.

William P. Sisson and James R. Cox, for petitioners. *William B. Woodin and Charles M. Baker*, for executors.

TELLER, S. The petitioners, Mary Ann Hillman and Eddie C. Hillman, filed a petition April 23, 1889, in this court, asking that the executors, Henry G. Crise and D. Pulaski Mersereau, be required to appear and render an account, and pay the petitioners certain moneys alleged to have been held by said decedent, William Crise, at the time of his decease, as trustee for the benefit of the petitioners. William Crise died December 9, 1881, leaving a last will and testament, which was admitted to probate by the surrogate of this county on the 31st day of January, 1882, upon which day letters testamentary were issued to said executors. An inventory of the personal property of the decedent was filed March 30, 1882. The amount of the personality, as shown by the inventory, was \$17,105.87. By his will, the testator gave all his property to his executors, in trust to convert into cash as soon after his decease as they may deem best for the interest of his estate, and to divide the same equally among his children, except the said Mary Ann Hillman, and to retain in their hands one-sixth part of said estate, and invest the same safely at interest, and pay over the income thereof to said Mary Ann Hillman for the support of herself and family during her life-time, and, at her death, to pay over the principal sum, and any balance of interest, to the children of said daughter then living, and the descendants of deceased children. The executors were authorized to purchase for the use of said daughter a house and lot out of said share, to be used by her during her life, and to pass to her children in fee upon her decease. The testator was at the time of his death the owner of a farm of 210 acres of land. The testator, within a few years before his death, gave to each of his children, except Mrs. Hillman, the sum of \$1,000. On the 1st day of April, 1872, the testator delivered to one E. W. Arms, of Aurora, who had acted as agent for him in making loans of money, etc., the sum of \$1,210, and took from him a receipt in the following words: "\$1,210. I have in my possession twelve hundred and ten dollars, in trust from William Crise, to invest for the benefit of his daughter Mary Ann Hillman; the interest of which only to be paid to her when said Crise thinks she needs it, for the support of herself or her child. Dated, Aurora, April 1, 1872. E. W. ARMS." A receipt in the handwriting of said Arms, bearing the same date, was presented to Mrs. Hillman by the testator, and signed by her. It was produced in evidence, and is as follows: "\$1,210. Rec'd, Aurora, April 1st, 1872, of William Crise, twelve hundred and ten dollars, being an advance by him to me of \$1,000, and interest on same from April 1st, 1869, to make me equal with advances then made to his other children. MARY A. HILLMAN." This receipt was in the possession of Mrs. Hillman at the time of the death of her father. The paper signed by E. W. Arms was left in Mrs. Hillman's possession several years, when the testator sent one of his children for it. It was delivered to the testator, and was subsequently found among the papers of E. W. Arms after his decease. At the time of the delivery of this paper to Mrs. Hillman, the testator said it was money he had left in trust with E. W. Arms, to make her equal with the other children. The delivery of the receipt by Mrs. Hillman to her father appears, if made at all, to have been subsequent to the delivery of the paper to her, signed, "E. W. ARMS." When the receipt was returned to her does not appear. An account is shown to have been kept by said Arms with

William Crise, and with each of his children. The accounts of three of the children, Sally Ann Watkins, Ann Elizabeth Watkins, and Rachel E. Allen, are each opened with a credit as follows: "1866, April 1. By amt. of William Crise, (gift,) \$1,000." The account of Henry G. Crise contains a credit of April 1, 1866: "By amt. of William Crise, (gift,) \$1,002.92." The account of Charlotte Crise contains a credit of the same date of \$472.78, by cash left by William Crise, and theretofore invested. It also shows the purchase of a piano for her at \$372, and other credits in 1867 and 1868; making altogether about the same amount. The account kept by Mr. Arms with Mary Ann Hillman was opened April 1, 1872, with the credit: "By amt. from father, (William Crise,) in trust for you to invest. R. \$1,210." On April 1st of each following year appears a credit of interest; and on April 1, 1875, the account appears to have been balanced by a charge as follows: "Transferred & Cr. William Crise, ac. to bal. \$1,482.30." Upon the account kept by Mr. Arms with William Crise, of date April 1, 1875, appeared the entry: "By amt. Ann Hillman's ac., set apart for her April 1, '72, \$1,210, and the int. on same, \$1,482.30." The same day a charge appears to have been made in the same account: "To amt. lent on David C. Auble, B. & M. \$2,357.09." The account also shows that the interest upon this mortgage was subsequently collected by E. W. Arms, and credited to William Crise.

It is shown by the testimony of Mrs. Mersereau (formerly Charlotte J. Crise) that her father, William Crise, had said to her that he had given four of his children (naming them) some money, and that he was going to place some money in Mr. Arms' hands for Mrs. Hillman, to be paid to her if he (William Crise) saw fit. This was prior to April 1, 1872. Afterwards she heard her father say he should not give it to her. On or about April 1, 1872, William Crise gave to each of his children, except Mrs. Hillman, an additional \$1,000. The will of William Crise is dated October 19, 1872. He died on the 19th day of December, 1881. The inventory of the personal property was filed March 30, 1882. A codicil to the will was made and published May 23, 1877, appointing D. P. Mersereau (the testator's son-in-law) an executor of his will, in place of E. W. Arms, then deceased.

On the 29th day of May, 1884, the executors appeared in this court, and filed waivers of citation to the judicial settlement of their accounts from all the children of the decedent, including Mrs. Hillman, and also waivers of Eddie C. Hillman and Lillian C. Hillman. Eddie C. Hillman is the only child now living of the said Mary Ann Hillman, and one of the petitioners in the present proceeding. An account was filed by said executors the same day, and a decree was granted settling the same. Said decree was not entered at the time of the filing of the petition in this proceeding, but it has since been prepared, and entered May 23, 1889, as of the 29th of May, 1884. The executors, upon said accounting, were charged with the sum of \$20,270.14, being the amount of the personal property inventoried, together with the increase thereon. They were credited with \$1,113.04, paid for debts and expenses of administration, and with the sum of \$16,134.25, distributed among legatees; leaving the sum of \$3,022.85 in their hands as trustees for Mary Ann Hillman, under the provisions of the will. Upon the present proceeding, the executors have filed their account, (May 21, 1889,) showing the receipt by them, since the former accounting, of \$3,263.70, (made up principally of the avails of farm produce,) and crediting themselves with the sum of \$2,867.30, paid out for expenses of administration, and distributed as income to the parties entitled under the will; also charging themselves with farm stock and produce held by them as executors jointly with one William J. Ryan. They also report that from the trust moneys above mentioned they purchased a house and lot for the use of Mrs. Hillman, May 29, 1884, the fee thereof to vest in her children, for which they paid \$2,200; and that the balance of said trust moneys, viz., the sum of \$822.85, is on hand, and invested for the use of the

cestui que trust. There is still under the control of the executors, who are given the power of sale thereof, a farm of 210 acres, which they are authorized to lease, and collect rents, make repairs, pay taxes and insurance, and manage generally as they may deem best for the interest of the estate. A sale is authorized at such time and upon such terms as the executors may deem best, except that it shall not be sold at public sale without the consent of two-thirds in interest of the persons entitled to the avails. The avails are to be paid in equal portions to the children of the testator, except the share (one-sixth) of Mrs. Hillman is to be retained and invested by the executors, who are to pay the income to her during her life, and, at her death, to pay the principal thereof to her children, etc.

It is claimed by the petitioners that William Crise, in depositing the fund of \$1,210 with E. W. Arms, on the 1st day of April, 1872, transferred the beneficial interest therein to his daughter Mrs. Hillman and her children, and that the paper there signed by Mr. Arms, and subsequently delivered by Mr. Crise to Mrs. Hillman, is evidence of a declaration of trust in her favor. Assuming that the language of this instrument was adopted by Mr. Crise as expressing his intention, it must be construed to mean, as it states, that the interest of the fund alone was to be paid to Mrs. Hillman; and that, only, when the donor thought she needed it. No direction is made with regard to the principal, except that it was in trust from William Crise. It was to be invested for the benefit of his daughter as specified, *i. e.*, that she might have the interest when her father decided she needed it. I fail to find in this instrument evidence of a declaration of trust sufficient to pass the ownership of the principal fund. No intention is expressed to have the principal sum at any time turned over to Mrs. Hillman or her children. The donor reserved the right to dictate as to the interest, and his subsequent acts showed he believed he had the right to receive the principal. To create a trust, the acts or words relied upon must be unequivocal; and while a different interpretation may, with equal plausibility, be placed upon the transaction, it would not be proper to draw the inference that a trust was intended which divested the donor of all further ownership of the property. *Martin v. Funk*, 75 N. Y. 134; *Young v. Young*, 80 N. Y. 422; *Barry v. Lambert*, 98 N. Y. 306. The petitioners further say that the fact that the testator had given \$1,000 each to his other children, and had talked of giving Mrs. Hillman the same sum in 1866 or 1867, to make her equal with his other children, and that, subsequent to the deposit with Mr. Arms, the testator delivered to her the paper signed "E. W. ARMS," stating that it would some time make her equal with the other children, and that he thereafter took a receipt from Mrs. Hillman for the amount of the deposit, which recited that it was an advance of \$1,000, and interest on same from April 1, 1869, all show that it was his intention to create and declare a trust in favor of Mrs. Hillman which passed the equitable title to this fund to her. The entries in Mr. Arms' book of accounts are also referred to as confirmatory of this theory; but there is no proof to indicate that Mr. Crise either dictated these entries, or that he knew what they were. The objection to the theory of the petitioners is that the two written instruments bearing date of April 1, 1872, but delivered at different times, indicate quite different purposes on the part of William Crise. One shows an intention to invest the fund, and use the income for the benefit of Mrs. Hillman as the donor might direct. The other relates to an absolute gift. These purposes do not appear to have been concurrent, and there is no evidence of any delivery to Mrs. Hillman, or to any one acting for her. The subsequent surrender of the paper signed by Mr. Arms, the return by her father of the receipt signed by Mrs. Hillman, and the withdrawal of the fund from Mr. Arms' hands, show that the parties then understood that Mr. Crise continued to have control over the property; that it was still, in fact, in his possession. The only delivery had been to the agent of Mr. Crise, who continued to act

under his instructions. Neither the principal nor the interest was ever at the disposal of Mrs. Hillman. The evidence all leads to the conclusion that the testator intended to give his daughter the interest when he was satisfied she needed it for her support, and to give her the principal at some future time, but that he failed to make such delivery as to constitute a completed gift. The evidence does not establish such a declaration of trust as would transfer the title to the property.

I also think the petitioners are estopped by the proceedings upon the accounting had May 29, 1884, from setting up the claim that the testator held the fund in question, at the time of his death, in trust for them, or either of them. The petitioners were both parties to that proceeding. They both executed waivers of citation thereto, in which the proceeding is mentioned as the final judicial settlement of the accounts of Henry G. Crise and David P. Mersereau, executors, etc., of William Crise, deceased. The account then presented purported to include all the property belonging to the estate of the deceased which had come to the possession of the executors, or been received by any other person for their use, except the real estate. The latter did not in any manner represent the fund in question. The rights of the parties then and now before the court, as to the property in dispute, were involved in the distribution theretofore made, and which was in fact adjudged by the court to have been properly made. That the petitioner Mrs. Mary Ann Hillman, who now claims that a trust had been declared in her favor, knew at the time that the rights of the parties as to this property were being adjudicated, is shown by the fact that, upon the 3d day of April, 1882, when the executors paid the other children their distributive shares of the personal property, three of them gave Mrs. Hillman \$333.33 each, because she had not received as much as the others,—that being one-sixth of the amount considered necessary to make her equal; and, had the other two children given the same amount each, Mrs. Hillman would have been made equal as to the principal. The account stated the amount of the balance at \$3,022.85, which sum was held by the executors in trust for Mary Ann Hillman, in accordance with the will of said deceased. No objections were made to the account, and a decree was directed to be entered settling the same. There was therefore a judgment of a court, having jurisdiction of the parties and subject-matter, upon an issue involved in the proceeding, and the same was conclusive, and must be so held in this proceeding. *Davis v. Tallcot*, 12 N. Y. 184; *Blair v. Bartlett*, 75 N. Y. 150. An application has been made, pending this proceeding, to open the decree settling the account filed in May, 1884, but, so far as the question now under consideration is involved, I understand the application to have been abandoned; the attorneys for the executors consenting that, so far as any errors are concerned which appear upon the face of the account, such as mistakes in figures, they may be corrected upon this hearing. However, were the application for opening the decree, and a new trial of the question relating to the ownership of the alleged trust fund, properly before the court, I do not think the facts would justify the court in opening the decree. It is further submitted by the petitioners that the former decree did not adjudicate upon this trust, for the reason that the trust fund formed no part of the estate of William Crise. The answer to this proposition is that the fund in question appears to have been mingled with the assets of the decedent, and by his death the claimants lost any vested rights they might have had as owners of the property, and were remitted to the standing of mere creditors of the estate of William Crise. *In re O'Brien*, 45 Hun, 284. Being parties to the former accounting, they ought to have asserted their claim at that time. The account now presented will be settled, with such corrections as may be agreed upon, or hereafter directed.

*In re CURTIS' ESTATE.**(Surrogate's Court, Westchester County. May, 1889.)***LEGACY TAXES—EXEMPTION—CHARITABLE INSTITUTIONS.**

A hospital "for the care and treatment of sick and disabled indigent patients" is an almshouse, within the meaning of 1 Rev. St. N. Y. 888, § 4, subd. 4, exempting from taxation the real and personal property belonging to every "poor-house, house of industry, almshouse," etc., so as to exempt a legacy to it from the legacy taxes provided for in Laws N. Y. 1887, c. 713, which exempts therefrom "societies, corporations, and institutions now exempted by law from taxation."

The will of Abijah Curtis, deceased, gave a legacy of \$1,000 to St. John's Riverside Hospital of Yonkers. The support of the hospital is dependent wholly upon voluntary contributions. Frank Curtis and Frederick De Biller, the executors of the will, are prepared to pay the legacy, less the tax to which they claim the legacy is subject, under the provisions of Laws N. Y. 1887, c. 713. This act provides for taxing legacies, and exempts "societies, corporations, and institutions, now exempted by law from taxation," from the taxes therein provided for. The legatee claims it to be exempt from such taxes. An application is made to this court to determine the question.

Jacob F. Miller, for executors. *S. H. Thayer, Jr.*, for legatee.

COFFIN, S. The "St. John's Riverside Hospital" is a benevolent and charitable institution, situated in Yonkers, duly incorporated under chapter 319 of the Laws of 1848. Its object, as declared in its certificate of incorporation, is "to maintain and support a hospital for the care and treatment of sick and disabled indigent patients." By the sixth section of the chapter referred to it was made capable of taking, holding, or receiving any property, real or personal, by virtue of any devise or bequest contained in any last will or testament of any person whatsoever, the clear annual income of which devise or bequest shall not exceed the sum of \$10,000. By section 4, 1 Rev. St. p. 888, it is declared that "the following property shall be exempt from taxation:" *First.* All property, real or personal, exempted from taxation by the constitution of the state, or under the constitution of the United States. *Second.* All lands belonging to this state or the United States. *Third.* Every building erected for the use of a college, incorporated academy, or other seminary of learning; every building of public worship; every school-house, court-house, and jail; and the several lots whereon such buildings are situated, and the furniture belonging to each of them. *Fourth.* Every poor-house, house of industry, almshouse, and every house belonging to a company incorporated for the reformation of offenders, and the real or personal property belonging to or connected with the same. *Fifth.* The real and personal property of every public library. *Sixth.* All stocks owned by the state, or by literary or charitable institutions. *Seventh.* The personal estate of every incorporated company not made liable to taxation on its capital by the fourth title of this chapter. Now, poor-houses, almshouses, houses of industry, and houses for the reformation of offenders are all charitable institutions, and thus embraced within the above sixth subdivision; so that, had the testator bequeathed stocks instead of money, the bequest would surely have been exempted from the tax, as stocks are undoubtedly personal property. See section 3, Rev. St., *supra*. It would seem that the subdivision is superfluous, except for the fact that stocks belonging to the state and to literary institutions had not previously been exempted; but, aside from the consideration of subdivision 6, it seems to have been held in *Association v. Mayor, etc.*, 104 N. Y. 581, 12 N. E. Rep. 279, that an institution of the character of that under consideration may fairly be considered an "almshouse," and within the provision of subdivision 4, which, as amended by chapter 186 of the Laws of 1866, exempts from taxation "the real and personal property used for such purposes, belonging to or connected with the same." If, therefore, the corporation of this hospital

should have on hand, as alms contributed for the object of its creation, the sum of \$1,000 at the time the annual assessment is made for the purpose of taxation, it would clearly be exempt.

In an annual report of the trustees, suppose it appear that the amount of contributions be stated at \$3,500, and the amount of expenditures at \$2,000; balance in treasury, \$1,500. This balance would be personal property belonging to the institution, and to be used for the purposes for which it was created, and consequently exempt from taxation. All of its real and personal property, whether such personal property consist of money, household furniture, or public or corporate stocks, used for the purposes for which it was founded, or connected with such use, are covered by the statutory exemption. It is only where it ceases to be used in such connection that it becomes subject to taxation.

The scope of the opinion in the case of *Catlin v. Church*, (recently decided by the court of appeals, and reported in 20 N. E. Rep. 864,) appears to have been in some measure misconceived. There the question related to a legacy given to a church in this state, and to another legacy given to a college in another state, that was free from taxation by the laws of that state, and therefore did not, strictly speaking, involve the precise one here presented; but the court did consider, to a considerable extent, the exemptions provided by the above section 4, with its subdivisions, more especially the seventh, which was particularly urged upon its attention. Among other things, it remarked that "the limited exemptions in subdivisions 8 and 6, and the complete exemptions in subdivisions 4 and 5, of the personal property of incorporated institutions mentioned, was a work of supererogation, if the legislature intended, by subdivision 7, to wholly exempt from taxation the personal property of all such institutions." Here is a distinct recognition of the complete exemption of an almshouse, such as the same court, in 104 N. Y. 581, 12 N. E. Rep. 279, *supra*, declared one similar to this to be; citing with approbation the case of *Society v. Commissioners*, 36 Hun, 311, where the objects of the society were declared to be solely for "the purpose of affording pecuniary and other relief to such persons, natives of Switzerland, or of Swiss origin, as may be in the United States and in need of assistance." See, also, *Asylum v. Supervisors*, 31 Hun, 116.

It is difficult to discover any distinction, in principle, between institutions supporting by alms colored or white orphans, indigent foreigners, whether well or ill, and "sick and disabled indigent persons." They all equally belong to the almshouse class. Doubtless there are charitable corporations which may not be comprehended within the definition of "almshouse." The primary meaning of the word "hospital," for instance, was an inn, (and from which our modern word "hotel" is derived,) where guests were entertained for compensation. Now the word is more commonly applied to a building founded through charity, where the sick and disabled may be treated solely at their own expense, or at the sole expense of the corporation, which receives only indigent patients, and then has all the attributes of an almshouse, and in either case it becomes, as we understand the term, a charitable institution.

The court of appeals, in *Catlin v. Church*, 20 N. E. Rep. 864, could have had reference only to the former, where it says the practical construction by the legislature is in accord with the view that the subdivision (7) "does not apply to religious, literary, or charitable corporations," but only to business corporations; and the subsequent remarks should be regarded as having the like application. It is not intended there to say that an almshouse, such as the same court has virtually pronounced this hospital to be, can only be rendered exempt from taxation by a special law, when it is already exempt under subdivision 4. It is, as was well said by the court in 104 N. Y. 581, 12 N. E. Rep. 279, *supra*, "performing a work of pure charity, and is taking upon its own shoulders a portion of the burden that would otherwise fall upon

the public." It would seem a strange anomaly in legislative justice to levy a tax upon contributions voluntarily made, which shield the people from taxation. If these indigent patients cared for in this hospital by a few generous and humane individuals were not so cared for, they would have to be treated and supported at the expense of the county, by the usual method of taxation.

In accordance with these views, it is determined that the legacy in question is not subject to the tax provided by the Laws of 1887, but is to one of the "societies, corporations, and institutions" exempted therefrom.

DRAKE v. SHIELS *et al.*

(*Supreme Court, Special Term, New York County. July 16, 1889.*)

SPECIFIC PERFORMANCE—SALE OF LEASE—TITLE OF VENDOR.

A contract to buy a lease of premises known as "75 Fourth Avenue" cannot be enforced where it appears that one wall of the building in question is not on the demised premises, as the vendor's title is to that extent defective.

Action by Hetty R. Drake against Thomas Shiels and others to enforce a contract to purchase a lease.

T. B. Wakeman, for plaintiff. *Emil S. Arnold*, for defendant Shiels. *Wakeman & Campbell*, for defendant Campbell. *Henry Merckle*, for defendant Arnold.

INGRAHAM, J. Under the stipulation upon which this case was submitted, the rights of the parties are to be determined as if this was an equitable action brought by the plaintiff herein against the defendant Shiels, to compel him to specifically perform and carry out the agreement of purchase, and, in case the court should decide that Shiels was entitled to a deduction from the purchase price, the amount should be determined by a referee, to be appointed by the court before final judgment. The question, therefore, to be determined is whether or not the court, in an action brought by plaintiff, would have required the defendant to specifically perform the contract. By the contract the defendant agreed to purchase, and the plaintiff agreed to sell, a certain indenture of lease of property known by the street number 75 Fourth avenue, and 75 East Tenth street, in the city of New York, together with all and singular the buildings and improvements erected upon the said property, together with all the rights of renewal, and payment for buildings, as may be contained in said lease.

The law in this state is now well settled that in all contracts of sale, including that of sale of real estate, or of a leasehold interest in real estate, the vendor impliedly warrants that he is the owner of the property, and has the right to convey, though nothing whatever is said upon the subject; and it has been held that there is in every contract for the sale of a leasehold interest an implied undertaking to make out the lessor's title to demise, as well as that of the vendor to the lease itself, which implied undertaking is available in law as well as in equity. *Souter v. Drake*, 5 Barn & Adol. 992; *Burwell v. Jackson*, 9 N. Y. 539. In this case, therefore, there was an implied warranty that the plaintiff had a good title to the lease of the premises known by the street number 75 Fourth avenue, and 75 East Tenth street, and that she also had a good title to all and singular the buildings and improvements located upon the said property. It is admitted by the statement of facts that the east wall of the building known as "75 East Tenth Street" is not erected upon the leasehold premises, but that wall is entirely upon the property adjoining the leasehold premises on the east. Plaintiff, therefore, had no title to the portion of that building. It is the building known by the street numbers that plaintiff agreed to sell, and that building had four walls; and while the defendant might be chargeable with knowledge of the location and condition of the property, and of the fact that the wall between the buildings sold and the

buildings adjoining on the west was a party-wall, he was to have by his contract at least a half of that party-wall. An agreement to sell a building is not complied with by selling three walls thereof. The purchaser is entitled to the four walls.

I think, therefore, that in an action brought by the plaintiff the court would not have decreed specific performance of the contract against the defendant Shiels; and Shiels is therefore entitled to a judgment, under the stipulation, to recover the difference between what the lease would have been worth if the building stood on the leased premises and what it is worth in its actual condition. There are no facts before the court upon which I can ascertain whether, under all the circumstances, the lease would have been worth more to Shiels if the building had been wholly situated upon the leasehold property; and, under the agreement between the parties, there should be an interlocutory judgment appointing a referee to ascertain what, if anything, Shiels is entitled to recover. Judgment to be settled on notice.

BOSWORTH v. HIGGINS.

(*Supreme Court, General Term, Fifth Department. October 19, 1889.*)

1. CONTRACT—ACTION ON—PLEADING.

A complaint alleged that defendant fraudulently represented a horse to be sound; that plaintiff, relying on said warranty and representations, purchased said horse, paying defendant therefor; that at the time of said warranty and sale said horse was unsound, and was worth \$250 less than defendant represented and warranted, and was known by defendant so to be. Defendant moved for nonsuit for that plaintiff had failed to prove a warranty. *Held*, that the word "fraudulently," as used in the complaint, did not change the *gravamen* of the action, which was one for breach of contract, and not for tort.

2. PLEADING—AMENDMENT.

After the evidence was in there was no error in allowing the complaint to be amended by striking out the word "fraudulently," as the rights of parties were not prejudiced thereby.

Appeal from judgment on report of referee.

Action by Edward J. Bosworth against Edward F. Higgins, for breach of contract on sale of a horse. The action was begun in the municipal court of Rochester, where judgment was entered against defendant. On appeal to the county court of Monroe county the case was referred by consent, and on the report of the referee, judgment being again entered against defendant, he appeals.

Argued before BARKER, P. J., and DWIGHT and MACOMBER, JJ.

McNaughton & Taylor, for appellant. *W. H. Whiting*, for respondent.

MACOMBER, J. This action was originally begun in the municipal court of the city of Rochester. The complaint was filed for the recovery of damages in the exchange of horses between the parties. The answer which was interposed set up a general denial, and also a counter-claim for damages for breach of warranty of a gray horse which was turned out by the plaintiff to the defendant in the trade. At the trial in that court the defendant did not appear, and judgment was taken against him. His appeal to the county court from the judgment entered in the municipal court was for the purpose of obtaining a new trial. The case was referred by consent, and such reference resulted substantially in the same judgment which was pronounced by the municipal court. Various exceptions have been presented for our consideration touching the reception and rejection of evidence, but in none of them do we find any error committed which in any manner prejudiced the defendant's rights.

The principal matter urged upon our attention is the proposition that the action was not after all for a breach of warranty of the horse, but rather for

damages resulting from false and fraudulent representations, and that consequently the plaintiff could not recover upon a contract. The case mainly relied upon by the counsel for the appellant is that of *Ross v. Mather*, 51 N. Y. 108, where the commission of appeals holds substantially that if the complaint contains suitable allegations for a recovery for fraud and deceit, and also for a breach of warranty, a recovery cannot be had upon the breach of warranty. This case, however, is opposed in principle to the decision of the court of appeals in *Conaughty v. Nichols*, 42 N. Y. 83, as well as to cases subsequently decided by the court of appeals, to which reference will shortly be made. In the case of *Ross v. Mather*, *supra*, the complaint was clearly and undoubtedly designed to charge the defendant in damages for false and fraudulent representations. It contained every element necessary to a recovery in such an action. The elements entering into a case for recovery upon that ground are, as stated in *Arthur v. Griswold*, 55 N. Y. 400, representations, falsity, *scienter*, deception, and injury. In the case before us, however, it is plain that the pleader intended to charge the defendant only in an action on contract for the recovery of damages for a breach of warranty. The language of the complaint is "that, on the 18th day of May, 1888, the defendant offered to sell to the plaintiff a certain horse, and warranted and fraudulently represented said horse to be in all respects perfectly sound; that the plaintiff, relying upon said warranty and representations, then and there purchased said horse and paid to the defendant therefor another horse, of the value of \$125, and \$90 in money; that at the time of said warranty and sale the said horse was unsound, had a spavin on one hind leg, and another spavin coming on the other hind leg, and was worth \$250 less than the defendant represented and warranted, and was known by the defendant so to be; and that said horse still so remains." Leaving out the word "fraudulently" in the first sentence quoted from the complaint, there would be no room for discussion of this question; for then the case would stand precisely as a simple one for recovery upon a contract. In our judgment, the use of that word in that connection, followed as it is by other allegations which look solely to a complaint for breach of warranty, does not turn the complaint into one for fraud. The *gravamen* of the action was breach of contract, and, in such a case, the allegation of fraud in the complaint, inducing the entering into of the contract on the part of the plaintiff, does not affect the nature of the action, or the remedy therein. The word "fraudulently" in this instance was wholly irrelevant, and the allegation of fraud was not an issuable one, and could not have been tried, if the plaintiff had desired it to be, under these allegations. *Graves v. Waite*, 59 N. Y. 156; *Tuers v. Tuers*, 100 N. Y. 196, 2 N. E. Rep. 922; *Brackett v. Griswold*, 112 N. Y. 454, 20 N. E. Rep. 376.

Moreover, the defendant, at the trial before the referee, proceeded upon the same assumption that the plaintiff did,—that the action was for a breach of warranty only; for at the close of the plaintiff's case a motion was made for a nonsuit upon the grounds—*First*, that the plaintiff had failed to prove a warranty of this horse. There was no suggestion that the action was not upon and brought to recover for a breach of warranty; nor was it claimed that the correct reading of the complaint showed it to be for a tort. The question was not raised until after the close of the evidence on both sides, when, for the first time, the point was made. Thereupon the referee, to make the case entirely clear, permitted, properly enough, although quite unnecessarily, an amendment, by which, if we understand it, the word "fraudulently" was eliminated from the complaint. No one was prejudiced by this amendment. It did not bring into the case a new cause of action. It did not strike out of it any cause of action which counsel, until the last moment, had supposed existed. *Price v. Brown*, 98 N. Y. 393. The judgment should be affirmed.

ROOD et al. v. WATSON et al.

(Supreme Court, General Term, Fifth Department. October 19, 1889.)

CONSTRUCTION OF WILL.—NATURE OF ESTATE.

Testator bequeathed all his estate to his wife for life, with the "right to use as she may choose, except that I give and bequeath to our adopted daughter, J., the sum of \$1,600, for her to have and to use her natural life, the same to pass to her children after her decease, provided they live to the age of twenty-one years; if they should die before that age, then, at the death of said J., this legacy shall revert to the estate." Testator's next of kin were nieces and nephews. *Held*, that the widow took the property with power to dispose of it, except the legacy to the adopted daughter.

Appeal from special term, Yates county.

Action by Henry S. Rood and another against James C. Watson and others to determine the construction of the will of Foster S. Watson, deceased. On a decision declaring Jane A. Watson, the widow of testator, entitled to all the property except a legacy of \$1,600, a judgment was entered, from which plaintiffs appeal.

Argued before BARKER, P. J., and DWIGHT and MACOMBER, JJ.

John T. Knox, for appellants. *Edwin Hicks*, for respondents.

MACOMBER, J. No question arises on this appeal except upon the second item of the will, which is as follows: "(2) I hereby give and bequeath to my wife, Jane A. Watson, all my estate, real and personal, to have and to hold in her natural life, right to have and to use as she may choose, except that I give and bequeath to our adopted daughter, Julia S. Marble, of the town of East Bloomfield, Ontario county, and state of New York, the sum of \$1,600, for her to have and to use her natural life, the same to pass to her children after her decease, provided they live to the age of twenty-one years; if they should die before that age, then, at the death of said Julia, this legacy shall revert to the estate." This will was drawn by an unskilled hand. The testator left about \$10,000, besides real estate of the value of one or two thousand dollars. There survived him no children or other descendants. The next of kin were collateral relations, being sons and daughters of his deceased brothers and sisters. There is nothing in the attending circumstances to show that the testator had any other objects of bounty save his widow and his adopted daughter, to whom all of his estate was given, as is contained in the above provision of his will. From the terms of the will themselves, and from these attending circumstances, the intention of the testator must be derived. It will be noted that the will contains no bequest or devise over after the death of the wife, nor any residuary clause. The learned justice at the trial says in his opinion: "The right to use the property devised as she chooses is not limited, and it gives to Mrs. Watson the power of disposition to any extent she wishes. *Spencer v. Stratt*, 88 Hun, 228; *Campbell v. Beaumont*, 91 N. Y. 464. The only question is whether the words 'in her natural life' limit the estate which accompanies an absolute power of disposition. A devise or bequest of property indefinitely, with an absolute power of disposition, usually vests in the legatee the full estate in absolute ownership if the property is personal in its nature, and in fee if it is real estate. *Van Horne v. Campbell*, 100 N. Y. 287-302, 3 N. E. Rep. 316, 771. The words quoted above do not literally have any meaning whatever, whether considered in a legal sense or in the ordinary every-day meaning of them. They were probably intended to be used for the phrase 'for her natural life.' If they are taken to mean the same thing as that phrase, the property is given to Mrs. Watson for life, with the power of disposition. If they were a devise over of the property, or what was left of it, the courts, to carry into effect the whole intention of the testator, would probably hold that, while she had the absolute power to use what she chose of the estate, the limitation over would be

good as to what remained. But all the cases holding in that way do so to give effect to the limitation over, because the intention of the testator requires it. In this case there is no limitation over, and the effect to be given to the bequest to Mrs. Watson is not controlled by the necessity of carrying such limitation into effect. But another rule presents itself here, which is that the testator is always presumed to dispose of his whole estate when he makes a will, and not to intend to die intestate as to any of it. *Vernon v. Vernon*, 53 N. Y. 351; *Thomas v. Snyder*, 43 Hun. 14, 15. If any weight is given to the words 'in her natural life' the necessary result would be that the testator dies intestate as to all his property, except the legacy to his adopted daughter, after the death of his wife. He had no children dependent upon him who might have a right to his bounty, and it is not at all likely that he intended to leave his property undisposed of, nor does the law so presume. The words used are sufficient to give Mrs. Watson the complete power of disposition, even though there be attached to the words quoted the meaning suggested; and, with such complete power of disposition, the absolute ownership goes. I do not think the quoted words mean the same thing as the phrase 'for her natural life.' The word 'in' is not synonymous with 'for,' and there is no reason for making it read 'for;' it might as well be changed to 'after' or 'beyond,' or any other word which would make it consistent with the power of disposition. I do not think the court is called upon to struggle with the meaning of these words for the purpose of attaching an unnecessary limitation to this bequest."

We only add to the foregoing opinion, which to this extent we adopt, by saying that in the absence of a clearly-defined limitation, which has not been made to appear by any natural construction of the will, the legatee and devisee takes the entire title to the property, with power to dispose of the same. The judgment appealed from should be affirmed. All concur.

MATHER v. UNION LOAN & TRUST CO. *et al.*

(City Court of New York, Special Term. September 21, 1899.)

PLEADING—FRIVOLOUS ANSWER—MOTION FOR JUDGMENT.

In an action against a corporation as the acceptor of a draft defendant pleaded that it was not a moneyed corporation; that the acceptance was not made in the course of its business, or at its office, and was not sanctioned or authorized by its directors, but was written by defendant's vice-president, at his private office, a place having no connection with defendant or its business, solely on his own account, as an accommodation to the drawer. *Held* that, as the answer puts in issue the question whether the act of the vice-president was a corporate act, though it also admits that plaintiff is a *bona fide* holder of the draft for value, a motion for judgment on the answer as frivolous will be denied, as such motion admits the averment of the answer.

Action by Roderick B. Mather against the Union Loan & Trust Company, as acceptor, and others as drawers and indorsers, of a draft. The answer alleges that the defendant is not a moneyed corporation; that the acceptance was not made in the due and regular course of its business; that it was not made at the company's office or place of business; and that neither its directors nor stockholders ever sanctioned or approved of the same, nor did they in any manner authorize it. The answer further alleges that the acceptance was written by the vice-president, A. J. Whittier, at his then private office, 240 Broadway, in the city of New York, a place having no connection whatever with the corporation, or with its business; that the acceptance was given by Whittier on his own account, and as an accommodation solely to the drawer, and without any consideration whatever to the corporation. The motion is for judgment on this pleading as frivolous.

James A. Patrick, for plaintiff. Andrew J. Ensign, for defendants.

MCADAM, C. J. While there is no doubt of the rule that a corporation has no right to bind itself by an accommodation indorsement or acceptance, (*Wahlig v. Manufacturing Co.*, 5 N. Y. Supp. 420; *McCullough v. Moss*, 5 Denio, 567; *Smead v. Railroad Co.*, 11 Ind. 104; and see *Bank v. Corset-Works*, 36 N. W. Rep. 696; *McLellan v. File-Works*, 56 Mich. 582, 23 N. W. Rep. 321.) it is still true that a corporation is liable to a *bona fide* holder on its accommodation indorsement or acceptance, (*Association v. White-Lead Co.*, 35 N. Y. 505,) although made for a purpose or at a place not authorized by the charter of the corporation, (*Bank v. Bank*, 16 N. Y. 125.) As the form of the answer admits as a fact that the plaintiff is a *bona fide* holder of the acceptance for value, (Code, § 522,) the plaintiff's rights are to be determined by the principle last stated regarding *bona fide* holders. The difficulty with the plaintiff's present position is that by his motion for judgment he admits the allegations of the answer that the draft was accepted by Whittier, the vice-president of the defendant, on his individual account, and at his private office, for the accommodation of the drawer, no consideration whatever moving to the corporation, and without any authority from its directors or stockholders. This admission deprives the acceptance of corporate authority, and makes the act of Whittier an individual obligation of his own. *McCullough v. Moss*, 5 Denio, 567. An inquiry into the authority of an agent executing a negotiable instrument or other contract is always in order, and in case of an agent of a corporation this involves an inquiry whether the agent acted for a corporation purpose authorized by the company's charter, by-laws, or resolutions, or in violation or in excess of them. The defendant not being a banking corporation, the acceptance was not within the apparent authority with which the agent was invested; and it is for the plaintiff to prove that it was authorized by the charter, by-laws, or some resolutions of the corporation, or, as in *Olcott v. Railroad Co.*, 27 N. Y. 546, by its recognition of similar acts of the same official, or by proof that the corporation ratified the act performed by accepting some benefit by its performance. The substantial difference between the acts of an officer of a banking and business corporation in regard to commercial paper is only in the proof of authority required. The acts of an officer of a bank, in respect to commercial paper, as a rule carry with them the presumption of authority implied from the very nature of the corporate business, and from the apparent authority with which the officer must be assumed to have been clothed with respect thereto in the proper carrying on of that business; but when it comes to a corporation whose business does not necessarily require the giving or indorsement of notes, or the acceptance of bills, the law exacts proof that the act has corporate sanction in some form. *Insurance Co. v. Insurance Co.*, 7 Wend. 81; *Dabney v. Stevens*, 10 Abb. Pr. (N. S.) 39; *Bank v. Clements*, 3 Bosw. 600; *Jackson v. Campbell*, 5 Wend. 572; *Bank v. Norton*, 1 Hill, 572; *Soper v. Railroad Co.*, 19 Barb. 310; *Adriance v. Roome*, 52 Barb. 399; *Hoyt v. Thompson*, 5 N. Y. 320. It must be borne in mind that the officer of a corporation has an individual, as well as an official, capacity, and that he acts as an individual except in cases coming within the scope of his official authority, in which his doings only become official acts that bind the corporation, because performed to carry out some purposes of its creation, with its sanction either expressly or impliedly given. When the individual assumes to act in his official character the party dealing with him is apprised of his agency, and must ascertain its scope and extent, that he may prove the same in case the corporation for which the act is performed disputes the authority assumed to be exercised. With a banking corporation the proof required is slight, and easily procurable, but with other corporations the extent of the proof must depend upon the peculiar circumstances of each case. For the reasons stated the answer puts in issue the material question whether the act of Whittier was a corporate act of the defendant, performed within the scope of his authority, and this must be determined at the trial. If he had

power to accept bills in the name of the corporation, the question whether it was an accommodation indorsement or not may become immaterial, in view of the fact that the plaintiff is a *bona fide* holder of the acceptance for value; but whether he possessed any power whatever to accept bills must, in the nature of things, depend upon matters which are the proper subject of proof at the trial. For these reasons the motion for judgment on the answer as frivolous must be denied, with \$10 costs to abide the event.

MANNING et al. v. BECK et al.

(Supreme Court, General Term, Fifth Department. October 19, 1889.)

ASSIGNMENT FOR BENEFIT OF CREDITORS—PREFERENCES.

An insolvent debtor gave a bill of sale of his stock of goods, worth \$11,000, to his son, a large part of the consideration being an alleged existing indebtedness. The residue of the debtor's estate was inventoried at \$5,000. On the day after the execution of the bill of sale the debtor executed a general assignment for benefit of creditors. *Held*, an attempt to create a preference, and that the assignment would be set aside at the suit of a creditor.

Appeal from special term, Monroe county.

Action by George G. Manning and others against Lewis P. Beck and others, to set aside an assignment as in fraud of creditors. There was an order granting an injunction, and continuing the stay theretofore previously made in an order to show cause why the injunction should not be granted; also an order for the appointment of a receiver, and directing defendants to turn over certain property to such receiver, and to account to him therefor; and defendants appeal.

Argued before BARKER, P. J., and DWIGHT and MACOMBER, JJ.

H. H. Woodward, for appellants. E. F. Wellington, for respondents.

MACOMBER, J. The object of this action is to set aside the general assignment for the benefit of creditors made by the defendant Lewis P. Beck to the defendant H. Israel Weinberg. On the 3d day of January, 1889, the defendant Lewis P. Beck, by a bill of sale, transferred all of the stock of goods and fixtures in his store, consisting of a general assortment of boots and shoes, to the defendant William H. Beck, who is his son, for the expressed consideration of \$11,977.32, being supposed to represent 90 per cent. of the inventoried value of the stock, and 70 per cent. of the cost of the fixtures. Payment was made as follows: \$5,754.85 by the satisfaction of an alleged indebtedness owing by Lewis P. Beck to his son, William; \$743.63 by William's assuming the back rent of the store, which was owing by Lewis P. Beck to the defendant Weinberg; \$855.10 by William's like assumption of three outstanding notes made by his father, Lewis P. Beck, and indorsed by himself; \$118.23 in cash; and the residue of such purchase price was represented by, and included in, 12 promissory notes made by William, varying in amounts, and differing in times of payment. These 12 notes correspond exactly with 12 other promissory notes then outstanding, owing by Lewis P. Beck, as maker, and were so drawn, with one or two exceptions, that they should mature at the same time that the note for which it was given should mature. These notes were severally transferred to the holders of the antecedent notes. One day thereafter, namely, on the 4th day of January, 1889, the above transaction being supposed to have been completed, the defendant Lewis P. Beck executed and delivered to H. Israel Weinberg the general assignment for the benefit of creditors already mentioned, which was recorded on the following day. The defendants, and each of them, so far as disclosed by the affidavits, stand upon the legality of the original sale by the father to the son, and claim that there still remains for distribution among the creditors no more than was actually received by the assignee, which is

an amount that will scarcely pay the expenses of administering upon the estate, though the same is stated in the inventory to be of the value of about \$3,000.

From the relations existing between Lewis P. Beck and his son, William, it is quite true that each knew substantially the financial condition of the other. On the 31st of October, 1888, the father had executed to his son a chattel mortgage to secure an alleged indebtedness then existing in the form of notes, which mortgage contained a provision that the mortgagor might sell for cash, as agent of the mortgagee, and pay the proceeds to the latter, to be applied upon outstanding notes. A subsequent mortgage was given on the 3d day of December, 1888. Neither of these chattel mortgages was filed, and the same, so far as the affidavits show, remained a matter of personal confidence between the parties thereto. An attempt seems to have been made to give the possession of this property into the hands of William under these mortgages, but the same was ineffective, because the mortgagor still made sales of the stock in trade, bought new stock, and handled the same substantially as he had theretofore done; though in form, but not in substance, the proceeds of such sales were turned over to the mortgagee, William, and the same were ostensibly reloaned to the father from day to day to enable him to carry on the business. The answer of the defendant Lewis P. Beck alleges that on the 31st day of December, 1888, William surrendered to him the store, and kept no further account of sales or of moneys received there on any account, and that the said chattel mortgages were canceled. During the time that William was nominally in possession of the store and property, Lewis P. Beck purchased on credit goods to the amount of \$2,931.84, of which \$1,442 thereof was purchased from the plaintiff, the sellers having no knowledge of the existence of the chattel mortgages, or of the relation of William thereto. Though the assignment for the benefit of creditors is without preferences in name, the assignor did, by the above transaction, effect a preference, which is contrary to the act of 1887, (chapter 503, Laws 1887.) The bill of sale by which the son, William, was enabled to take substantially all of the property of the debtor, must be deemed to be a part of a general scheme of the assignor to give an unlawful preference to his son. The execution of this bill of sale, followed so closely by the formal act of executing an assignment for the benefit of creditors, must be regarded as an attempt on the part of the debtor so to place his property that none of the creditors other than the favored ones should share in the same. That this was an attempted mode of eluding the laws is corroborated by the fact that the assignee himself stands in the relation of a preferred creditor, inasmuch as he was the recipient of a payment of the indebtedness due him for rent before the execution and acceptance by him of the assignment. Under these circumstances it would not be supposable that he would be solicitous to, or that he would in fact bring an action to, set aside any of these acts of his assignor upon the ground that they were a fraud upon the assignment.

The counsel have argued that there is no fraud in the assignment, but that whatever acts are justly complained of were those of the debtor preceding the assignment, and that these may be set aside and declared of no effect by suitable action in equity. It is true that when there is fraud upon an honest assignment, by prior fraudulent transfers of property by the assignor, or by a subsequent withholding of property from the assignee, a remedy is given to the assignee which may avoid the fraudulent acts, and secure all the property of the assignor for distribution under the assignment. *Loos v. Wilkin-son*, 110 N. Y. 210, 18 N. E. Rep. 99. This principle, however, does not prevent a creditor from attacking the assignment itself, where it was made by the assignor with a fraudulent intent, whether such intent be disclosed by the contents of the assignment itself or by contemporaneous acts. A voluntary surrender, by an insolvent debtor, of dominion over his entire estate,

as was substantially done in this instance, and the transfer of the whole, or substantially the whole, of his property to a portion only of his creditors, in order to give them a preference over others, whether made by one instrument or more, whatever form the same may take, when such transfer operates as an unlawful preference in fact, the assignment itself may be assailed by a creditor, and the same set aside as a fraud upon the act. *White v. Coltzhausen*, 129 U. S. 329, 9 Sup. Ct. Rep. 309, where the language of the court by Mr. Justice HARLAN (129 U. S. 336, 9 Sup. Ct. Rep. 310) is peculiarly applicable to the facts disclosed in this case: "After he had executed the conveyances, bill of sale, warrant of attorney, and transfers, to which reference has been made, he was left without anything that could be reached. * * * So completely was he stripped by this transaction of all property, that consequently, when his deposition was taken, he admitted that he owned nothing except the clothing he wore. He recognized his hopelessly insolvent condition, and formed the purpose of yielding to creditors the dominion of his entire estate; and it is too plain to admit of dispute that in executing to his mother, sisters, and brother the conveyances, bill of sale, warrant of attorney, and transfers in question, his intention was to give them, and their intention was to obtain, a preference over all other creditors. What was done was in execution of a scheme for the appropriation of his entire estate by his family to the exclusion of other creditors."

The order appealed from should be affirmed, with \$10 costs and disbursements. All concur.

HEQUEMBOURG v. BOOKSTAVÉR, Mayor, et al.

(*Supreme Court, General Term, Fifth Department. October 19, 1889.*)

COSTS—TAXATION—SEPARATE APPEARANCES.

In an action to declare unconstitutional an act to establish an electric light plant in the city of Dunkirk, the city, the mayor, the council, and the board of water commissioners were defendants, and made four separate appearances. There was nothing to show that the three first-named defendants represented any other interest than that of the city; but it was shown that the water commissioners were accustomed to be represented in public matters by their own attorney, and that they sometimes held interests antagonistic to the city. *Held*, that an order taxing four bills of costs against plaintiff, as a condition of his discontinuing the action, would be modified so as to tax only two bills against him.

Appeal from special term, Erie county.

Action by Charles E. Hequembourg against William Bookstaver, mayor of the city of Dunkirk, and others. Plaintiff appeals from that portion only of an order which imposed the payment of four bills of costs upon the plaintiff as a condition of his discontinuing this action. For decision on appeal from order denying motion to continue injunction, see 2 N. Y. Supp. 447. For order on discontinuance of appeal in court of appeals, see 20 N. E. Rep. 879, *mem.*

Argued before DWIGHT and MACOMBER, JJ.

John G. Milburn, for appellant. Walter D. Holt, for the city of Dunkirk. Walter W. Holt, for William Bookstaver, mayor. Stearns & Kingsley, for Flahaven and others, members of the common council. Charles D. Murray, for Coleman and others, water-works commissioners.

MACOMBER, J. If there was proper occasion for the separate appearances of these defendants respectively, the allowance to each of them of the costs of the action must be upheld. If, on the contrary, there is but one class of defendants representing the city of Dunkirk, (all the defendants are engaged in one common public purpose,) there was no occasion for them to appear separately in the action, and consequently there was no warrant of authority for an allowance to them, in the exercise of the sound discretion of the court, of a

separate bill of costs upon the voluntary discontinuance of the action by the plaintiff. The object of the action, as disclosed by the complaint, was to procure a judgment of the courts that chapter 29 of the Laws of 1888, not having received the governor's signature within 10 days from the time that it was received by him from the legislature, never in truth and in fact became a law, and that the same was unconstitutional. The object of the act was the construction of an electric light plant in the city of Dunkirk, to supply private consumers as well as the streets and public buildings. By its terms the operation of the electric light plant was placed upon the board of water commissioners, which body, the complaint alleges, was not legally organized, and was incapable of receiving from the legislature such a public duty. The defendant William Bookstaver is the mayor of the city of Dunkirk; Charles J. Flahaven, Cornelius Stumm, Byron Rathbun, S. M. Smith, Michael J. O'Donnell, Thomas C. Jones, Patrick Higgins, and Harry J. Gibbs, Jr., are members of the common council of such city. The defendants William T. Coleman, John Maddigan, George Abell, Louis Heyle, M. L. Hinman, John S. Beggs, and Julian T. Williams are the water-works commissioners of said city, with the mayor as an *ex officio* member of such board. The city, by name, is also made a party defendant. The single purpose of the plaintiff, as disclosed by the complaint, was to obtain a judgment of this court declaring the act above mentioned inoperative and unconstitutional. It affected one general public interest, and that was the interest of the inhabitants of the city of Dunkirk. The city, by its corporate name, was a proper party. It appeared by its official attorney. It was well, and perhaps prudent, to make the members of the common council of that city parties, also individually, as it was also the members of the board of the water commissioners; yet no relief was asked against any one of those gentlemen. The sole relief was directed against the corporation known as the "City of Dunkirk," represented by these several public officers. The city attorney of that town clearly represented, and it was his duty to appear for, the mayor and the common council, as well as for the corporation itself. He had no right to delegate his powers to any other person, for there was no clashing of interests between the corporation, the common council, and the mayor, but all were engaged in one common purpose,—to establish an electric light plant for public and private purposes in that city. All of these persons, being public bodies, sued as such, and, no relief being sought against them personally, should have appeared by one attorney; and that, too, by the person designated by law to act for the general interests of the municipality. The affidavit of Mr. Murray, however, in behalf of the bill of costs in favor of the water-works commissioners, presents a slightly different question. It is there conclusively shown by him that this corporation, the names of whose trustees appear as defendants, has, by the course and practice of the city itself from its incorporation, been represented in all public matters by its separate attorney; that it has at different times held interests which might grow into matters antagonistic to the city itself, and hence the propriety of separate representation by attorney. It is not clear, therefore, that the city attorney in this instance should have appeared for this corporation; nor is it clear that he had the right so to appear. It is seen, therefore, that, while all the defendants when named individually are joined on account of their public relations to the city, there was a propriety in the separate appearance of those constituting the board of water commissioners. Undoubtedly, as the case has turned out, it would have been equally safe for these gentlemen to have appeared by the city attorney; yet such has not been the custom of that body, and we are not prepared to say that it was incumbent upon that board to employ the city attorney in this instance. It follows, therefore, that the allowance for a separate bill of costs to the board of water commissioners was not improper. The allowance to the other defendants, except one general bill to the attorney for the city of Dunkirk, does not seem to us to

have been justified by the nature of the action and the relief sought, for the reason that they had no occasion to appear by attorney. In this respect we follow, as we believe, a precedent set by the court of appeals in this case, by which they permitted the plaintiff to discontinue his appeal in that court upon the payment of two bills of costs.¹

From these considerations it follows that the order appealed from should be modified in the particulars named in this opinion, and in all other respects affirmed.

PEOPLE v. HAMMOND *et al.*

(*Supreme Court, General Term, Fifth Department. October 19, 1889.*)

1. BAIL—FORFEITURE—ADVICE OF COUNSEL.

Where it appears that accused was present in court at the time he had given bail for his appearance; that in response to the inquiry of counsel the district attorney stated that he would not move the indictment against accused at that term; and that thereupon accused, on the advice of counsel, induced by the statement of the district attorney, left the court,—there is no forfeiture of bail, though it is contended that the statement did not necessarily relate to the indictment in question, but to another then pending against accused.

2. SAME—ACKNOWLEDGMENT—RELEASE OF SURETY.

Where the sureties in a bail-bond, in which accused is principal, duly acknowledge the bond and justify as sureties, failure of the principal to acknowledge the bond will not affect the sureties' liability.

Appeal from special term, Livingston county.

Action by the people of the state of New York against Amariah Hammond and others to enforce an alleged forfeiture of bail. The complaint was dismissed, and an appeal was taken by the people.

Argued before BARKER, P. J., and DWIGHT and MACOMBER, JJ.

George W. Daggett, for the People. *F. C. Peck*, for respondents.

MACOMBER, J. One of the original defendants to this action, Amariah Bradner, was indicted at the oyer and terminer held in Livingston county in the month of May, 1886, for the crime of larceny in the second degree. Upon the presentment of the indictment, the same was sent to the court of sessions of that county for trial. Subsequently the accused as principal, and this appellant, Amariah Hammond, and another, as sureties, executed an undertaking in the sum of \$500 for the appearance of the accused. This undertaking was properly acknowledged by the sureties, who duly justified as such, but the same was not acknowledged by the principal. The learned judge before whom this action was tried has dismissed the complaint upon the ground that the failure of the principal to acknowledge the undertaking was fatal to any claim of liability against the sureties thereto. To this proposition we cannot assent. The statute permits the defendant, whether in a civil action or in an indictment, to execute an undertaking with or without sureties. Code Crim. Proc. § 581; Code Civil Proc. §§ 810, 811. Had Bradner not been a party to this paper in name, no question could have been raised in regard to the liability of the sureties thereto under these provisions of the several Codes. If there be a fallacy in the reasoning of the learned judge, it consists in the proposition that, inasmuch as the recognizance is required to be a record, that it therefore must be acknowledged by all of the parties thereto whose names appear thereon. The surety, having undertaken, in the form stated, for the faithful appearance of the accused for trial, is not in a position to avail himself of any mere formal defect in the instrument which applies to another party thereto, and not to himself.

But there are other grounds upon which this judgment may be maintained. It is found as a fact by the trial court, which finding is abundantly sustained

¹20 N. E. Rep. 879, *mem.*

by the testimony of two reputable members of the bar of long standing, that at the adjourned term of the court of sessions held in the latter part of June the defendant Bradner was there ready to appear when required, and his counsel was at the court. On inquiry by the counsel for the accused the district attorney stated, and this, too, at a time before any forfeiture of bail is claimed, that he should not move the indictment against the accused at that term. Thereupon, under direction or advice of counsel, Bradner was induced by such statement of the district attorney to leave the court at Geneseo, and not further to attend upon that term, and he did so in perfect good faith, understanding by the information which he had received that his presence was not required there longer. The force of this testimony is sought to be broken in part by the argument of the learned district attorney, that his statement made to counsel, and so communicated to the accused, did not necessarily relate to the indictment in question, but to others of a series of indictments of which this was one. But no such limitation can be made upon the force and effect of this statement as disclosed by the evidence. It is quite unreasonable to believe that these gentlemen of large experience in the practice of the courts should knowingly have conveyed to their client information in one case which they knew had been derived only in another. The subsequent voluntary appearance of the defendant in the indictment at the court of oyer and terminer, to which the case had been sent back, corroborates the proposition of the defendant's counsel that the accused acted upon the information given to his counsel by the district attorney. The judgment should be affirmed. All concur.

GILBERT v. MANNING.

(*Supreme Court, General Term, Fifth Department. October 19, 1889.*)

Sale—Action for Price—Market Quotations.

In an action for the price of barley sold "at market price" it appeared that defendant told plaintiff that by the "market price" he meant "just what the paper quotes," whereupon plaintiff bought the commercial paper of the day before, the issue of the day of the sale not containing any quotations of barley. *Held*, that the paper was admissible to show the price for which the barley was sold.

Appeal from circuit court, Erie county.

Action by Robert Gilbert against John B. Manning for the price of barley sold and delivered. Defendant appeals from a judgment entered on a verdict for plaintiff, and from an order denying a motion for a new trial on the minutes.

Argued before BARKER, P. J., and DWIGHT and MACOMBER, JJ.

H. C. Day, for appellant. *Giles E. Stilwell*, for respondent.

MACOMBER, J. A recovery was had by the plaintiff upon a cause of action arising upon an order made by the agent or foreman of the defendant for the purchase from the plaintiff of a quantity of barley. The plaintiff brought a load of such barley to the defendant's malt-house on the 12th day of October, 1878, and received from the man in charge the following memorandum: "C. F. M. HOUSE, October 12. Bought barley of R. Gilbert at market price. 90 bushels, 33-49. ED. SEITZ." The barley represented by this receipt was actually delivered by the plaintiff to the defendant and received by the latter, and retained by him and used in his business. Though the complaint is framed so as to cover another quantity of barley which was never actually received by the defendant, yet upon the trial such additional cause of action seems to have been abandoned, and the case was, apparently by the consent of the plaintiff's counsel, submitted to the jury by the learned court solely upon the claim for this 90 and 33-49 bushels. The question upon this appeal is whether or not there was sufficient evidence of the market price to warrant the rendition of the judgment.

The only point urged by the appellant's counsel which merits consideration relates to the admission of the market quotation of barley in a newspaper published in the city of Buffalo. The quotation, as contained in the Commercial Advertiser of October 11, 1878, was admitted in evidence, as follows: "Barley, state, held at \$1.10 and \$1.15." This was objected to as incompetent, and also upon the ground that the statement does not give the market price, but only what barley is held for; and it is argued that such evidence does not disclose the market price. After the reception of the evidence and the ruling of the court the learned counsel for the plaintiff attempted to withdraw the evidence, but, so far as can be made out from the case, such attempt was not successful, the defendant's counsel not consenting to the same. It appears in a preceding portion of the case, by the evidence of the plaintiff, that not only was the market price agreed upon by him and the defendant's agent, but that the means of ascertaining such price were also determined. This witness says, "I told him about 92 or 92 and $\frac{1}{2}$ bushels. 'Well,' he says, 'we will pay you the market price for that barley.' 'Well,' I says, 'what do you mean by the market price?' He says, 'Just what the paper quotes.' Well, I went up. I left him then, and went upon the street, and I bought, I think, the Commercial, and I saw the quotations, and I thought that was as good as anybody would do." This case, therefore, is clearly distinguishable from that of *Whelan v. Lynch*, 60 N. Y. 469, where the particular mode of determining the market price had not been agreed upon. From the evidence the jury was justified in deciding that the barley was of the quality represented by the plaintiff to the defendant's agent. The circumstance that the paper in question was dated the 11th of October instead of the 12th is unimportant, because the defendant testified that on the 12th day of October there was not any quotation of barley in the Buffalo papers. The criterion, therefore, which the parties had by their agreement selected, namely, the quotation in the market column of the Buffalo papers, was satisfied by the publication nearest to and preceding the time of the sale and delivery of the barley under the agreement already mentioned. The judgment should be affirmed, with costs. All concur.

KENNEDY v. ROCHESTER C. & B. R. Co.

(*Supreme Court, General Term, Fifth Department. October 19, 1889.*)

1. EVIDENCE—DECLARATIONS—EXPRESSION OF PAIN.

In an action for personal injuries, declarations by plaintiff made within an hour after the accident, that her head and side pained her, are admissible in evidence when accompanied by marked signs of physical suffering, and do not appear to have been made for the purpose of informing those about her that she was suffering pain in those parts.

2. DAMAGES—EXCESSIVE.

Where the evidence tends to show that plaintiff suffered permanent physical and mental injury in consequence of defendant's negligence, a verdict for \$5,000 damages will not be set aside as excessive.

Appeal from circuit court, Monroe county.

Action by Mary J. Kennedy against the Rochester City & Brighton Railroad Company, for personal injuries. Defendant appeals from a judgment on a verdict for plaintiff, and from an order denying a motion for a new trial.

Argued before BARKER, P. J., and DWIGHT and MACOMBER, JJ.

Thomas Raines, for appellant. P. Chamberlain, Jr., for respondent.

BARKER, P. J. This action is to recover damages for an injury received while a passenger on one of the defendant's cars, alleged to have been caused by the negligent conduct of the person in charge of the same. The plaintiff, in company with her sister, hailed the car as it was passing, and the driver recognized the call, and stopped the car for them to take passage therein. The

plaintiff testified, and her statement was corroborated by her sister, that when she reached the rear of the car she placed one hand on the railing attached to the body of the car, and placed one foot on the first step of the platform, and was in the act of raising the other when the car started up with a sudden jerk, and she was thrown off by force of the jar, and fell on the stone pavement, and received injuries to her head and side. The defendant's evidence tended to show that the plaintiff jumped from the car after she had gained the platform, and while the car was standing, and fell on the pavement with some violence, and in this way she received the injuries of which she complains. The plaintiff was unmarried, a seamstress by occupation, and 28 years of age. The evidence tended to show that the injuries which she received were painful and permanent in their character, and impairing in a degree her mental faculties.

The conflict in the evidence on the question of the defendant's negligence made a clear case for the consideration of the jury. That the defendant does not dispute. We see no reason for interfering with the verdict on the ground that it is against the weight of evidence. The learned trial judge correctly stated to the jury what would constitute negligence on the part of the defendant, and also the state of facts, if they existed, which would exempt it from that imputation, and to this part of the charge the defendant assented.

Some exceptions were taken by the defendant to the ruling of the court in receiving items of evidence, against its objections, which merit examination. The plaintiff's home was some ten blocks distant from the place where she was injured, which she reached in about one hour thereafter, in company with her sister, they walking part of the distance. Her sister was called as a witness, and briefly described the condition and appearance of the plaintiff after she reached her home, stating, in substance, that she was restless all night, and did not get any sleep. This question was then asked this witness: "State, when she came home, did she complain at all?" *Answer*. "Yes." *Q*. "State what she complained of." This question was objected to as incompetent, and overruled, and the defendant excepted, and the witness gave the answer: "She complained of her side and head; pain in her head and side; and she didn't get much sleep all night." It is contended that this evidence was incompetent for the reason that it is mere hearsay, and nothing more than a simple statement or declaration made by the plaintiff, after she was injured, that she was, at the time of making it, suffering from pain in her head and side. In support of the exception the appellant relies upon the rule of evidence as modified and stated in *Roche v. Railroad Co.*, 105 N. Y. 295, 11 N. E. Rep. 630. In that case it was held that, in an action to recover damages from alleged negligence causing a personal injury, declarations of the party injured, made some time after the injury, simply to the effect that he is suffering pain, when not made to a physician in professional attendance, are not competent as evidence; but that screams, groans, and involuntary exclamations made by the injured person, indicative of physical injury or distress of mind, are competent.

Prior to the adoption of the provision of the Code allowing parties to testify in their own behalf, the rule was well established that, whenever the bodily or mental feelings of an individual are material to be proved, the usual and natural expressions of such feelings, made at the time in question, were competent as original evidence in his favor. 1 Greenl. Ev. § 102; *Bacon v. Inhabitants of Charlton*, 7 Cush. 581; *Caldwell v. Murphy*, 11 N. Y. 416; *Werely v. Persons*, 28 N. Y. 344.

This rule forms an exception to the general rule of evidence, and was founded largely upon the necessity of admitting such proof to establish the nature and character of the injuries which the complaining party had suffered from the negligence of another. In recent decisions made by the court of appeals this rule has been limited in its application, and the question is whether the evidence admitted was competent under the modified rule. I think it was. In

the case of *Hagenlocher v. Railroad Co.*, 99 N. Y. 186, 1 N. E. Rep. 536, it was held that it was competent to prove, in behalf of the plaintiff, in an action to recover damages from an injury caused by the alleged negligence of the defendant, exclamations made by the injured party indicative of pain at the time they were uttered. In that case the evidence received and held to be competent was to the effect that when the plaintiff's injured foot was lifted or slightly touched with a blanket she groaned or screamed with pain. The court in its opinion remarked, if evidence of the exclamations, which are the natural concomitants and signs of pain and suffering, were excluded, in many cases a party testifying as a witness in his own behalf would be deprived of that corroboration of his evidence to which he is justly entitled. Evidence may be given that a person appeared to be in great agony; was emaciated; looked haggard and feeble; and why not that she screamed from pain? The more recent case of *Roche v. Railroad Co.*, *supra*, is the authority upon which the appellant relies in support of this exception. In that case the action was to recover for personal injuries received by the plaintiff while a passenger on the defendant's car, alleged to have been caused by the defendant's negligence. The evidence received and held to be incompetent was to the effect that, some days after the happening of the accident which caused the injury, the plaintiff, in the presence of the witness, complained that she was suffering pain in her injured arm, at the same time exhibiting it, and it appeared to be in an inflamed condition. In stating the circumstances under which the statement was made, the court, in its opinion, remarks: "The witness did not testify that on these occasions the plaintiff screamed or groaned, or gave other manifestations of a seemingly involuntary nature, and indicative of bodily suffering, but he proved simple statements or declarations made by plaintiff that she was, at the time of making them, suffering 'pain in her arm.'" The *Case of Hagenlocher, supra*, was referred to by the court with approval; and with this comment: that that case decides that, even since the Code, evidence of exclamations indicative of pain, made by a party injured, is admissible; and that the rule does not confine the proof to exclamations made at the time of the injury. The case seemed to modify the old rule so as to exclude a simple statement or declaration, made by the injured party some days after the accident, that he was suffering from pain in the part of the body claimed to be injured, when unaccompanied by any other manifestation of an involuntary nature, indicative of suffering, but adhering to the pre-existing rule so far as to admit evidence of exclamations indicative of pain made by the injured party. This is the view taken of that case by this court in *Olp v. Gardner*, 48 Hun, 169, where HAIGHT, J., speaking for the court, said, "The rule, as we understand it, now is that while evidence of declarations which are of an involuntary nature, indicating pain or suffering, such as sudden or involuntary groans, screams, or signs, resulting from a touch, movement, or contact with a foreign substance, are competent; but the evidence of statements made long after the injury, as to the effect of the injury, or as to the suffering endured therefrom, is not competent." In the case at bar the complaint made by the plaintiff was uttered within an hour after the accident, and in the presence of the witness, who saw the plaintiff when she fell; and at the time the utterance was made by the plaintiff there were other signs of an involuntary nature indicating bodily suffering, such as restlessness and inability to sleep for the entire night following the accident. The utterance of the plaintiff that her head and side pained her was in the nature and to the same effect as a groan or sigh made by suffering persons. The statement does not appear to have been made for the purpose of informing those attending the plaintiff that her person was injured, and that she was suffering pain in those parts, but they may be fairly characterized as an exclamation made by a suffering person who was then in a restless condition, and unable to secure sleep, without any design or purpose on her part of communicating to those sur-

rounding her the fact that she was suffering pain in her head and side. The complaint made was accompanied by other marked signs of suffering from bodily injuries recently received, which, in my opinion, made her statements competent evidence within the limit of the modified rule. In *Roche's Case, supra*, it would seem from the facts of the case, as stated in the opinion of the court, that the statement, which it was held was incompetent for the plaintiff to prove, was made by her for the simple purpose of informing the person to whom her remarks were addressed that she had received an injury, and was suffering pain therefrom. The case at bar is in all essential particulars like the case of *Leuke v. Dry-Dock Co.*, 46 Hun, 283. In that case the witness observed the accident, which occurred in a public street, and the plaintiff was taken to a store in the vicinity kept by the witness, who saw the plaintiff's injured limb, which then seemed to be swelling. The witness was allowed to testify that the plaintiff complained at that time of pain in his leg. It was held that the evidence was competent; that the complaints uttered were in the nature of an exclamation by the injured party, and were competent, within the rule as stated in the recent cases; citing *Roche v. Railroad Co.*, *supra*. It may be difficult in many cases which are likely to arise to distinguish between what is a mere statement by the injured party, made for the purpose of conveying to another the fact that he is suffering bodily pains, and the involuntary exclamation of such a person indicative of pain arising from an injury. Each case as it arises must be determined by its own facts and attending circumstances.

All the other exceptions referred to in the appellant's brief have been examined, and I find no error in the rulings just brought to our attention. The plaintiff's counsel read an extract from a medical author on the subject of nervous disorder and shocks, in which he expressed the opinion that, in a certain class of cases, the patient would never recover, and then asked one of the plaintiff's medical witnesses, "Is that good doctrine?" The defendant's counsel made a general objection, which was overruled, and an exception taken. The witness made no answer to this question, but the court asked the witness the following question: "Does that meet your judgment as a medical man?" and the witness answered the question in the affirmative, without any objection by the defendant. The question propounded by the court is very different in its import and meaning from the one asked by the plaintiff's counsel, and, as the answer was received to the last question without objection, it may be assumed that the defendant consented that the witness might answer the same.

The appellant also claims that the damages as fixed by the verdict of the jury are excessive. In actions to recover damages for personal injuries caused by the negligence of another, the amount which should be awarded is necessarily a matter of judgment, and the verdict of a jury will not be set aside as excessive unless it manifestly appears to be the result of passion, partiality, prejudice, or corruption, or a failure on the part of the jury to comprehend the rule of damages applicable to the case as stated to them by the court, their guide, although the court would have been better satisfied with a verdict for a less sum. In this case the evidence tended to show that the plaintiff had suffered permanent physical injury, and also a degree of mental impairment, in consequence of the defendant's negligence, and we are unable to say that the judgment of the jury is not fairly supported by the evidence and circumstances of the case. We cannot disturb the verdict on that ground. Judgment and order affirmed. All concur.

O'CONNOR v. McMAHON.

(Supreme Court, General Term, Fifth Department. October 19, 1889.)

1. PARTITION—JURISDICTION—VALIDITY OF DECREE.

Plaintiff and her husband separated and continued to live apart, he leaving her in possession of certain land conveyed to them jointly before separation. Subsequently he conveyed an undivided half thereof to defendant, but without plaintiff's joining in or confirming the deed. The interest of plaintiff's husband was afterwards sold under a judgment against him. The purchaser went into possession, and sued defendant for a partition of said premises, without making plaintiff a party to such action. Plaintiff was served with notice of a motion to put defendant in possession in pursuance of judgment, which motion the court sustained over plaintiff's objections. *Held*, that the proceeding of the court in putting defendant in possession was a mere nullity for want of jurisdiction.

2. HUSBAND AND WIFE—TENANCY BY ENTIRETIES.

The conveyance by plaintiff's husband to defendant, in which plaintiff did not join, is void, as such land was held by them as tenants by the entirety. Following *Zorutlein v. Bram*, 2 N. E. Rep. 388.

3. SAME—SEPARATE ESTATE OF WIFE.

Under Laws N. Y. 1860, c. 90, § 1, providing that the property acquired by a married woman by grant and the issues thereof shall remain her separate property, and that it shall not be subject to the control or liable for the debts of her husband, plaintiff's husband cannot, by a conveyance of the land, deprive her of the enjoyment of the land, and the rents and profits thereof.

Motion for new trial on exceptions.

Trespass by Mary O'Connor against Dennis McMahon, for the alleged unlawful taking possession of certain premises and removing the crop thereon. The case was removed to this court from a court of a justice of the peace, and, on a verdict for nominal damages, defendant moves for a new trial.

Argued before BARKER, P. J., and DWIGHT and MACOMBER, JJ.

Hadden & McNamara, for plaintiff. *George T. Spencer*, for defendant.

MACOMBER, J. Certain real estate, known as "Lot 1, in block 100, in the village of Corning," was conveyed to the plaintiff and her husband, Dennis O'Connor, on the 13th day of September, 1873. In a year or two thereafter Dennis O'Connor and the plaintiff separated, he voluntarily leaving her in the possession and control of the premises, and they have continued to live separate and apart since that time. On the 31st day of October, 1876, Dennis O'Connor executed a deed of an undivided half of said premises to the defendant, Dennis McMahon. The plaintiff, however, did not join in this conveyance, nor has she done any act to confirm the same in any respect. On the 11th of November, 1876, one Catharine M. Hogan recovered a judgment against the same Dennis O'Connor. Subsequently the interest of said Dennis in such lands was sold by the sheriff of the county of Steuben to Catharine M. Hogan, who thereupon took possession of the west half of the said lot, and erected a house thereon, assuming that she was a tenant in common with this plaintiff. Afterwards, Catharine M. Hogan brought an action in the county court of Steuben against the said Dennis McMahon and his wife for a partition of the premises in question, upon the ground that McMahon and his wife were tenants in common with her of said premises. The plaintiff in this action was not made a party to that action, but on the 5th day of October, 1885, after a judgment had been entered therein, a motion was made in the Steuben county court by Dennis McMahon for an order putting him into possession of the east half of said lot, that being the portion of the land awarded to him in and by the judgment given in the partition suit. Such motion papers were served upon this plaintiff. She appeared in pursuance of the notice, and objected to the jurisdiction and power of the court thus summarily to adjudge upon her rights, which objection was overruled, and the court proceeded to carry into effect the judgment already pronounced. During all of this time the plaintiff was in possession of all of the lands, and had growing upon the part in dis-

pute a crop of oats. Shortly thereafter, with the aid of the sheriff, McMahon took possession of the east half of the lot, removed the oats, and erected a fence between the two parts of the land, against the will and objection of the plaintiff. This case is brought in trespass to recover damages for the unlawful taking of the possession of the premises, and going upon said land and removing and destroying a growing crop thereon.

The proceeding in the county court of Steuben county, whereby, upon a mere motion to put McMahon in possession of a portion of the premises, the rights of this plaintiff were attempted to be adjudicated, was a mere nullity. Not being a party to the action, she could not be removed from the land, or any portion of it, in this summary manner. Nor was it necessary for her to appeal from that determination of the county court in this respect, for on the face of the proceedings the county court acquired no jurisdiction. She objected timely to the proposed action in carrying into effect the judgment in partition, and she cannot be prejudiced by the fact that, after having her objection overruled, she, by the aid of counsel, did what she could to resist the unlawful proceedings against her rights. The question, therefore, in this case must be determined by the rule governing estates in entirety, where conveyances are made to husband and wife. Notwithstanding the doubts previously expressed in *Meeker v. Wright*, 76 N. Y. 262, and *Schultz v. Schultz*, 89 N. Y. 644, the case of *Bertles v. Nunan*, 92 N. Y. 152, has settled the law in this state to the effect that under a conveyance to a husband and wife jointly they take, not as tenants in common nor as joint tenants, but as tenants by the entirety, and, upon the death of either, the survivor takes the whole estate. The opinion in that case, which contains almost a complete enumeration of the cases theretofore arising in this state upon the question involved, declares that this estate by the entirety still exists, notwithstanding the laws of 1848, 1849, 1860, and 1862. This decision was reaffirmed in the case of *Zornlein v. Bram*, 100 N. Y. 12, 2 N. E. Rep. 388, which also decided that this common-law rule was not done away with by the act of 1880, (chapter 472, Laws 1880,) allowing the husband and wife to make a division between themselves of land so held by them. This case further holds that neither husband nor wife can separately convey to a third person by deed any portion of such land so held by them. This decision would seem to be decisive of the case before us.

But the counsel for the defendant has made an argument to the effect that inasmuch as under the common-law rule the husband as such was entitled to receive the proceeds and avails of the land during the jointlives of the owners, he could, as he has attempted to do in this instance, transfer such right to a third person. A sufficient answer to this proposition is that in the answer to the complaint the defendant has put his right wholly upon the claim of title to the land by virtue of such conveyance by the husband, and in the proceedings for the partition of such lands above mentioned. Furthermore, for the purposes of this hearing, it is not necessary to decide whether in any case the husband may, by the hand of another, by virtue of his common-law marital rights, incident to holding the estate in entirety with his wife, receive and dispose of the issues and profits of the real estate, regardless of the rights of his wife. The contention for such proposition would be vulnerable in one respect, namely, that under the common-law rule, while he receives with one hand the rents and profits of the real estate so held, he is, by the same common-law rule, required with the other to dispense the same, or so much as is necessary therefor, to the support and maintenance of his wife and family, which was not done in this instance.

The act of 1860 (chapter 90, § 1) has an important bearing upon the questions here presented. That section is as follows: "The property, both real and personal, which any married woman now owns, as her sole and separate property; that which comes to her by descent, devise, bequest, gift, or grant; * * * and the rents, issues, and proceeds of all such property,—shall, not-

withstanding her marriage, be and remain her sole and separate property, and may be used, collected, and invested by her in her own name, and shall not be subject to the interference or control of her husband, or liable for his debts, except such debts as may have been contracted for the support of herself or her children by her as his agent." The real estate in question was conveyed to the plaintiff and her husband subsequently to the passage of this act. The plaintiff's rights, therefore, must receive the protection of the act. Her title is by grant. We are of the opinion that the husband cannot do any act which will deprive the wife of her rights under this statute to the enjoyment of the land, and the reasonable support which the same may bring to her. The husband, by virtue of his marital rights, has the undoubted power to receive and dispense the avails of the land for the common support of himself, his wife, and their children. In the due and lawful management thereof he is doubtless free from the interference of his wife. This dominating right springs from the relation that he bears to her as husband under the common-law rule. When, however, he absents himself from the possession and control of the property, and leaves his wife in the sole possession and control, as was done in this case, he can do no act which will deprive her of the enjoyment which the grant was intended to bring to her. If this view is correct, following, as we believe we do, the decision of *Zornlein v. Bram, supra*, the act of the husband in conveying an undivided half of the land to the defendant was inoperative, and, under such conveyance, the defendant had not the right to any of the crops, or to the use and possession of the lands. The verdict was right, and judgment thereon should be ordered for the plaintiff, with costs. All concur.

CHILDS *et al.* v. TUTTLE *et al.*

(Supreme Court, General Term, Fourth Department. September 19, 1889.)

For majority opinion, see *ante*. 59.

CHURCHILL, J., (*dissenting*.) The respondents are manufacturers of spring-tooth harrows, at Utica, N. Y. The defendants are fifteen in number: Willis H. Tuttle and five others, composing the firm of G. B. Olin & Co., of Canandaigua, N. Y.; A. W. Stevens and another, composing the firm of A. W. Stevens & Son, of Auburn, N. Y.; and Dewitt C. Reed and two others, composing the firm of D. C. & H. C. Reed & Co., Nehemiah Chase and two others, composing the firm of Chase, Taylor & Co., and William L. Lawrence, all of Kalamazoo, Mich. These defendants are all engaged at their several places of residence in the manufacture of spring-tooth harrows, under the patent No. 201,946, known as the "Reed Patent," which patent is owned by the firm of G. B. Olin & Co., for the New England states, New York, New Jersey, Pennsylvania, Delaware, Maryland, East and West Virginia, and by the firm of D. C. & H. C. Reed & Co., for the remainder of the territory of the United States.

The defendants claim that the harrow manufactured by the respondents is an infringement of this patent. This claim is denied by the respondents. In February, 1887, the firm of G. B. Olin & Co., after considerable friction with the respondents upon that question, commenced an action in the circuit court of the United States for the northern district of New York, based upon this claim of infringement. Issue was properly joined, and in March, 1887, and again in May, 1887, the plaintiffs in that suit moved the court for an injunction to restrain the defendants from marketing their harrows. These motions were heard on voluminous papers and exhibits, presenting from both sides this question of infringement, and were denied. Testimony was afterwards taken on both sides to a large amount, and at great expense, and in June, 1888, this evidence had been printed, and the case was pressed for a

hearing upon the merits by the defendants in that action, but postponement was asked for by the plaintiffs. The hearing was postponed to September, and again, on the motion of the plaintiffs, and against the opposition of the defendants, to October, and was finally set down peremptorily for hearing November 20, 1888. At that date the defendants were ready, but the plaintiffs asked further postponement, which was refused by the court, and the complaint was thereupon dismissed on the motion of the solicitors of the plaintiffs in that action.

The respondents in the present action allege in their complaint that the defendants in this action, soon after the dismissal of the complaint in the action above referred to, entered into a combination to injure, harass, and annoy the respondents, and to destroy their business as manufacturers of spring-tooth harrows, and that as a means to be employed for this purpose numerous suits were to be brought in the circuit courts of the United States against the purchasers of respondents' harrows, and that such suits were to be brought, not in the belief that the harrows manufactured by the respondents were an infringement upon the Reed patent, but for the purpose of intimidating respondents' customers, and thereby injuring and destroying their business. The complaint in this action asks for perpetual and preliminary injunctions to restrain the defendants from commencing actions for the purpose above stated. Upon the verified complaint and accompanying affidavits a preliminary injunction was granted by a justice of this court. The special term, upon an order to show cause, granted upon affidavits presented by the appellant, and upon the original papers, and additional affidavits presented by the respondents, refused to vacate the injunction. From the order refusing to vacate, this appeal was taken to the general term.

To restrain by injunction the bringing of suits, or other acts calculated to intimidate customers or destroy the business of a rival, is an old and well-established right of courts of equity, and may be exercised where the party to be restrained is within the jurisdiction of the court, although the effect of the injunction may be to restrain the bringing of actions in the courts of other states or countries. 2 Story, Eq. Jur. §§ 875, 899, 900. This is conceded by the learned counsel for the appellant in his printed brief. Story, however, in stating the doctrine, makes this exception: "There is one exception to this doctrine, which has been long recognized in America; and that is that the state courts cannot enjoin proceedings in the courts of the United States, nor the latter in the former courts. This exception proceeds upon peculiar grounds of municipal and constitutional law, the respective courts being entirely competent to administer full relief in the suits pending therein." 2 Story, Eq. Jur. § 900. This exception is insisted upon by the learned counsel for the appellant as fatal to the maintenance of this action. It will be observed that Story gives the entire competency of the courts referred to to administer full relief as a foundation for the exception: but in the particular case presented by the complaint in this action United States courts are powerless to grant the relief sought. The appellant, with seven other of the defendants in this action, and also the respondents, are residents of the state of New York, and the courts of the United States have no jurisdiction of an action of this sort between such parties. Act Cong. Sept. 24, 1789, § 11; *Hyde v. Ruble*, 104 U. S. 407; *Blake v. McKim*, 103 U. S. 336.

A case, similar in its features to the present one, was recently before the United States circuit court for the northern district of Illinois,—*Emack v. Kane*, 34 Fed. Rep. 46, decided February 27, 1888. It was an action brought by the manufacturer of a patented article to restrain the manufacturers of a rival patented article from issuing to the complainant's customers "circulars threatening all who should buy from the complainant, or deal in his slates, with lawsuits, upon the ground that the complainant's slate was an infringement of the other's patent." There were circumstances in that case, as

in this, tending to show that the suits threatened were not for the purpose of settling this question of infringement, but for the purpose of intimidating the complainant's customers, and injuring his trade. The court held that in such actions a court of equity would not pass upon the validity of a patent, but might consider the state of the art, in connection with the defendant's conduct, to ascertain his good faith in issuing the circulars; and the court also held that an injunction should issue, since the proof shows "that the charges of infringement were not made in good faith, but with malicious intent to injure complainant's business." In that case the parties resided in different states, and the United States courts had unquestioned jurisdiction. It will be seen upon the authority of that case that, if all the defendants in this case had been residents of the state of Michigan, this action for the precise relief sought might have been maintained in the United States circuit courts. Act Sept. 24, 1789, § 11. The absence of jurisdiction in the courts of the United States to entertain this action between the parties to it, and so to grant the relief sought, takes this case out of the exception stated by Justice Story. Injunction is the right arm of the court of equity, by which it reaches wrongs beyond the remedy of the ordinary processes of the courts of law. The right to use it in a case of this kind, when, if the complaint be true, great injury is threatened, otherwise remediless, should not be denied except upon the judgment of a court of last resort. If the respondents upon the trial of this action establish the facts charged in the complaint, (which the papers presented show to be not improbable,) the case will then be in a situation in which such a judgment may be obtained. The order appealed from should be affirmed, with costs.

GATES v. HENDRICK.

(*Supreme Court, General Term, Fifth Department. October 19, 1889.*)

CONTRACT—CONSTRUCTION—PREMATURE ACTION.

By a written contract defendant sold certain land to plaintiff, and agreed to lease the land sold, and other land then owned by plaintiff, which was then cleared, or which defendant might clear, for four years, at a certain annual rental. Defendant also agreed to clear five acres of the land. *Held*, that defendant might clear the five acres at any time during his tenancy, and an action for failure to do so could not be maintained until its termination.

Appeal from judgment on report of referee.

Action by Henry Gates against Levi G. Hendrick for breach of contract.

Judgment dismissing complaint, and plaintiff appeals.

Argued before BARKER, P. J., and DWIGHT and MACOMBER, JJ.

Jacob B. Decker, for appellant. Brink & Joiner, for respondent.

MACOMBER, J. This action was brought to recover for the non-performance of a written contract to clear five acres of land, and the loss of the use of such land. The answer sets up the defense that the action was premature brought. It was begun on the 25th day of January, 1887. The contract was dated the 14th day of August, 1882, and provided that the defendant should sell a part of the south fifty acres of land, on which he then resided, lying north of the highway, being about four acres of land, for which the plaintiff was to pay him \$100 per acre. After certain other provisions not necessary to mention in detail, the contract provides: "Gates further agrees to lease the said land bought of Hendrick, together with that he now owns, which is cleared, or Hendrick may clear, lying to the north of the same, being part of twenty-five acres, for four years from April 1st next, at forty dollars per annum, payable annually. Hendrick is to pay, also, all taxes assessed against said land. Said Hendrick also agrees to clear five acres adjoining the land now cleared. * * * Payment of rent to be made on November first in each year." By the fair construction of this instrument, the de-

fendant had four years from the 1st day of April, 1883, namely, until the 1st day of April, 1887, in which to perform his part of the agreement, for the supposed omission to do which this action is brought. The defendant had paid the rent reserved, and had performed all of the obligations on his part, save that he had not completed the clearing of the five acres in question on the 25th day of January, 1887, when this action was begun. Under these circumstances no right of action accrued to the plaintiff for the failure to clear the woodland until after the expiration of the time contracted for. Hence it follows that the action was prematurely brought, and the complaint was properly dismissed by the learned referee. The judgment should therefore be affirmed. All concur.

CHAPMAN v. CHUMAR *et al.*

(*Supreme Court, General Term, Fifth Department. October 19, 1889.*)

CORPORATIONS—STOCKHOLDER'S LIABILITY.

A book-keeper, having no other duties than such as usually pertain to that position, is a "servant," within Laws N. Y. 1848, c. 40, § 18, making stockholders of a corporation liable personally for wages due its laborers, servants, and apprentices.

Appeal from special term, Wyoming county.

Action by L. Byron Chapman against Charles H. Chumar and others, stockholders of the Eldridge Salt Company, to make the defendants liable for plaintiff's wages, earned as a servant for said corporation. A demurrer to the complaint was overruled, and defendants appeal.

Argued before DWIGHT, MACOMBER, and CHILDS, JJ.

A. J. Abbott, for appellants. Frank W. Brown, for respondent.

MACOMBER, J. By this action, the plaintiff, who is a judgment creditor of the Eldridge Salt Company, seeks to make responsible the directors of that corporation for the payment of his debt. The plaintiff was, during the months of January, February, and March, 1888, employed by that corporation as book-keeper, at the agreed price of \$75 per month; amounting in the whole to the sum of \$225, upon which there had been paid only the sum of \$35. The plaintiff properly alleges the recovery of the judgment, and the issue of the execution thereon, and the return thereof unsatisfied, against the corporation. This corporation was formed under the General Laws of 1848; chapter 40, § 18, of which provides that the stockholders shall be jointly and severally liable for all debts which shall be due and owing to all their laborers, servants, and apprentices for services performed for such corporation. We do not understand that the purpose of this action is to charge any of the defendants with liability under any other section of this act. The only question worthy of discussion, as it seems to us, is whether the defendant was a servant within the meaning of this statute. It is not shown by the complaint that he had any other duties to perform than those of book-keeper. We must assume, therefore, that he was not an officer of the corporation, that he was not a superintendent, and that he had no general supervising powers by which there was lodged in him any discretion or any control over the actions or conduct of the corporation, or its officers and employees. If, in truth, the plaintiff ever performed any duties other than those technically of a book-keeper,—that is to say, a person who simply records the financial transactions of the concern, without power to direct or manage,—the same does not appear by any allegation in the complaint. In all of the cases cited by the counsel for the appellants, (*Dean v. De Wolfe*, 16 Hun, 186, affirmed in 82 N. Y. 626; *Aikin v. Wasson*, 24 N. Y. 482; *Coffin v. Reynolds*, 37 N. Y. 640; *Gurney v. Railway Co.*, 58 N. Y. 367; *Wakefield v. Fargo*, 90 N. Y. 213,) as well as in *Hill v. Spencer*, 61 N. Y. 274, and *Krauser v. Ruckel*, 17 Hun, 463, the person claiming the benefit of this statute, while in part performing menial duties which

would in terms bring him within its provisions, also was charged with some superintending duty that took him out of the description of servants who worked for, and were directed solely by, a master, and who had no discretionary or supervising powers over the corporation or its officers or men. An examination of these several authorities will show this to be the case without an exception, and hence they are not applicable to the facts alleged in this complaint. The judgment entered upon the decision should be affirmed, with costs, but with leave to the defendants to plead over, on payment of the costs of the demurrer and of this appeal. All concur.

TRAVIS v. TOWN OF CARROLLTON.

(Supreme Court, General Term, Fifth Department. October 19, 1889.)

DEFECTIVE BRIDGES—CONTRIBUTORY NEGLIGENCE.

In an action for the loss of horses caused by defects in defendant's bridge, plaintiff's driver testified that on approaching the bridge he saw that the planks were separated, and thought it made the bridge unsafe, and that he therefore stopped and looked at it, but decided to take the chances of trying to go over; and that it was in the same condition as it was the day before, when he had crossed in safety. *Held*, that he was guilty of contributory negligence, which precluded a recovery unless the accident did not result from the defect from which the danger was apprehended.

Appeal from circuit court, Cattaraugus county.

Action by Erastus Travis against the town of Carrollton for the loss of two horses on account of a defective bridge. Judgment for plaintiff, and defendant appeals.

W. S. Thraser, for appellant. *J. G. Johnson*, for respondent.

DWIGHT, J. The action was for the loss of a pair of horses, resulting from the alleged negligent construction of a bridge on one of defendant's highways. The negligence, if any existed, seems to have consisted in the omission to spike or otherwise fasten the planking to the stringers of the bridge. Whether the planking was spiked, and, if not, whether the omission to spike was negligent, and whether that negligence was the cause of the accident, were questions which were properly submitted to the jury upon evidence which sustains the verdict in all the particulars mentioned. The question principally discussed on this argument is whether the verdict was against evidence on the question of contributory negligence. The team was driven by a young man employed by the plaintiff, of about 17 years of age at the time of the accident. He had crossed the bridge with a load on the day before, and was returning with an empty wagon at the time of the accident. He testified, on his direct examination: "When I got to the bridge I stopped, and saw that everything was all right. The planks lay there, as far as I could see, as good as anything; and the bridge was above water." On his cross-examination he said: "The planks were not close together then; they were separated a little. I don't know how much, but more than planks ordinarily upon some bridges. I saw those. I looked before I drove on. * * * I thought these holes in the bridge then made it unsafe. * * * There not being plank enough there to cover the bridge is what made it unsafe; and that I saw myself before I drove onto it." On his redirect examination he testified: "There were no broken plank in the bridge. The widest crack in the bridge was about two inches. There were several such cracks in the bridge. I did not think at the time that I looked at it that it would be dangerous to drive on with my team. It was in the same condition that it was the day before, and then I had no trouble in going over it. These holes extended the whole length of the plank." On his recross-examination he testified: "I say that when I looked at these cracks in the bridge, before I went onto it, I thought that was what made the bridge unsafe, and that was why I stopped and looked at it, and I don't want to be understood as changing that in any way; and, after looking at it, I

thought I would take the chances of trying to go over, but I thought it was unsafe; that is what I mean." And on his further redirect examination he testified: "I did not apprehend any danger from the bridge, except for the cracks being in there." Nothing could be more explicit than this declaration of the person whose conduct was the subject of inquiry, that he saw in the bridge what he believed to be a source of danger, and took the chances of escaping that danger, as he had done the day before. This evidence is conclusive against the right of the plaintiff to recover, unless the jury was justified in finding, from the whole evidence, that the accident did not, after all, result from the defect in the bridge from which the danger was apprehended, and of which the driver of the horses took the risk. In that case the plaintiff might still be entitled to recover, notwithstanding the admitted negligence on the part of the person to whom he had intrusted the care of his horses; because that was not contributory negligence if it did not contribute to produce the accident and loss complained of. This question was also carefully submitted to the jury, and we are not prepared to say that the verdict in that particular did violence to the evidence upon which its just decision depended. If not, the verdict was properly held conclusive upon this as well as upon the other main question in the case, and the motion for a new trial was properly denied. The judgment and order appealed from must be affirmed. All concur.

HARRIS *et al.* v. OAKLEY.

(*Supreme Court, General Term, Fifth Department. October 19, 1889.*)

1. DEED—DESCRIPTION—BOUNDARIES.

The owner of a lot in the city of Rochester, of the area of about one-half acre, rectangular in form, fronting 274 feet on a street, and abutting on the rear for the same distance on a canal, the location of both, as well as the other lines, being undisputed, conveyed a portion, by description, of "137 feet front and rear, measuring from G. H.'s north line on G. street, and also 137 feet from G. H.'s south line on the canal; being the piece of land occupied as a garden by the grantor." The lot was divided by a fence, one side being used as a garden; the fence starting on G. street midway, but striking the back line at the canal at a point 19½ feet from the middle of the lot. The fence was not mentioned in the deed. *Held*, that the reference to the garden was too indefinite to control the calls for exact distances from known bounds, and the divisional point on the canal should be located 137 feet from G. H.'s line.

2. NAME—WHEN VOID—ADVERSE POSSESSION.

8 Rev. St. N. Y. (7th Ed.) p. 2196, § 147, providing that conveyances of land, in the actual possession of another, claiming under an adverse title, at the time of the delivery thereof, shall be absolutely void, does not apply to a case where both parties claim under a common grantor, and the party in possession, by mistake in the construction of his deed, holds land not embraced therein.

3. EVIDENCE—PAROL TO VARY DEED.

Testimony of declarations of a grantor, before the execution of a deed, tending to establish a boundary other than that made by the deed as construed by the court on appeal, is inadmissible, as its effect would be to convey land by parol in contravention of the statute of frauds.

4. SAME.

It was also inadmissible to show grounds for the reformation of the deed, when the proper parties were not before the court for that purpose, and there were no proper averments in the pleadings for such a purpose.

Appeal from circuit court, Monroe county.

James A. Harris and others sued Monroe H. Oakley in ejectment. From a judgment for plaintiffs, defendant appeals. For statement of the case and opinion on former appeal, see 2 N. Y. Supp. 305.

Argued before BARKER, P. J., and DWIGHT and MACOMBER, JJ.

W. H. Whiting, for appellant. Horace McGuire, for respondents.

DWIGHT, J. The action was ejectment for a triangular piece of land, title to which depends upon the correct location of the boundary line between par-

cels of land conveyed by the same grantor to the plaintiffs and the defendant, respectively. The questions presented, aside from those relating to the admission of evidence, are precisely the same as those presented on a former appeal, decided in this court in June, 1888. 2 N. Y. Supp. 305. That decision gave construction to the deeds of the parties, and located the boundary line, in accordance with the contention of the plaintiff. It was also held at that time, and upon the same evidence as that now in the case, that the deed to the plaintiff was not void, under the statute of champerty, in respect to the piece of land in dispute. No questions, therefore, remain to be considered on this appeal, except those which arise upon rulings of the court, on the trial now under review; and in this respect we think the exceptions point to no error. The rulings in question excluded testimony offered to show declarations by the grantor, before the execution of the deed to the defendant, tending to establish a boundary other than that made by the deed, as construed by the former decision of the court. The effect of such testimony would have been to accomplish a conveyance of land by parol, in contravention of the statute of frauds; or to vary the description contained in the deed, for which purpose it was incompetent, under elementary rules of evidence; or to establish an equitable counter-claim for the reformation of the deed on the ground of mutual mistake, for which purpose the proper parties were not before the court, nor the proper averments in the answer. Under the decision on the former appeal, the judgment now appealed from must be affirmed.

KNELL v. CITY OF BUFFALO.

(*Supreme Court, General Term, Fifth Department. October 19, 1889.*)

1. MUNICIPAL CORPORATIONS—STREET IMPROVEMENTS—PROCEDURE.

It sufficiently appears that the proceedings of a council, in referring a petition for street improvement, were presented to the mayor for approval, when it is shown that the documents were given to the mayor's clerk, who, in accordance to his custom, was at the office to receive such papers, and that the mayor afterwards attempted to approve them.

2. SAME—FILING SPECIFICATIONS.

Where it appears that the plans of the proposed improvement were on file when the engineer advertised for proposals, it will also be presumed, in the absence of evidence, that the specifications were also on file, as the law requires.

3. SAME—IRREGULARITIES.

Where the only omissions in the preliminary steps authorizing street improvement are of matters of form, the law being substantially complied with, and the mayor having approved the action of the council in making the contract, such irregularities will not vitiate an assessment.

4. SAME—ACTION TO VACATE ASSESSMENT.

In an action by one property holder, suing for himself and others similarly interested, to annul an illegal assessment, where no other person becomes a party, it is error to enjoin the collection of an assessment against the property of any other person except plaintiff.

Appeal from judgment on report of referee.

This action was brought in behalf of the plaintiff, Louis Knell, and all others who might come in, for the purpose of having declared null and void and restraining the collection of assessment roll No. 4,500, for repaving Broadway, in the city of Buffalo, between Ellicott and Spring Streets, with asphalt pavement. The whole amount of the assessment was \$77,404.80, all of which had been paid by the persons liable therefor, except the sum of \$6,329.31. The plaintiff's assessment was \$734.78, of which he had paid the sum of \$432.82; leaving still unpaid by him \$301.96.

Argued before BARKER, P. J., and DWIGHT and MACOMBER, JJ.

Frank C. Laughlin, for appellant. O. C. De Witt, for respondent.

MACOMBER, J. The judgment, among other things, permits all persons, not parties to the action, whose lands have been subjected to the lien of the

assessment above mentioned, and who have contributed, and who may thereafter contribute, towards defraying the expense of the action, and who are represented by the plaintiff herein, to come in on their application, and have the judgment entered herein declared for their benefit; and adjudges the assessments against their respective parcels of land to be null and void; and gives a perpetual injunction restraining the defendant from enforcing the same, or any part thereof, against them, or either of them. No person, so far as the record discloses, intervened and made himself a party to this suit, in pursuance of the allegation contained in the complaint that the action was brought for the benefit of all parties similarly situated. It was not, therefore, competent for the referee to direct a judgment in favor of other persons than the plaintiff who were not made parties to the action. It is quite clear that, if the plaintiff had failed in this action, neither one of these several persons owning lands upon Broadway would be concluded by the judgment entered herein. The defendant cannot be deemed to be concluded by a judgment to which the decision of the referee says the plaintiff is entitled, as to any of these persons, because the rights of each of them may turn upon facts peculiar to each particular case, and not upon any general or supposed pervading defect in the proceedings for the pavement of this street. It follows, therefore, that the judgment should be modified by eliminating therefrom all provisions for the benefit of persons who were not originally, or who did not subsequently become, parties to the action, before the decision of the referee.

The referee has found that the assessment of this public improvement is invalid upon various grounds, which may be stated briefly. The principal reason why, in his judgment, the assessment is regarded as void, is that the assessors, as is alleged, acted upon and reported a petition for the improvement in question before the mayor approved of the action of the common council in referring the petition to them to determine the fact whether it had been signed by the necessary tax-payers. It is clearly established, and so found by the referee, that a sufficient majority petition for this improvement was presented to the common council on the 26th day of May, 1884, and by that body referred to the assessors. On the 9th day of June, two weeks thereafter, the assessors returned the petition to the common council, with their certificate annexed, in all respects as required by the charter. Title 9, Charter of Buffalo, §§ 78, 79. It appears, however, that the mayor did not approve at that time, personally, the action of the common council. He has further found that the resolutions or proceedings were never legally presented to the mayor. In respect to this last finding of fact, the learned referee appears to be in error. The mayor, it seems, had a clerk by the name of Robbins, who was generally at the mayor's office, ready to receive any communication or paper designed for the mayor's signature. He received these proceedings of the common council, at the time mentioned, while in the mayor's office, and while acting as his legally constituted clerk. It does not appear that the mayor's attention was called particularly to this action of the common council, or that he was requested to approve or disapprove the same; but there is a provision of the charter of the city by which such proceedings are deemed to be approved by the mayor, unless within a period of 10 days he returns the same without his approval. Charter of the City, tit. 2; § 25. The decision of the referee is placed upon the narrow ground that the proceedings of the common council had not been legally presented to the mayor, and that the presentation made at his office, the same being handed to the clerk, was not sufficient. In this conclusion we cannot concur. There appears to have been no attempt made to conceal the proceedings from the mayor. On the contrary, a subsequent attempted approval of the same shows that it was his purpose from the beginning to concur in this action of the common council. We are constrained, therefore, to differ from the learned referee upon the main matter upon which his judgment rests.

The referee has further found that the necessary plans and specifications for the proposed improvement were not prepared and placed on file when the engineer advertised for proposals. In this too, in our judgment, he was in error under the well-established facts of the case. The proper plans had been prepared, and were on file at the time of advertising for proposals. There seems to have been no motive for the engineer to have advertised for proposals before the specifications were completed and filed; and this finding of the referee is against the strong probabilities of the case, and against much of the testimony.

So, also, with his conclusion that the bid or proposal to do the work, as received and acted upon, was not sealed. No other proposal was submitted than the one for the Barber asphalt pavement. It is abundantly established that the engineer, when he received the envelope, had no previous knowledge of its contents, and that the envelope at that time was actually sealed. Under these circumstances, nobody could be injured, even if the proposed bid had not been sealed; but, as intimated above, the preponderance of evidence shows that the same was regularly inclosed in an envelope, and sealed.

Further opposition to the legality of this assessment, and the proceedings thereunder, consists in the assertion that the contract of laying was prematurely entered into, and before the formal steps required by the charter had been fully complied with. Even if this be so, the contract was ratified and validated by the subsequent proceedings, and by the mayor's abstention from vetoing the resolution, but approving the same. It is true that in all matters of substance, in carrying out local improvements, the statutory authority therefor must be strictly pursued, and any substantial departure therefrom vitiates the proceedings under it. *Merritt v. Village of Portchester*, 71 N. Y. 309. But mere clerical or accidental departures therefrom, as in this instance, being mere irregularities which the parties fail to avail themselves of at the time, are not matters of substance, and afford no reason for the court's interference in enforcing the payment of the expenses of such improvements, when it is clearly to be seen, as in this case, that the substance of the provisions of the statute has been observed, and that the municipal authorities had acquired full and complete jurisdiction in the premises. The approval of the resolution made by the clerk, Robbins, in the name of the mayor, was of course a mere nullity. *Lyth v. City of Buffalo*, 48 Hun, 175. The resolution became operative by lapse of time, and by the subsequent approval thereof by the mayor before any objection was made to the proceedings for the pavement of this street. Under these circumstances, we think that the proceedings of the common council for the pavement of Broadway, in the city of Buffalo, were legal, and that consequently the judgment entered upon the report of the referee should be reversed, and a new trial be had before another referee, with costs to the appellant, to abide the final award of costs. All concur.

DORT v. NICKEN.

(Supreme Court, General Term, Fifth Department. October 19, 1889.)

PRINCIPAL AND AGENT—RATIFICATION—RELEASE OF MORTGAGE.

Defendant and her husband executed a mortgage on her land to secure a debt owed by him. Without her knowledge he procured a loan from plaintiff for the purpose of discharging the mortgage, and agreed that she should give plaintiff a mortgage on the same land to secure the loan. The husband paid the mortgage, and took a release, of which she remained ignorant until the release was recorded, when she paid the record fee, and took the release from the clerk's office. *Held*, that she did not, by accepting the benefit of the release, so ratify her husband's unauthorized promise that equity would compel her to execute a mortgage to plaintiff.

Appeal from special term, Erie county.

Action by Casper Dort against Eva Nicken, to compel her to execute a mortgage on land. Judgment for plaintiff, and defendant appeals.

Argued before BARKER, P. J., and DWIGHT and MACOMBER, JJ.
Fitch & Braunlein, for appellant. *H. N. Platt*, for respondent.

MACOMBER, J. On the 26th day of May, 1875, this defendant and her husband, Adam Nicken, being the owners in fee of the premises described in the complaint, executed and delivered to George Goetz and J. Martin Jones a mortgage upon said premises to secure the payment of \$1,100, with interest, which mortgage was thereafter duly recorded in the clerk's office in Erie county. The defendant is now the sole owner of the premises, having acquired the same by certain mesne conveyances. On the 10th day of November, 1887, there remained due and unpaid upon said mortgage the sum of \$625. The mortgage was then held by one Louisa N. Groben. On the last-named day this plaintiff paid to Groben the amount due upon said mortgage. On the 15th day of November, 1887, the said Groben duly executed and delivered to the defendant the proper discharge of said mortgage, which was on the 18th day of January, 1888, recorded, and the mortgage discharged of record. The trial court has found that the plaintiff advanced the money for this mortgage under an agreement made by the defendant's husband that the plaintiff should be secured for its payment by another mortgage executed by this defendant upon the same property. This promise was made without the knowledge or consent of the defendant. It is not shown that the defendant did anything to induce the plaintiff to advance moneys in behalf of her husband. The defendant has done no act which would connect her with the perpetration of any deceit or fraud upon the plaintiff. She did, however, some time after the discharge was executed and delivered, for the purpose of having the mortgage discharged of record, voluntarily pay to the clerk, for recording the discharge, the sum of 50 cents, and afterwards received from the county clerk the discharge which had been so recorded. Upon this fact alone the learned trial judge has held the defendant liable for the indebtedness, upon the ground that by recording the discharge, and paying for such record, she ratified the act of her husband in inducing the plaintiff to advance the sum of \$625, upon his promise that she would give security upon these lands. The learned trial judge, in his opinion, says: "While, therefore, she did not authorize her husband to make the agreement which he entered into with the plaintiff for the loan of this money and its security, by means of a mortgage to be executed by her, and which she refused to perform by giving the mortgage, she did, in this manner, obtain the fruits, result, or benefit of the transaction. That was claimed by her as a matter of right, and the discharge was surrendered to her at her request, after it had been obtained by the plaintiff from the clerk's office, and that was a ratification of the unauthorized agreement made by her husband in her behalf upon which the plaintiff advanced this money; for she could not take the benefit derived under that agreement, as she did, by providing for the recording of the discharge, and afterwards requesting and securing its delivery to her, without assuming the obligations of the agreement under which she became entitled to that discharge."

The authorities cited by the learned judge, (*Heermans v. Clarkson*, 64 N. Y. 171; *Leslie v. Wiley*, 47 N. Y. 648; *Andrews v. Insurance Co.*, 92 N. Y. 597; *Trust Co. v. Walworth*, 1 N. Y. 433,) and other cases which might be cited, show that a ratification may be made of an unauthorized act, and that, when made, the same must be deemed a ratification of the whole of the transaction, and not a part thereof only. Their application to the facts disclosed in this case, however, is not readily apparent. The truth is, as between the husband and the wife, this defendant was a mere surety for the payment of the indebtedness which originally existed upon the premises. Her husband was the original debtor, and this property had been pledged as security for

the payment of such indebtedness. There does not seem to be any connection between the procuring of the discharge of the old mortgage and the fraud in getting the money therefor from the plaintiff which would bind this defendant by way of ratification by simply being the involuntary recipient of the discharge of a mortgage procured by her husband. Furthermore, it does not seem to us that the mere requiring and paying for the record of the discharge of the old mortgage can be deemed a ratification of any act of her husband. It is found as a fact by the trial court under the evidence that the same had previously been executed and delivered to her. As between the parties this was a complete discharge of the indebtedness. Placing such discharge upon record affected the rights of no person. Had it been shown that the defendant had done any act in aid of her husband in fraudulently procuring the moneys for the discharge of the old mortgage, a different question would arise; but we are of the opinion that under the finding of fact and conclusion of law the defendant should execute another mortgage upon the same premises to reimburse the plaintiff for moneys fraudulently obtained from him does not necessarily follow, and for this reason the judgment should be reversed and new trial granted, with costs to the appellant, to abide the final award of costs. All concur.

BRADLEY v. CITY OF ROCHESTER.

(Supreme Court, General Term, Fifth Department. October 19, 1889.)

1. LICENSE—MUNICIPAL ORDINANCES—DELEGATION OF AUTHORITY.

The charter of the city of Rochester, § 40, gives to the common council the power to make ordinances to regulate (subdivision 19) the vending of wood, coal, meats, vegetables, etc., and to prescribe the fees to be paid for a license for their sale, and (subdivision 24) to regulate and restrain hawking and peddling in the streets. The city passed an ordinance prohibiting the peddling of vegetables, etc., without a license, and authorizing the mayor to license any proper person thus to sell on payment of license fee. *Held*, that the ordinance was not void as delegating to the mayor authority conferred by the charter on the common council.

2. SAME—UNLAWFUL DISCRIMINATION.

Nor is it void as discriminating in favor of some and against other forms of traffic, as subdivision 24 of the charter selects hawking and peddling as special objects for the regulating and restraining power of the council.

3. SAME—LICENSE FEES.

In an action to recover back license fees already paid to the city, the contention that the licenses are void because not signed by the mayor but only by the city clerk is groundless, where it does not appear but that the licenses were as effectual to secure the privileges paid for as if they had been signed by the mayor, and no objection was made on this ground by the parties taking the licenses.

Appeal from Monroe county court.

Argued before BARKER, P. J., and DWIGHT and MACOMBER, JJ.
H. J. Sullivan, for appellant. C. D. Ketchel, for respondent.

DWIGHT, J. The action was to recover back sums of money paid by the plaintiff and his assignors to the defendant for huckster's license fees. The judgment appealed from reversed that of the municipal court, which dismissed the plaintiff's complaint. The county court held that the ordinance of the common council of the city of Rochester, which provided for the licenses in question, was void for the reason that it assumed to delegate to the mayor an authority given by statute to the common council itself, and which could only be exercised by it. In this view of the case we think the county court erred. The charter of the city of Rochester (section 40) gives to the common council the "power to make * * * such ordinances, by-laws, and regulations as it may deem desirable within the said city for the following purposes;" among them, by subdivision 19, "to regulate the vending of wood, coal, or other fuel, meats, vegetables, fruits, fish, poultry, milk, and provisions of all kinds, * * * and to prescribe the fees to be paid for a license

for the sale of the aforesaid commodities;" and, by subdivision 24, "to regulate and restrain hawking and peddling in the streets." The ordinance in question is entitled "An ordinance regulating the sale of vegetables and provisions," and is as follows: "Section 1. No person shall peddle or sell from house to house, within the city of Rochester, any kerosene oil, vegetables, fruit, garden produce, or provisions of any kind whatever, without having a license therefor, under penalty of \$10 for each offense. Sec. 2. The mayor of the city of Rochester shall license any proper person to sell as above on payment therefor of a license fee of \$15 for each wagon employed." Here is no attempt to delegate to the mayor any authority conferred by the charter upon the common council. On the contrary, the enactment of the ordinance was a direct exercise by the common council of the authority conferred upon it, viz., to regulate and restrain (by ordinance) the peddling of certain commodities in the streets of Rochester. This the ordinance seeks to accomplish by establishing a system of licenses for such traffic, and prescribing the license fees to be paid therefor. It does not delegate to the mayor the authority belonging to the common council, but in the exercise of that authority imposes upon the mayor a duty appropriate to his office. The authority conferred upon the common council by statute is not to issue licenses, but to make an ordinance providing for licenses to be issued. The duty imposed upon the mayor by the ordinance is to issue the licenses thus provided for. The imposition of that duty upon the mayor is clearly within the authority conferred upon the common council.

Counsel for the respondent (here) makes the further objection to the ordinance that it discriminates in favor of some and against other forms of traffic, to all of which the statute equally applies. There does not seem to be much force in the objection, even under the first subdivision (subdivision 19) quoted above; but it is entirely obviated by the second subdivision quoted, (subdivision 24,) which selects hawking and peddling on the streets as special objects for the regulating and restraining power conferred upon the common council. It is further objected on the part of the respondent that the licenses are illegal and void because they are not signed by the mayor, but only by the city clerk. There are at least two answers to this objection: (1) So far as appears, the licenses were as effectual to secure to the plaintiff and his assigns the privileges paid for as if they had been signed by the mayor; (2) no objection was made by the parties taking the licenses on this ground. So far as this objection was concerned, the payment of the license fees was voluntary. The licensees were not required to pay their money for licenses not in due form; and the city, having accepted their money, would have been estopped to question the regularity of their licenses. That the adoption of an ordinance providing for license was a valid exercise of power conferred by the legislature upon the common council is not open to question. *People v. Mulholland*, 19 Hun. 550, affirmed, 82 N. Y. 324. The judgment of the county court should be reversed, and that of the municipal court of Rochester affirmed. All concur. So ordered, with costs.

D. RANSOM, SON & Co. v. BALL.

(*Supreme Court, General Term, Fifth Department. October 19, 1889.*)

1. TRADE-MARK—INFRINGEMENT.

Defendant, in the preparation and sale of a medicine, imitated exactly the name of the medicine, the description of it, the directions for its use, and the design of the wrappers used by plaintiff. The inner wrapper of plaintiff's medicine described it as "prepared by Dr. M., who had originally prepared it, and sold out his interest to plaintiff, but the outer wrapper described it as prepared by plaintiff. M. had either assumed or acquired from his business the title of "Doctor." Held, that the statements as to its preparation were not a fraud on the public, and constituted no defense in a suit by plaintiff to enjoin such use by defendant.

2. SAME—FRAUDULENT INTENT.

The use of the word "Magnetic" in the title, M.'s "Universal Magnetic Balm," where there was no pretense that the liquid possessed any magnetic qualities, does not show any fraudulent intent to deceive the public which would deprive plaintiff of its right to an injunction.

Appeal from special term.

D. Ransom, Son & Co., a corporation, sued to restrain Alvin M. Ball from infringing an alleged trade-mark. From a judgment for plaintiffs, defendant appeals.

Argued before BARKER, P. J., and CHILDS and DWIGHT, JJ.

P. S. Perkins, for appellant. *N. Morey*, for respondent.

DWIGHT, J. The action was to restrain the defendant from infringing the plaintiff's trade-mark, employed upon the wrappers of a proprietary medicine. The fraud of the defendant in pirating the name of the medicine, the language in which it was described, the directions for its use, and the engraved design of the wrappers in which it was sold, was bold and barefaced. There is no attempt to deny or excuse it. The only defense alleged is that the plaintiff corporation had no rights which the defendant was bound to respect, or which a court of equity will interfere to protect, because its trade-mark was itself a fraud upon the public. This charge is founded upon two specifications, viz.: (1) That the plaintiff's label falsely described the medicine as "Prepared by Dr. J. R. Miller;" and (2) that the use of the word "Magnetic" in the name of the medicine was without foundation in fact.

We do not think that the facts presented under either or both of these specifications support the charge of fraud against the plaintiff. The medicine was originally prepared and sold by one J. R. Miller, who had either assumed, or acquired from his business, the title of "Doctor." He had sold the *formula* of the preparation, the good-will of the business, and the trade-mark, or the name under which the medicine had been sold, to the plaintiff. The outer wrappers of the plaintiff's bottle bore the words, plainly printed, "Prepared and sold by D. Ransom, Son & Co., Proprs., Buffalo, N. Y." It was on an inner wrapper only, directly beneath the directions for the use of the medicine, that the words were printed, "Prepared by Dr. J. R. Miller." We think it did no violence to the facts to say that these words intended that the medicine was originally prepared by Miller, or even—as the judge at special term was inclined to think—that the directions were prepared by Miller. An intention to defraud by these means can hardly be imputed to the plaintiff, when we see that it took pains to inform purchasers of the actual facts by the inscription on the outer label, while the inscription complained of was concealed until after the medicine was purchased, and the outer wrapper removed. As for the use of the prefix "Dr." to Miller's name, it must be said that the title is too common, and too indefinite in its meaning, to be likely to deceive anybody. It is as freely used as that of "Professor," and means as little.

The medicine bore the name of "Miller's Universal Magnetic Balm." It is not pretended that the liquid possessed any of the properties of magnetism in the scientific sense of the word; nor do we think it clear that the use of the word "Magnetic" in its title was intended to deceive the public in that respect. The word, so far as any meaning was attached to it, was probably used rather in a figurative, than in a literal or scientific, sense; and there was but little danger of its being misunderstood. There is no evidence in the case which, as we think, would have justified the finding that, in continuing the use of the name under which the plaintiff bought the right to manufacture and sell Miller's preparation, it was guilty of any intentional or actual fraud upon the public which deprives it of the right to the protection of the law in the use of its property. The judgment should be affirmed. All concur. Judgment affirmed, with costs.

FRENCH v. PRATT.

(Supreme Court, General Term, Fifth Department. October 19, 1889.)

EXECUTION SALE—PROPERTY IN RECEIVER'S HANDS.

A sale by a sheriff, under execution, of property in the hands of a receiver, without leave of court, is void, and passes no title.

Appeal from judgment on report of referee.

Action by Abbie E. French against Charles H. Pratt. Judgment was entered for plaintiff, and defendant appeals.

Argued before BARKER, P. J., and DWIGHT and MACOMBER, JJ.

Giles E. Stillwell, for appellant. *Day & Romer*, for respondent.

BARKER, P. J. This cause came before this court for review upon an appeal from a judgment entered upon the report of a referee. The action was brought to recover damages for removing certain machinery and articles from premises, bid off by the plaintiff at a sheriff's sale of real estate under several executions issued out of the Erie county court upon judgments recovered in justice's court upon confession against one Henry A. Pratt, the father of the defendant. The articles removed by the defendant consisted of certain machinery for making cider. The plaintiff's title, if any, to the property in question, was obtained by virtue of a sheriff's deed purporting to convey the real estate upon which the machinery was located, pursuant to the sale made under the execution. The plaintiff claims ownership upon the theory that the press and machinery in question were fixtures, a part of the realty, and passed to the purchaser as an incident of it. The defendant, on the other hand, claimed title to the property in question under and by virtue of a bill of sale of the property from Henry A. Pratt to one C. P. Pratt, which was assigned to the defendant, and also by virtue of a release of the property in question from one Alger, who had been appointed a receiver of the property in question, and taken possession of it prior to the sale under the executions, in an action brought by the wife of Henry A. Pratt against him, in which transfers by both Henry A. Pratt and the receiver the property in question was treated as personal property, and not as real estate. The referee reported in favor of the plaintiff, necessarily disposing of the case upon the theory that the machinery in question was fixtures and a part of the freehold, at the same time holding that the transfer or sale by Henry A. Pratt to Charles P. Pratt was fraudulent and void as against existing creditors of Henry A. Pratt.

It appears from the facts found by the referee that on the 18th day of March, 1883, in an action for separation brought by the wife of H. A. Pratt against him, one Alger was appointed receiver of the property of Henry A. Pratt, and took possession of this property, and on the 18th day of March, 1883, the defendant, who was the son of H. A. Pratt, paid his mother the sum of \$500 and upwards, and in consideration thereof was given by her and said receiver a written release of all their right, title, and interest in the same. The judgments against Henry A. Pratt were all recovered in 1882, and by filing transcripts became liens on the land December 14, 1882, and executions thereon were issued to the sheriff February 20, 1883, and this, among other property, was sold by him to the plaintiff on April 6, 1883, after the receiver had taken possession. Under such circumstances the defendant claims title, and that the sale of the property by the sheriff, while the property was in the possession of a receiver, without leave of the court, is illegal and void, and cites in support of his position the recent case of *Walling v. Miller*, 108 N. Y. 173, 15 N. E. Rep. 65. It is said in that case that on the day the receiver took possession "of the property, and thereafter, it was in theory of law in the possession and custody of the court, and the sheriff had no right to interfere with it by virtue of his lien under the execution in his hands. The lien of the ex-

ecution was not destroyed by the appointment of the receiver, but the rights and interests of all parties in the property were thereafter to be adjusted by the court which appointed the receiver, and the property could not be taken out of the possession of the receiver, and sold upon the execution without leave of the court. The execution creditor could bring his lien to the attention of the court in the action in which the receiver was appointed, and ask to have the execution satisfied out of the proceeds of the property. But persons having liens upon the property had no right to interfere with its possession by the receiver, and, without any application or adjudication of the court, sell and dispose of it, and thus dissipate it, and deprive the court of jurisdiction to administer it. * * * Therefore, before a legal sale could be made of these buildings upon the execution, application should have been made to the court which appointed the receiver for leave to make the sale. An application might also have been made to the court for payment of the execution out of the proceeds of the sale. But the sale under the execution without leave of the court, while the property was thus in the custody of the court, was wholly illegal and void. Therefore, as the plaintiff's title rests wholly upon the execution sale, it fails, and for that reason he should have been nonsuited at the trial." The court of appeals cites in support of the doctrine declared by it the cases of *Noe v. Gibson*, 7 Paige, 518; *Bank v. Schermerhorn*, 10 Paige, 263; *Wiswall v. Sampson*, 14 How. 52,—all of which sustain the rule. In view, therefore, of these decisions and the facts found by the referee, the referee should have dismissed the plaintiff's case for the reason that she had established no title to the property taken by the defendant. This view of the case renders it unnecessary to discuss the other exceptions in the case. The judgments appealed from should be reversed, and a new trial ordered, with costs to abide the event. All concur.

HURD *et al.* v. BOVEE *et al.*

BOVEE *et al.* v. HURD *et al.*

(Supreme Court, General Term, Fifth Department. October 19, 1889.)

1. EVIDENCE—PAROL.

A memorandum for the sale of lumber was as follows: "Sold to B. & K. * * * 100 M. 1-inch shipping culls, to be shipped before July 1st, at \$11.25, they to pay the B. C. railway charges; and 100 M. 1-inch shipping culls, to be shipped after August 25, and before Oct. 1, at \$11; and 100 M. 16½-inch and up wide coffin boards, sound common, seasoned eight months. Terms, two months." *Held*, that evidence was admissible to show the whole contract, as the memorandum failed to fix the price of the last amount of lumber, or the time of delivery, and the language, "Terms, two months," was ambiguous.

2. SAME.

Evidence that the purchasers were to give their notes for the several deliveries at two months, and that the price for the last lot was \$16 per thousand, does not vary or contradict the terms of the written memorandum.

3. SAME—RELEVANCY.

In an action for the price of the third lot of lumber, the defense being a breach of the contract by plaintiffs, evidence relating to the former shipments was admissible, as a necessary part of the history of the transaction, and as showing the interpretation given to the contract by defendants, and also as showing performance by plaintiffs up to the alleged refusal of defendants to perform their part.

Appeal from judgments on report of referee.

Action by Hurd & Hauenstein against Bovee & Kelsey, and by Bovee & Kelsey against Hurd & Hauenstein. Judgments in both actions were entered in favor of plaintiffs in the first action, and Bovee & Kelsey appeal.

Argued before BARKER, P. J., and DWIGHT and CHILDS, JJ.

W. J. Peck, for appellants. N. Morey, for respondents.

DWIGHT, J. These were cross-actions. The first was for the price of a quantity of lumber sold and delivered; the second, for damages for the non-

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performance of a contract for the sale and delivery of lumber. The alleged defense in the first action was the cause of action alleged in the second. At the time of the bargain for the lumber, a memorandum was made by the plaintiff Hauenstein, and signed by him in the name of his firm, and delivered to the defendant Bovee. It was in the following words: "Buffalo, N. Y., May 13, 1880. Sold to Messrs. Bovee & Kelsey, to be delivered on cars here, 100 M. 1-inch shipping culls, to be shipped before July 1st, at \$11.25, they to pay the B. C. railway charges; and 100 M. 1-inch shipping culls, to be shipped after August 25, and before Oct. 1, at \$11; and 100 M. 16 $\frac{1}{4}$ -inch and up wide coffin boards, sound common, seasoned eight months. Terms, two months. [Signed] HURD & HAUSTEIN."

On the trial, evidence was received, on the part of the plaintiffs in the first action, to show what was the whole of the contract between the parties. The evidence was objected to, and the exception to its admission presents the question principally discussed as the ground of this appeal. We think the evidence was properly admitted, because the memorandum showed on its face that it did not contain a complete contract between the parties. There is no price fixed for the 100,000 feet of wide boards, nor any time fixed at or within which that portion of the lumber should be delivered. Moreover, the language, "Terms, two months," is manifestly ambiguous. Does it mean two months' credit on each delivery of the lumber sold, or two months' credit on the whole, after the last shipment shall be made? And the memorandum is all the more uncertain in this respect because no time is fixed or limited for the shipment of the last-mentioned 100,000 feet of lumber. The oral evidence of the contract actually made seems to have been properly received, for the reasons stated, and under the authority of such cases as *Trust Co. v. Whiton*, 97 N. Y. 172, and *Briggs v. Hilton*, 99 N. Y. 517, 526, 3 N. E. Rep. 51. The evidence on both sides shows that the provision for two months' time, indefinite as it was, was not in the memorandum when it was signed, but was added on the suggestion of the defendant Bovee that the terms of sale were omitted. The oral evidence being admitted, the referee was justified in finding that the credit to be given was two months on each delivery, and not on the entire amount of lumber after the whole should be delivered. It could hardly have been the latter, in view of the fact that the period of delivery of the first two lots of lumber covered nearly five months of time; and therefore, on the defendant's theory, the credit to be given to them would have varied from two to seven months, even supposing the last-mentioned lumber were to have been delivered within the time prescribed for the delivery of the former lots. The oral evidence received justified the further finding, in addition to the facts evidenced by the memorandum, that the defendants were to give their notes for the several deliveries of lumber, at two months, and that they were to pay for the last lot, of wide boards, at \$16 per thousand feet. There was nothing in the evidence thus received to contradict or vary any of the terms contained in the written memorandum. It merely supplied some details essential to the contract, but omitted from the memorandum, and in one case resolved a patent ambiguity in respect to the terms of payment.

The contract being thus established, there could not well be any question, on the facts, of the right of the plaintiffs in the first action to recover. They, first, on May 28th, shipped to the defendants' order about 60,000 feet of the shipping culls, which were accepted and paid for, as the contract provided, by the defendants' note at two months. With the transmission of this note, the defendants requested the plaintiffs to ship no more until further orders. Accordingly, the plaintiffs made no further shipment until July 31st, when, by further direction of the defendants, they shipped about 50,000 feet of the same class of lumber, to the same consignees, named by the defendants, which was refused by the consignees as not being in compliance with their (the con-

signees') contract with the defendants; and the plaintiffs, while protesting that it was in compliance with their own contract with the defendants, finally consented to take the lumber back. It is instructive, in respect to the completeness of the memorandum in evidence, to observe, in this connection, that the defendants rejected this lumber on the ground that some portion of it was less than six inches wide, and insisted that this was in violation of the contract actually made with the plaintiffs, although the width of the lumber is not mentioned in the memorandum. Later, and shortly before the 1st of October, by direction of the defendants, the plaintiffs made another shipment of about 60,000 feet of the shipping culls to the same consignees, which was accepted by the defendants as in compliance with the contract, but for which they did not pay by their note or otherwise, and for which the recovery was had in the first of these actions. The grounds assigned by the defendants for their refusal to give their note in payment for this shipment of lumber was the same as that pleaded as a defense to the first action, viz., that the contract was entire, and that the plaintiffs were bound to deliver all the lumber mentioned in the memorandum before they were entitled to be paid for any. We have seen that this ground of defense was unavailing under the contract as established on the trial, and found by the referee. That contract, the referee was justified in holding, was broken by the defendants, and not by the plaintiffs.

There was an objection by the defendants to the reception of evidence relating to the two shipments of lumber which preceded that for which the recovery was had. The objection was not much insisted upon on the argument here, and it was clearly not well founded. The evidence furnished a necessary part of the history of the transactions of the parties under their contract. It went to show the practical interpretation given to the contract by the defendants themselves, and that the contract had been performed by the plaintiffs up to the time of the refusal of the defendants to perform on their part.

On the whole we regard the plaintiffs' case in the first action, and their defense in the second, as well supported in fact and in law. Both the judgments should be affirmed. All concur.

HUBBELL v. HARBECK.

(*Supreme Court, General Term, Fifth Department. October 19, 1889.*)

JUSTICES OF THE PEACE—RETAINER AS ATTORNEY.

Where a justice of the peace, who was also an attorney at law, two days after a summons issued by him, accepted a retainer from the plaintiff to bring another suit for him in the supreme court, the judgment entered by the justice for the plaintiff in the original suit should be set aside, though there probably was no corrupt intent in accepting the retainer.

Appeal from Allegany county court.

John Hubbell recovered judgment against John Harbeck before a justice of the peace. From a judgment of the county court setting aside the judgment, plaintiff appeals.

Argued before BARKER, P. J., and MACOMBER and CHILDS, JJ.

S. C. Swift, for appellant. *F. N. Todd*, for respondent.

DWIGHT, J. Two days after he issued the summons in this action, the justice, who was an attorney at law, accepted a retainer from the plaintiff to bring an action for him in the supreme court, and proceeded to do so. It was the first time he had ever been employed as an attorney by the plaintiff. He was acting in that capacity when this action was tried. The defendant, having learned of the relation existing between his adversary and the court after the joining of issue, filed an affidavit of the facts on the adjourned day, and asked that the action be dismissed for that reason. The motion was denied, and the justice tried and rendered judgment in the action. It is said that the

case showed that the justice was not influenced to the prejudice of the defendant by his relation to the plaintiff; and so it seems to us on the evidence contained in the return. But in this case the justice not only tried the cause, ruled on questions of law and the admission of evidence, decided the case, and made the judgment, but he took the minutes of testimony, and made the return. All these functions were performed by one who stood to the plaintiff in the confidential relation of his attorney in another action, upon a retainer which the plaintiff had tendered to him, and he had accepted, after he had assumed the office of judge between the plaintiff and defendant. There may have been no corrupt intent in offering the retainer. There probably was none in accepting it. But the transaction did not avoid the appearance of evil, and was certain to cause suspicion and distrust on the part of the defendant towards the tribunal to which he was compelled to submit his rights. In *O'Brien v. Long*, 1 N. Y. Supp. 695, (decided in this court last year,) an order setting aside a referee's report was sustained upon facts much less marked than those which characterize this case. There a referee was attorney for one of the parties in two actions, which were referred to the attorney for the plaintiff in the action before him. He reported in favor of the plaintiff, and the report was set aside, though, as the court said, "there was no reason for supposing that the referee was corruptly influenced by the fact," and the plaintiff himself was wholly ignorant of the relation existing between his attorney and the referee. In this case it was the plaintiff who induced the improper relation by the offer of a retainer to the justice before whom his action was pending: The case of *Stebbins v. Brown*, 65 Barb. 272, was precisely like this case, except that the judicial officer who accepted the retainer from one of the parties to a litigation pending before him was a referee appointed by the supreme court; and his report was set aside. We know of no reason why the same rule in defense of the purity and exemption from suspicion of the judicial office should not apply to justices of the peace equally with referees. In the case of *People v. Suffolk Common Pleas*, 18 Wend. 550, the action of a justice of the peace was in question, and a writ of *certiorari* to review a judgment rendered by him was quashed because the justice himself drew the affidavit upon which the writ was allowed. Judge BRONSON, in his opinion, says: "The act complained of was calculated to impair the confidence of the opposite party in the impartiality of the officer, which is, of itself, an evil which should be carefully avoided." We have no hesitation in affirming the judgment of the county court, which reversed that of the justice, on the ground above stated. All concur. Judgment of the county court, reversing that of the justice, affirmed, with costs.

BREWER v. FORD.

(Supreme Court, General Term, Fifth Department. October 19, 1889.)

SALE—CONDITIONAL SALE—TROVER BY VENDOR.

If personal property is sold and delivered under an agreement that the title shall not pass until the negotiable notes given for the purchase money are fully paid, the seller can, on default in payment, recover in trover the value of the goods from the assignee of the purchaser, under an assignment for the benefit of creditors, without first tendering the unpaid notes; as to deny him a recovery without such tender would be to virtually confine him to the security of the property, when, by the contract, he is also entitled to rely on the purchaser's promise to pay. MACOMBER, J., dissenting.

Appeal from circuit court, Erie county.

Action by Francis B. Brewer against James E. Ford, assignee for the benefit of creditors of the Clark Manufacturing Company, to recover for the conversion of certain machinery. A verdict was directed for defendant, and judgment rendered accordingly, from which plaintiff appeals.

Argued before BARKER, P. J., and DWIGHT and MACOMBER, JJ.

Fitch & Braunlein, for appellant. *Frank C. Ferguson*, for respondent.

BARKER, P. J. The trial court directed a verdict in the defendant's favor. This, I think, was error. The plaintiff was the owner of the property in question on the 19th day of January, 1880. On that day he, by an instrument in writing, agreed to sell the same with other property to the Clark Manufacturing Company, doing business in the city of Buffalo, at the agreed price of \$9,000. The purchaser, in pursuance of the terms of the agreement, gave its negotiable promissory notes, payable on future dates, and bearing interest. The contract contained this provision: "B. F. Brewer agrees to sell to the Clark Manufacturing Company a certain amount of machinery, and all patterns pertaining to lock business. * * * Said machinery shall be the property of said Brewer, in care, custody, and charge of the said Mix Brothers until paid for. Said Brewer agrees to accept in payment of said purchase, as conditioned above, \$500 on the 1st day of April, prox.; \$500, with interest on the whole amount unpaid, on the 1st day of April, 1881; \$1,000 on the whole amount unpaid, on the 1st day of April thereafter until the same is paid. Notes to be given for the amounts. And the aforesaid manufacturing company agrees to make the above-described purchase upon the conditions therein set forth, recited for the faithful performance of the above-written contract and agreement." Mix Bros., referred to in the agreement, were lockmakers, and immediately after the contract was executed they went into the employment of the manufacturing company, and were engaged in the use of the machinery in question which had been delivered to the purchaser. In April, 1887, the manufacturing company was insolvent, and made a general assignment of all of its property to the defendant, Ford, for the benefit of its creditors. At that time three of the notes, of \$1,000 each, remained unpaid, one of them past due and the others would fall due in one or two years thereafter. When the assignment was executed, a part of the property and machinery sold under the said contract had been lost, consumed, sold, or destroyed, and that which remained was included in the schedule attached to the assignment, and was delivered into the possession of the assignee, the defendant. The value of this portion of the property had greatly depreciated, and the proofs tended to show that its market value was less than the amount of the unpaid notes. Before the commencement of this action the plaintiff demanded the property of the defendant, who refused to give up his possession. The plaintiff was the owner of the notes, and had them in court during the trial. At the close of the evidence the court held that by the terms of the contract the title to the property remained in the plaintiff, but that he was not entitled to recover in this action the value of the property mentioned unless he unconditionally delivered up the unpaid notes for cancellation. This the plaintiff refused to do, but he offered to place the notes in the hands of the clerk of the court, to remain in his possession for the purpose and with the authority to indorse upon the notes as payment thereon such sum as the jury should, in their verdict, fix as the value of the property, and if the amount of the verdict equals the amount of the notes the notes should be canceled and delivered to the defendant in this action, or to the Clark Manufacturing Company, or to such person or persons as the court may direct. The court thereupon directed a verdict in the defendant's favor.

By the terms of the agreement the title did not pass to the vendee, but it was expressly reserved to the vendor until paid for. The contract on the part of the vendor was wholly executory. The words used are, "agrees to sell," which excludes all claim that it was a sale *in presenti*. It was lawful for the parties to make an agreement to that effect. It is manifest that the object which the parties had in view was to give the plaintiff security on the property until the purchase price was fully paid, for it is distinctly stated

that the purchaser consented to all the conditions of the contract, for the purpose of securing "the faithful performance of the agreement," and, as if to emphasize that the title to the property was not to pass until paid for, the vendor bound himself in the sum of \$500 for the faithful performance of the agreement. The vendees gave no other security than their promise, and it is reasonable to suppose that the contract was put in the form in which it was executed, that the plaintiff should retain the title as a security for the payment of the purchase money. The plaintiff, in this controversy with the defendant, stands on the terms of the agreement as the basis of his right of action, and we must give effect to the intention of the parties as expressed in the contract. It was undoubtedly understood when the agreement was made that the vendee should have the use of the property and machinery in its manufacturing establishment, although no such intention is expressed in the agreement. But such an arrangement was not inconsistent with the condition expressed on the face of the contract, that the title should not pass to the vendee until the notes were all paid. When default was made in the payment of the notes which matured April 3, 1887, the plaintiff had the right to take possession of the property as against his vendee, for the purpose of preserving his security, and enforcing his right to have the property devoted to the payment of his debt. If he could not retake possession for that purpose, then the security was practically valueless, and the retention of the title in himself was of no avail. The various decisions in this state as to the character and effect of contracts similar to the one now before us sustain the propositions above stated. In *Herring v. Hoppock*, 15 N. Y. 409, it was determined that one who has bargained for the purpose of a chattel, and agreed to pay therefor at a future day, and has received a delivery under an agreement that no title should vest in him until payment, acquired no title, and that a creditor of such person, who had levied an execution thereon, was liable to the owner for the conversion of the chattel. This proposition is decisive of the present case, for the defendant occupies exactly the same position as his assignor did at the time he made the assignment. The case of *Ballard v. Burgett*, 40 N. Y. 314, fully recognized the doctrine stated in the case last cited, and all the subsequent decisions are to the same effect, and the following may also be cited: *Cole v. Mann*, 62 N. Y. 1; *Austin v. Dye*, 46 N. Y. 500; *Strong v. Taylor*, 2 Hill, 326; *Harkness v. Russell*, 118 U. S. 663, 7 Sup. Ct. Rep. 51; *Mott v. Bank*, 22 Hun, 354; *Sargent v. Metcalf*, 5 Gray, 306; *Manning v. Keenan*, 73 N. Y. 45. In denying the plaintiff's motion for a new trial, which was made before the learned judge who presided at the court, it was admitted that by the terms of the agreement the sale was conditional, and that no title passed to the vendee, and that it remained in the vendor until full payment of the purchase price; but he expressed the opinion that, in default of payment at the time stipulated, the vendor had one of two remedies, either of which he might pursue, but not both; that he could sue for the purchase money unpaid, and, if he did so, that would be an election on his part that the title should vest in the vendee at once, or he could bring an action to regain the possession of the property, or to recover its value from the wrong-doer, who may have converted it to his own use, and by so doing would be regarded as having terminated the agreement and canceling the vendee's promise to pay for the property. This view of the legal effect of the contract denies to the vendor the full benefit of his agreement, and deprives him of the right to enforce the vendee's promise to pay for the property, and at the same time retain the title thereto, as a security for the performance of the vendee's promise. In other words, the rule, as stated, would be equivalent to a denial of the validity of such contract.

The rights asserted by the plaintiff, that under the contract he may retain the title to the property, and at the same time enforce the vendee's promise

to pay the purchase price, are not inconsistent, and both propositions have their foundation in the agreement, which was in all respects lawful as between the parties thereto. Suppose A. should agree to sell to B. an article of personal property, at a fixed price, which B. agreed to pay at a future day, under a stipulation that the possession of the property should remain with the vendor, and the title not pass to the vendee until full performance of the buyer's promise to pay for the same, no one would assert, I think, that such an agreement was unlawful, and could not be enforced by a resort to proper legal remedies. The vendor could maintain an action on the vendee's promise to pay, and hold the title to the property, and retain the possession as a security for the payment of the judgment. Such an action would not be inconsistent with the right of the vendor to retain the title and possession until the vendee performed his promise. If it should be held that an action for the purchase money under such an agreement was inconsistent with the title in him, it would be in effect declaring the contract nugatory as to the vendor. So in the case before us, if the plaintiff cannot hold onto the title to the property without canceling the vendee's promise to pay for the same, he is deprived of one of the terms of his contract, which is admitted to be lawful in every respect. The case we are considering does not apply to that class of cases where the rule is well settled that, when a contract is induced by a fraud, that fact does not render it void, or prevent the property from passing, but gives the defrauded party a right, on discovering the fraud, to elect whether he will continue to treat the contract as binding, or disaffirm it and resume the possession of the property. In such cases the contract continues in force until the party defrauded has determined by his election to avoid it, and when once rightfully determined it is determined forever. *Moller v. Tuska*, 87 N. Y. 166; *Morris v. Rexford*, 18 N. Y. 552; *Powers v. Benedict*, 88 N. Y. 605. These are the cases cited by the learned counsel for the respondent in support of his position. Where the vendor, by the terms of his contract of bargain and sale, intends that the title shall pass to his vendee, and delivers to him the possession, and seeks thereafter to avoid the contract and reclaim the possession of his property, for the reason that the vendee perpetrated a fraud upon him, he must put the purchaser, before he can recover the property, in the same position that he was before the contract was made, and that requires him, if any portion of the money has been paid, to return it to him. In that class of cases the vendor proceeds as if no contract was ever made by reason of the vendee's fraud. If, with knowledge of the fraud, he sues the vendee on the contract of sale, it is an affirmation of the contract, and he cannot thereafter pretend that the contract was void. There is another class of cases to which the one at bar is nowise allied in principle or circumstance; that is, where there is a bargain and sale of goods and a delivery to the buyer with the express or implied understanding of immediate payment. Such a delivery is deemed to be conditional, and subject to revocation on the refusal of the purchaser to pay the price. In such a case, if the vendor fails to get payment, he may consider the delivery absolute, and rely on the responsibility of the vendee, or he may disaffirm and reclaim his property; but he cannot do both of these things. The remedies are not concurrent, and the choice between them once being made, the right to follow the other is gone forever. In the language of Judge COMSTOCK, in *Morris v. Rexford*, 18 N. Y. 557, "the law tolerates no such absurdity as the seizure of goods by a person claiming that he has never sold them and an action by the same person, founded on the sale and the delivery of the same goods, for the recovery of the price. In peculiar circumstances a party may take either one of these courses, but, having rightfully made his choice, the right to follow the other is extinct and gone." It will be observed in that class of cases no credit is given, nor any agreement that the title to the property shall remain in the vendor until paid for. In this case the goods were sold on credit, with the agreement that the

title should not pass until the goods were paid for. It is this provision of the contract which distinguishes it from the cases cited in support of the respondent's argument. Judgment reversed. Verdict set aside. New trial granted, with costs to abide event.

DWIGHT, J., concurs.

MACOMBER, J., (*dissenting*.) The action is trover, brought against this defendant, who is the assignee of a copartnership known as the "Clark Manufacturing Company," under an assignment for the benefit of creditors. The plaintiff and the Clark Manufacturing Company, on the 29th day of January, 1880, entered into a written agreement by which the plaintiff agreed to sell to that company a certain amount of machinery. The agreement and the transfer of the property were to be perfected, by the terms of the contract, on or about the 1st day of April thereafter, when any changes which certain persons, known as Mix Bros., should deem expedient to be made in the choice or character of the machinery, or in the prices of the machinery or merchandise, should be made. The contract declared that "said machinery shall be the property of the said Brewer, in care, custody, and charge of said Mix Brothers, until paid for." Payments were to be made as follows: \$500 in cash; \$500, and interest on the whole amount unpaid, on the 1st day of April, 1881; and \$1,000, and interest on the whole amount unpaid, on the 1st day of April in each year thereafter until the whole should be paid. Nine notes were given for part of the purchase money, three of which were unpaid in the month of April, 1887, and still remain unpaid, and are held by the plaintiff. They are negotiable instruments. The Clark Manufacturing Company made payments of these several installments up to the month of April, 1887, when, on the 17th day of that month, they made a general assignment of all their property to the defendant for the benefit of their creditors. At that time there remained unpaid three of the said promissory notes of \$1,000 each, but only one of them was due at the beginning of this action. A demand having been made upon the defendant by the plaintiff for the possession of the property coming into his hands as such assignee, and the demand having been refused, this action was brought to recover the value of all of such property, the complaint describing it in detail, and alleging its value to be \$5,000. Upon the trial of the action it appeared that the Mix Bros., who stood, in some sort, in the relation of custodians of the property for the benefit of both the seller and the purchasers, abandoned the shops of the Clark Manufacturing Company, the property which they had theretofore had in charge remaining with the purchasers. It was sought to be maintained by the counsel for the defendant, that such act on the part of Mix Bros. amounted to a waiver of any condition in the original sale, and that, consequently, the plaintiff could not maintain this action. Such objection, however, was properly overruled by the learned trial judge as a question of law; he holding, in substance, that the question was one of fact, and should be submitted to the jury in the event of the case going to the jury on other questions. The ownership and possession of the three unpaid notes being alleged in the complaint still to be in the plaintiff, and such possession being shown at the time of the trial, objection was made by the counsel for the defendant that a recovery could not be had in this action except upon the surrender of such notes. This contention was approved by the trial judge. The plaintiff's counsel, however, refused to surrender the notes to the defendant, and contended that he had the right to the possession of the same, and the right to maintain an action hereafter upon them in case the verdict of the jury in this action should not be adequate to pay the whole amount of the unpaid purchase price of the property. The court gave the plaintiff's counsel leave to surrender the notes and so maintain this action, but this was declined. The counsel then stated to the court:

"We do not make an unconditional offer to surrender these notes, because we think we have a right in case there is any balance due on these notes after applying the amount that the jury shall find due us, to proceed against the makers for the deficiency."

There is nothing ambiguous in the terms of the original written agreement. It, as a whole, is a plain contract for the conditional sale of personal property, the title to remain in the seller until paid for, in pursuance of the terms of commercial paper given at the time of the transfer of the property. But the Clark Manufacturing Company was to have the continuous possession and use of the property, so long as they paid the notes as they became due. The defendant, not being deemed a purchaser for value, can have no defense in this action which was not available to his assignors. They, having agreed that the title should remain in the plaintiff, were bound thereby until the property was entirely paid for, unless the plaintiff had voluntarily waived the conditional agreement, and by word or act had made it an absolute sale. The transaction occurring in the year 1885, by which the Mix Bros. left the shops of the Clark Manufacturing Company, indicated strongly that it was not the purpose of the plaintiff further to insist upon retention by himself of the title to the property. But such intention, as manifested by the acts of Mix Bros., did not present itself as a question of law, but as a question of fact, and consequently was rightly disposed of by the court below. It will be observed, therefore, that this presents a case of election of remedies in a somewhat different light from any that have appeared in the courts of this state. There is a class of cases, many of which are cited in the opinion of the judge at special term on the motion for a new trial, which it is not necessary to cite here, which show, under varying facts and circumstances, a uniformity of decision to the effect that when a party, having the right to avail himself of more than one remedy, takes one of them in the courts, he is precluded thereafter from availing himself of the other. These authorities, however, proceed generally upon the ground that there has been an election of a judicial remedy which is inconsistent with the subsequent remedy which is sought to be obtained, growing out of the same transaction. The peculiarity of this case consists in the fact, not that the plaintiff had undertaken by process of law to avail himself of the collection of the promissory notes, for he had not done that, but, rather, that, being in possession of such commercial paper, which was negotiable, he thereby assumed an attitude in this forum so inconsistent with the claim made in this action that the court could not properly permit him to proceed; for otherwise the rescission of the original contract, which the beginning of this action necessarily made, would not be a real, but a sham, rescission, and an action might still be maintained by the plaintiff or his transferee upon each of these three unpaid notes. I am of the opinion, therefore, that while the original agreement was a conditional sale only, and not an absolute one, of the personal property, and while the plaintiff had a right, in case of failure to pay according to the terms of the agreement, to possess himself of the property, or to maintain trover for its value, yet an active duty was devolved upon him, and that was to restore, before recovering a verdict in this form of action, the negotiable notes which were still outstanding and held by him. The judgment and order should be affirmed, with costs.

POPP v. NEW YORK CENT. & H. R. R. CO.

(*Supreme Court, General Term, Fifth Department. October 19, 1889.*)

1. CONTRIBUTORY NEGLIGENCE—PROVINCE OF JURY.

In a suit for personal injuries, where the defense is the contributory negligence of plaintiff, the question is one of fact for the jury, unless the negligence is gross and inexcusable.

2. DAMAGES—PLEADING AND PROOF.

Where the complaint alleges that the injuries rendered plaintiff "incapable of labor," evidence of plaintiff's customary earnings is admissible.

3. EVIDENCE—EXPERT TESTIMONY.

A physician may testify in such case as to whether, judging from the length of time the pain had lasted since the injury, it is "highly probable—reasonably certain—it will continue."¹

Appeal from circuit court, Monroe county.

Michael Popp sued the New York Central & Hudson River Railroad Company for damages for injuries received. Defendant appeals from a judgment entered on a verdict for plaintiff, and from an order denying a motion for a new trial.

Argued before BARKER, P. J., and DWIGHT and MACOMBER, JJ.

A. H. Harris, for appellant. W. S. Oliver, for respondent.

DWIGHT, J. After a careful perusal of the evidence in this case, we come to the same conclusion as that reached by the trial judge, on the motion at special term, that the case furnishes no exception to the rule so constantly declared, in cases of this character, that, where any inference is to be drawn from the evidence bearing upon the question of contributory negligence, that inference must be drawn by the jury. *Weber v. Railroad Co.*, 58 N. Y. 451; *Stackus v. Railroad Co.*, 79 N. Y. 464; *Sherry v. Railroad Co.*, 104 N. Y. 652, 10 N. E. Rep. 128; *Parsons v. Railroad Co.*, 21 N. E. Rep. 145. In the last case cited, the court, by RUGER, C. J., after defining, in familiar language, the degree of care to be required of the party injured, say: "This rule must in all cases, except those marked by gross and inexcusable negligence, render the question involved one of fact for the jury." The case at bar was not within the exception thus strictly defined. The motion for a nonsuit, on the ground of contributory negligence, was properly denied.

The two remaining exceptions relate to rulings upon questions of evidence. A physician, Dr. Jones, who had treated the plaintiff for the injuries complained of, after describing those injuries, and the condition of the patient down to the time of the trial, was asked by the plaintiff: "Judging from the length of time the pain had lasted since the injury, state whether you think it highly probable—reasonably certain—that it will continue." The question was objected to by the defendant, "as too speculative and remote." The objection was overruled, and the defendant excepted. The witness answered: "I think the chances of his not getting well, and being perfectly free from pain and trouble with that side, after this length of time, would be in favor of his not getting well. I think there will be more chances of his not getting entirely well than of his getting entirely well." Counsel for the defendant moved to strike out the testimony, which was refused, and an exception taken. At the opening of the court the next morning, counsel for the plaintiff asked that this testimony be stricken out. The court complied with the request, and instructed the jury to disregard the evidence in question; to which ruling and instruction counsel for the defendant excepted. In its charge, also, the court instructed the jury that the testimony of Dr. Jones on the question of the probable permanence of the plaintiff's injuries had been stricken out of the case, and was not to be considered by them at all. We think, under the authority of *Griswold v. Railroad Co.*, 21 N. E. Rep. 726, that the evidence objected to was properly received. In that case, the court, by FINCH, J., distinguishes the cases of *Strohm v. Railroad Co.*, 96 N. Y. 306, and *Tozer v. Railroad Co.*, 105 N. Y. 617, 11 N. E. Rep. 369, and points out the "obvious difference between an opinion as to the permanence of a disease or injury already existing, capable

¹Respecting the admissibility of expert testimony in regard to the probable cause and result of personal injuries, see *Peterson v. Railway Co.*, (Minn.) 89 N. W. Rep. 485, and note; *Bailey v. Westcott*, 4 N. Y. Supp. 482, and note.

of being examined and studied, and one as to the mere possible outbreak of new diseases or sufferings having their cause in the original injury." We think the opinion testified to by Dr. Jones in this case was clearly within the former category, and not the latter, and was therefore properly received in evidence. The request of counsel for the plaintiff to strike it from the case was probably made "for greater caution." The exception of the defendant to the ruling striking out the evidence was, of course, unavailing, and its exception to the original ruling by which it was admitted was not well taken, under the authority of the *Case of Griswold, supra*. Evidence was received of the value of the plaintiff's customary earnings. It was objected to on the ground that no cause of action for special damages was alleged in the complaint. The objection was not well taken. The complaint did allege that the injuries complained of rendered the plaintiff "incapable of labor;" and the rule seems to be established that evidence of loss of time, and, consequently, of the value of time lost, is admissible under an allegation of general damages. *Ward v. Vanderbilt*, 4 Abb. Dec. 521; *Leeds v. Gas-Light Co.*, 90 N. Y. 26; *Cabot v. McKane*, 1 N. Y. St. Rep. 495. We think, moreover, that the allegation in this complaint of inability to labor, produced by the injury, was sufficient to bring the case within the doctrine of *Ehrgott v. Mayor*, 96 N. Y. 275. The judgment and order appealed from should be affirmed. All concur.

OTIES v. COWLES ELECTRIC SMELTING & ALUMINUM CO.

(Supreme Court, General Term, Fifth Department. October 19, 1889.)

1. MASTER AND SERVANT—NEGLIGENCE OF MASTER.

Plaintiff, while in the employ of defendant, was injured by the fall of a derrick, owing to the breaking of one of the three guys by which it was supported. Held that, where the question whether more than three guys were necessary for the support of the derrick was properly submitted to the jury, their verdict for the plaintiff was conclusive that defendant was guilty of negligence in failing to furnish safe appliances.

2. SAME—NEGLIGENCE OF FELLOW-SERVANT.

Such duty could not be delegated by defendant, and he was not relieved from liability by any negligence of a fellow-servant of plaintiff.

3. SAME—CONTRIBUTORY NEGLIGENCE.

Plaintiff was not guilty of contributory negligence when it appeared that on operating the derrick the foreman directed the men working under the arm of the derrick to get out of the way, but that plaintiff was working on the other side of the derrick, and, when the mast fell, it did not fall towards the arm, but in the direction of plaintiff.

4. EVIDENCE—EXPERT TESTIMONY.

Evidence of experts as to the proper method of erecting and supporting the mast was properly admitted.

5. SAME.

A physician can testify as to the probable permanence of the injuries received.

6. DAMAGES—EXCESSIVE.

A verdict for \$8,000 was not excessive where plaintiff's face was crushed, his lower jaw made immovable, and he was rendered a cripple and invalid for life.

Appeal from circuit court, Niagara county.

Thomas Oties sued the Cowles Electric Smelting & Aluminum Company, and recovered a judgment for \$8,000. From the judgment and an order refusing a new trial defendant appeals.

Argued before BARKER, P. J., and MACOMBER and DWIGHT, JJ.

L. Prentiss and *A. K. Potter*, for appellant. *W. C. Greene*, for respondent.

DWIGHT, J. The plaintiff was in the employ of the defendant as a laborer engaged in the excavation of a race-way or hydraulic canal in connection with the defendant's works at Lockport. He was injured by the fall of a derrick erected by the defendant for use in the same work. The plaintiff's allegation was that the derrick was improperly constructed and insufficiently supported.

The proof was that it was supported by only three guys, and that one of them broke while a weight was being lifted, which necessarily caused the mast to fall. Evidence was given of the character of the guys, and the weight which each was capable of supporting if in perfect condition; and some conflicting evidence was given as to whether the defect in the cable which gave way was patent or latent, as bearing upon the question of the defendant's negligence in not remedying the defect, or substituting another cable for the defective one. We do not regard the question of the character of the defect in the cable as important on this review, for the reason that the verdict of the jury was amply supported, on this branch of the case, by evidence which tended to show a more radical defect in the construction of the machine than the use of an imperfect cable as one of the guys. That defect consisted in the employment of only three guys to support the mast, without a "stiff leg," or timber support, which the evidence shows may be used, in connection with guys, for the same purpose. The result was inevitable that, if any one of the guys gave way to a strain exerted upon it, the mast must fall; whereas, if four guys had been used, the remaining three might, and, if five had been used, the remaining four must, have continued to support it. The question whether more than three guys were necessary for the safe and proper erection and support of the derrick was clearly presented by the evidence, and, we must assume, since the charge of the court is not contained in the case, was properly submitted to the jury. The verdict must therefore be regarded as conclusive upon the first of the two propositions which it was necessary for the plaintiff to establish, viz., that the defendant was guilty of neglect of duty in respect to furnishing for the use of its employes safe and adequate machinery and appliances for the work in which they were engaged. The duty thus neglected was charged upon the defendant itself, and could be discharged only by actual performance. It could not be so delegated as to relieve the defendant from its obligation, and no negligence, in respect thereto, of a fellow-servant of the plaintiff, could shield the defendant from liability for its neglect. *Bushby v. Railroad Co.*, 107 N. Y. 374, 14 N. E. Rep. 407; *Frank v. Otis*, 15 N. Y. St. Rep. 681, affirmed, 113 N. Y. 654, 21 N. E. Rep. 415, and the cases cited.

The second question raised by the motion for a nonsuit relates to the defendant's allegation of contributory negligence on the part of the plaintiff. There seems to be no ground whatever upon which to base this objection to the recovery. The plaintiff was at work where he was put at work, and the jury was warranted in finding that he received no warning of the impending danger. The foreman under whom he was at work, and who operated the derrick, testified that every time he lifted a load he told "the men" to get out of the way; but it is quite evident from his narrative that the order or warning was not addressed to, nor did it include, the plaintiff. It seems to have been addressed to the men under the boom or on the side of the mast on which the boom with its load was being raised, and the foreman testified that in this case the mast "did not fall towards the boom, but over sideways into the canal, and the boom fell right down in its place." The plaintiff was struck down by the mast, where he was at work within the excavation, in a direction at right angles, or more, to that in which the boom was hanging. The jury was entirely justified in finding that no warning was given to him, and that he was guilty of no contributory negligence.

Some exceptions were taken by the defendant to rulings upon questions of evidence, some of which have been obviated by the view which we have expressed on the question of the defendant's negligence, and none seem to have been well taken. It was competent to show by the evidence of experts what was a safe and proper mode of erecting and supporting the mast; and the question whether a witness is qualified to testify as an expert is usually a question of fact for the trial court, and not reviewable on appeal. *Slocovich v. Insurance Co.*, 108 N. Y. 56, 14 N. E. Rep. 802, and the cases cited. The evidence

of Dr. Clark, as to the probable permanence of the injuries sustained by the plaintiff, was strictly within the approval of *Griswold v. Railroad Co.*, 21 N. E. Rep. 726. If the question objected to was liable to the criticism that it called for a fact, and not for the opinion of the witness, the fault was cured by the answer made, which was strictly competent.

There were no other exceptions which require examination. The verdict cannot be set aside on the ground that the damages were excessive. The injury was a very serious one. The plaintiff's face was crushed, and in the healing the lower jaw was rendered immovable to such an extent as to prevent the proper mastication and insalivation of his food, and thus to interfere with the nutrition of his system, one result of which was impaired action of his heart and lungs. The evidence tends to show that the man is a cripple and an invalid for life. The award of \$8,000 damages was not an abuse of the discretion of the jury. The judgment and order should be affirmed.

All concur.

CASE V. SIMONDS *et al.*

(*Supreme Court, General Term, Fifth Department. October 19, 1899.*)

1. SALE—REMEDY OF VENDOR—RESALE.

Plaintiff contracted to deliver 25 bales of hops to defendants at 17 cents a pound. Defendants refused 16 bales as unmerchantable. Plaintiff sold the 16 bales for 8 cents a pound, and sued for the difference. If any notice of intent to resell the hops was given to defendants, it was after the resale and payment therefor, under an agreement to deliver the hops to the purchaser unless defendants would pay 15 cents for them. *Held*, that the sale was sufficiently complete to render the notice unavailing to charge defendants.

2. SAME—NOTICE.

Where the hops were rejected November 7th, and the resale was December 26th, and the notice, if given at all, was at about that time, it was too late.

3. DAMAGES—BREACH OF CONTRACT.

Where the plaintiff made no effort to sell the hops to any one but the purchaser at the resale, and sold them at private sale, and there is no evidence that the price was a fair one, such resale will not fix the measure of damages to be recovered of defendants.

4. APPEAL—WEIGHT OF EVIDENCE.

Where evidence properly submitted to a jury is conflicting, the verdict must stand, though the court might have come to a different conclusion.

Appeal from circuit court, Ontario county.

Orestes Case sued F. W. Simonds and others, and recovered judgment. From the judgment and an order denying a new trial defendants appeal.

Argued before BARKER, P. J., and MACOMBER and DWIGHT, JJ.

F. H. Hamlin, for appellants. E. Hicks, for respondent.

DWIGHT, J. The action was by vendor against vendee in an executory contract for the sale of 25 bales of hops at 17 cents a pound. The vendee accepted 9 and refused 16 bales, on the ground that the latter were slack dried, and unmerchantable. The vendor afterwards resold the 16 bales at 8 cents a pound to one Smith, and claimed to recover the difference between the latter and the contract price from the defendants.

The two questions submitted to the jury were (1) whether the hops refused were merchantable or not; (2) whether the plaintiff gave the defendants the requisite notice of his intention to resell.

There was a good deal of evidence which opposed the plaintiff's contention in respect to the condition of the hops at the time of the tender of delivery, but it was evidence which was properly submitted to the jury, and the verdict in that respect must stand, even though the court might have come to a different conclusion.

Upon the other question the way is not clear for sustaining the verdict. In the first place, we think the evidence did not warrant the jury in finding that

the plaintiff gave any notice to the defendants, or their agent, of his intention to resell for their account before the resale was actually made. It is not necessary to recapitulate the evidence. It is enough to say that the plaintiff had testified at length in his own behalf; had been cross-examined, re-examined, re-cross-examined, and again re-examined; had had his attention called repeatedly to the subject of communications with, and notice to, the defendants and to their agent, and not only did not testify that he had given any such notice, but had substantially negatived the proposition that any such notice had been given. After the plaintiff's case had been rested, and a motion for a nonsuit had been made on the ground of the want of evidence of such notice, and a recess of the court had been taken pending the decision of that motion, he attempted to supply the defect in proof, but we think not with complete success. He then testified that he did give Hamlin, the defendants' agent, notice of his intention to resell the hops; but his evidence leaves it quite uncertain when such notice was given, with a clear balance of probabilities in favor of the theory that it was not before he had made the conditional resale to Smith. That sale was conditional only to the extent that, if it should turn out that the defendants would take the hops at 15 cents, Smith should give up his bargain, and his money should be refunded to him. The price was fixed and the money was paid, and it only remained to deliver the hops, unless the defendants should consent to take them at 15 cents. It was a complete sale so far as to defeat all the purposes of a notice to the first vendee. The effect of such notice is to create the relation of principal and agent between the first vendee and the vendor, and to bind the former by the act of the latter in making a resale of the property; and one purpose of the notice is to enable the first vendee to give directions to his newly-constituted agent in respect to the time and place and price at which the property shall be resold. The purpose was of course defeated when the terms of the resale were fixed, before the notice was given.

But there are other objections to the plaintiff's case in the respect now under consideration. The relation of principal and agent thus constituted between the first vendee and his vendor, though thrust upon the former without his choice, calls for the exercise of the same good faith and reasonable diligence on the part of the agent towards the principal as if the relation were constituted by the appointment of the latter. The agent must give the requisite notice promptly, especially if the market is a falling one. He must not delay an election of the remedy he will adopt, in order to secure to himself the benefit of a rising, while imposing upon the first vendee the risk of a falling market. In this case the hops were rejected by the vendee on the 7th of November. The resale was negotiated December 26th; and, if notice was given at all before such resale, it was only very shortly before, and after not less than seven weeks from the time of the refusal of the hops by the defendants. Moreover there is no evidence of any diligence on the part of the plaintiff to sell the hops for the best price. He testifies that he did not try to sell them to anybody except Smith. They were sold at private, and not at public, sale, and there is no evidence that the price obtained was a fair price, as the market then stood. The resale, as exhibited by the record, was not, we think, made under such circumstances as to fix a legal measure of the damages to be recovered by the plaintiff. For the reasons indicated the judgment and order appealed from should be reversed, and a new trial granted. All concur.

KENNEY v. NEW YORK CENT. & H. R. R. CO.

*(Supreme Court, General Term, Fifth Department. October 19, 1889.)***CARRIERS—NEGLIGENCE—INJURY TO EXPRESS MESSENGER.**

An agreement between a railroad company and an express company, that the former shall not be liable for any injury done to an employe of the latter, it being part of a contract by which the former was to carry goods for the latter at special rates, and to allow a messenger of the latter to go on each train free of charge, does not exonerate the railroad company from liability for its negligence resulting in the death of a messenger, who was ignorant of such agreement.

Appeal from circuit court, Erie county.

Action by Margaret Kenney, administratrix, etc., against the New York Central & Hudson River Railroad Company, to recover for the negligent killing of her intestate. Judgment for plaintiff, and defendant appeals.

Argued before BARKER, P. J., and DWIGHT and MACOMBER, JJ.
J. G. Milburn, for appellant. *Moses Shire*, for respondent.

DWIGHT, J. The action was for the negligent killing of the plaintiff's intestate. It was stipulated by the defendant that the deceased came to his death by the negligence of the defendant, without contributory negligence on his part. This admission entitled the plaintiff to recover, unless the defendant had made out its defense, which was to the effect that the defendant had been released beforehand from its liability in such manner as to bind the intestate and his personal representatives; and it is to be conceded that, for all the purposes of this examination, the case is to be treated as if it were an action by the intestate himself for an injury from which death did not result; for only in case such an action might have been maintained is a cause of action given to his personal representative. Code Civil Proc. § 1902. The intestate was a messenger of the National Express Company, and at the time of his death was in charge of goods then being transported by the defendant, for the express company, over the lines of the West Shore Railroad Company, which lines were then leased to and operated by the defendant. Previous to such lease a contract had been made between the West Shore Railroad Company and the National Express Company, by which the latter had the right to carry goods on all passenger trains of the former at rates specified by the contract, to be paid by the latter, and "to send one messenger by each train without charge." There was a clause of the contract which read as follows: "The party of the first party is hereby expressly released from and guarantied against any liability for any damage done to the agents of the party of the second part, whether in their employ as messengers or otherwise." In the answer of the defendant it was averred that the deceased had full notice of, and entered upon his duties and performed the same by virtue of, such contract, "and that pursuant to the terms of such contract he did, by his certain agreement, undertake to release and discharge the said railroad company and this defendant of and from any claim or right of action which he might have by reason of any injury which he should sustain while being carried under such contract." The weakness of the defendant's case is in the fact that this averment was not proved. There was no evidence of any agreement on the part of the deceased, nor of any knowledge on his part of the agreement of his employer, which assumed to grant immunity to the defendant for injuries done to him.

The question, so far as we know, is a new one, and it has not been much discussed upon this argument, but we are not able to see how it was competent for the express company, without the consent of the deceased, to bargain away his right to the protection of the law. That the defendant owed him the duty to exercise a reasonable care for his safety is a proposition which does not admit of dispute. The contract of his employer did not assume to discharge the defendant from that duty, but only from liability for its violation. The stipulation in this case, that the death of the deceased was caused

by negligence of the defendant, implies that the latter owed a duty to the former, because negligence consists of the omission of care which is due. This duty did not depend upon contract express or implied. The deceased was not a trespasser on the cars on the lines of the defendant. He was rightfully there, with the consent of the defendant, and, being so, the defendant was bound to exercise a reasonable care for his safety. It is true, the case contains a statement to the effect that proof was made "that he [the deceased] paid no fare, and that such rights as he had in the car where he was killed were derived by him under the terms of the agreement" above mentioned. But it cannot be intended by this that proof was made that the deceased had in any way forfeited or surrendered his natural and inalienable rights, among which was his right to life. The proof referred to must have been limited—as the statement is—to his "rights in the car;" that is, his right to be in the express or baggage car, and to be transported therein with the goods in his charge; to have the custody and control of those goods; to put off goods at stations to which they were consigned; and to take on goods at stations at which they were offered for transportation. These were his rights in the car, as the agent of the express company; and these were the rights which the express company contracted for, and might limit by its contract. But he had, besides these, the rights which belonged to himself as an individual, and among them was the right to safety of life and limb as against the wrongful or negligent acts of the defendant, its agents or servants. He had never waived that right, nor released the defendant from the liability which sprung from its violation. The express company could not waive a right which did not belong to it, nor release a liability which accrued to another. The obligation to carry the deceased and give him the necessary facilities for doing his work was an obligation to his employer, by virtue of the contract with the latter. The obligation not to do him a personal injury through negligence was a personal obligation which the defendant owed to him in common with all persons who were so situated as to be liable to such injury without fault or wrong on their own part. The liability which sprung from the violation of this obligation did not rest in contract any more than if the deceased had been negligently run over by the defendant's train at a crossing of its road, or if his house, contiguous to the defendant's track, had been negligently burned by fire from the defendant's engine. In no aspect of the case was it competent for the express company to waive or compromise the right of the intestate to protection against negligent wrong at the hands of the defendant, or to discharge the defendant from a cause of action which belonged only to the intestate or his personal representative. Indeed, it would seem that the railroad company did not altogether rely upon the agreement of the express company to release it from the liability in question, for it proceeded to take an agreement to guaranty it against such liability. This latter was a contract which it was competent for the express company to make, and prudent for the railroad company to require. In effect it recognized the existence of the liability on the part of the railroad company to the person injured, and shifted the final responsibility therefor by giving to the railroad company an action over for such damages as it should be compelled to pay.

If the views so far expressed are correct, it is unnecessary to examine the question principally discussed on the argument, whether the contract, even if the deceased were a party to it, was void as against public policy. We find that the deceased was not a party to the contract, and conclude that it had no effect to deprive him of his rights in the respect which has been under discussion. The judgment should be affirmed. All concur.

*In re MEECH.**(Surrogate's Court, Cattaraugus County. July 22, 1889.)*

GUARDIAN AND WARD—APPOINTMENT—CHARACTER.

Where the mother has from girlhood lived a disreputable and licentious life, and had for many years deserted her husband and infant daughter, she will be refused the guardianship of either the person or property of such infant.

Petition for the appointment of a temporary guardian for Mary Meech, a minor under the age of 14 years.

James Sheldon, for applicant. *A. J. Knight*, for respondents.

SPRING, S. This proceeding was commenced by a petition made by Emory Smith, a cousin of the infant Mary Meech. Citation was issued and served on the mother, and she appeared and filed a petition with proper bond, and seeks to be appointed herself. Objections to her appointment are made by four aunts of the child, on the ground that she is an unfit person to be intrusted with the custody and control of the minor, or of her property, and the trial has been directed exclusively to this issue. A summary of the testimony, which is mainly uncontradicted, is important. The father, Melvin Meech, died on the 3d day of May last, leaving about \$6,000 in real estate and securities, which, by his last will and testament, he devises and bequeaths to this daughter for life, and, upon her decease, to her heirs and next of kin. The mother is about 27 years of age. When about 14 she had a child by one Philletus Cook. She testifies that she was forcibly seduced by Cook while riding in a cutter from Protection, Erie county, to Arcade, Wyoming county,—an improbable story, as the child was born the succeeding June; and, beyond that, the proof shows her intimacy with Cook, even at that tender age, was continuously and notoriously meretricious. After this, and when this illegitimate child, Jennie, was about 2 years of age, she married Melvin Meech, then about 45 years of age. She resided with him 5 years, until 1882, and the child Mary was born in 1878. While she lived with Meech her neighbors testify her reputation for chastity was bad, and she then became acquainted with one of the La Points, the brother of her present husband. In 1882 she left Meech, taking with her the child Jennie. She first went to Buffalo, then to Rome, and from there to Canastota, in this state. Her recital of her trip to Canastota seems incredible. That a woman would leave her home in Erie county, and aimlessly go directly to Canastota, without any prearrangement, and where she testified she had no friends or acquaintances, is hardly to be credited. The significant circumstance is that we find her and Charles La Point at work in the same neighborhood. She remained in Canastota until the following winter, and then, at the suggestion of Charles La Point, she went to Moose River, in Lewis county, in this state, and lived with him there as his wife until two years ago, when they moved to Buffalo, and their adulterous connection continued there until after the death of Meech. Then, within a few weeks after his decease, and without the semblance of grief at his death, and apparently as soon as these proceedings were known to her, and the necessity dawned upon her of possibly covering up the shame of her meretricious union with the thin cloak of a marriage consummated years after her open adultery with La Point had commenced, she was united in marriage with him. While living with La Point at Moose River, she took her illegitimate daughter, Jennie, to an orphan asylum at Utica, and the child was subsequently bound out by the managers of that institution to a man named Foster, with whom she still resides. During her long intimacy with La Point, she never wrote to her daughter Mary Meech; and even when living in Buffalo, a short distance from her, so far as the proof shows, she never exhibited the least affection or anxiety for this motherless child after her separation from Meech. Not until the possibility presented itself that she might become

the custodian of this property was she anxious for the welfare of the child; and it appears to me that this affection is whetted and sharpened by, and derives all its force and vitality from, the property which Melvin Meech never designed to have placed under her management. La Point, her husband, has no property of any amount, but depends for his livelihood upon wages he earns as a day-laborer; and since living in Buffalo he has been, the greater part of the time, in the employ of a veterinary surgeon, and now lives over this establishment, in which sick horses are kept, and to which a livery stable is attached,—assuredly not a desirable place in which to educate and nurture a girl endowed with property sufficient to maintain and educate her in a suitable manner.

So we have in this case the applicant, the mother of the minor, confessedly leading a disreputable life from early girlhood,—one unvarying story of shame. Is she a suitable and proper person to be the custodian of this infant, and to be vested with the management of her property? I am aware that, ordinarily, the parent is first entitled to letters of guardianship; and in this case, the father being dead, the applicant would be entitled. But that right is not an absolute one. The paramount thing to be considered is the welfare of the child; and, with that as the controlling principle of his action, the surrogate is vested with an intelligent discretion as to the person to be intrusted with the custody of the minor and the management of his property. Code, §§ 2821, 2825; *In re Estate of Vandewater*, 10 N. Y. St. Rep. 330; *Griffin v. Sarsfield*, 2 Dem. Sur. 4; Field, Guard. & W. § 92; Redf. Pr. 735. And, while courts hesitate before denying this right to a parent, yet, where it unmistakably appears that the interest of the infant will be promoted by the appointment of a person other than such parent, that course will be pursued. *In re Watson*, 10 Abb. N. C. 215; *In re Raborg*, 3 N. Y. St. Rep. 323; *In re Welch*, 74 N. Y. 299; *Burmester v. Orth*, 5 Redf. Sur. 259.

Applying these well-settled principles to the case under consideration, I cannot commit the care and tuition of this child to her mother. The child naturally cannot have much affection for the mother, restrained and separated from her uninterruptedly for seven years, and during the whole time not the recipient of a spark of motherly love; and with the mother's history as the confessed paramour of La Point, with a sudden marriage within a few weeks after the death of the father, how could the child regard the mother with any esteem or love? Mrs. Meech exerted herself to sever her relations absolutely from Meech and his family. She assumed the name of La Point. She ignored, not only Meech, but this daughter; and her eagerness now is not for the custody of the child, but for the little patrimony so wisely provided by the father. Her first child—the offspring of her early licentiousness—we find first in an orphan asylum, and next bound out to a stranger. Does this indicate that affection for children which makes their welfare the animating principle in the parent's life? Would this child be liable to be instructed to cherish sacredly her virtue above everything else? Would the life of this erring mother be an inspiring influence for good to this young girl? I fear not. The unbridled license of Mrs. La Point should not be commended by vesting her with the tutelage of this infant. I therefore deny the petition, and decline to appoint her guardian either of the person or property of the minor. The whole proof has been directed to the history of the mother; and, before issuing letters, I wish to make inquiry as to the proper person to be intrusted with the care of the child and the management of her property, and I will take evidence further on Monday, the 29th inst. I will adjust the costs at that time, and findings of fact will be prepared in conformity hereto, and a decree entered denying the petition of the mother, and providing for the appointment of some other person; or that can be arranged by supplemental decree.

*In re DAILY'S WILL.**(Surrogate's Court, Kings County. July 15, 1889.)***WILLS—PROBATE—EVIDENCE.**

On application to probate a will which gave testatrix's husband all her personal property absolutely, and the use of her realty for life, to be divided among her relatives *per capita* at his death, there was evidence that testatrix was on bad terms with her husband's relatives, and desired to cut them off, and that she did not wish her husband to know that she was executing a will; that the will was intrusted to a subscribing witness to be by him kept in secrecy for a year after testatrix's death. Though this witness was of bad character, another subscribing witness and the lawyer who drew the will testified, and their testimony was undisputed. The estate consisted only of about \$2,500 worth of realty and a little personalty. Neither of the subscribing witnesses nor the draughtsman derived any benefit under the will, and did not know of testatrix's death at the time thereof. *Held*, that the will was not shown to be a forgery, and should be admitted to probate, though a former will had been probated before it was produced, which was a year after testatrix's death; the evidence showing that the proponent did not know of its existence until then.

On application to probate the will of Ann Daily, deceased.

John H. Kemble, for proponent. *James J. Rogers*, for contestants.

ABBOTT, S. Ann Daily died on the 21st of March, 1887, leaving her surviving no children nor descendants, but a husband, Michael Daily. At the time of her death her estate consisted of a two-story frame house and lot in Leonard street, Brooklyn, worth about \$2,500, and a little personal property. On the 22d of November, 1882, she executed a will, in and by which she left all her property, both real and personal, to her husband absolutely. This will was admitted to probate on the 18th day of April, 1887, and letters testamentary were issued to the husband, Michael Daily, who qualified as executor. He died on the 27th of July, 1887. On the 12th of January, 1888, one Catherine Nohr, a sister of the deceased husband, Michael Daily, petitioned to have the will of Ann Daily re-probated, on the ground that, through some error, one John Cunningham, a necessary party, had not been cited on the former application. On the return-day of the citation, objections to the re-probate were filed by said Cunningham. The matter was adjourned from time to time until February 10, 1888, when the subscribing witnesses were re-examined. The contest proceeded, and on the 21st day of March, 1888, another paper purporting to be the last will and testament of Ann Daily, bearing date the 14th day of September, 1886, was offered for probate by the executor, one William Kelly, a nephew of Ann Daily, deceased.

It is claimed by the proponents of the first will that this second paper is a forgery, and whether it is or not is the only question I am called upon to decide in this controversy. The parties on one side are the heirs at law of the husband, and on the other the relatives of the wife. This case was tried before my predecessor. One of the subscribing witnesses to the second paper, Charles H. Dorans, was partly examined before me; and of my own motion I recalled the other subscribing witness, Andrew J. Clark, and the lawyer who drew the will, Henry C. Beach, that I might see and examine them personally. The second paper appears to have been drawn and executed in the office of Henry C. Beach, in Sixth avenue, New York city.

The evidence tends to show that Ann Daily was not on good terms with her husband's relatives. She evidently desired that her husband should be kept in ignorance of the fact that she was about to execute another will, and in my judgment the course which she pursued was in exact conformity with this intention. She had taken some tickets from her nephew, William Kelly, to dispose of for some church charity. She had collected the money for them, and went to New York with the twofold object of turning over to Kelly this money which she had collected, and of seeing about making another will. Kelly was superintending some paving work on Eighteenth street, and when

she arrived there he had gone to dinner. Charles H. Dorans and Andrew J. Clark also came to see Kelly about this time, and she entered into conversation with them. Clark was intimate with Kelly's family, and had known Mrs. Daily for many years. Kelly returned shortly after, and she stepped aside with him and had some conversation about the money she had brought for him; then, returning to Clark, she told him she wanted to get a paper drawn up, as she was not feeling very well, and asked him if he knew where Mr. Waterbury's office was. He told her he did; and, after some talk with her about the contents of the paper she wished drawn, he said to her: "If you go to Mr. Waterbury, he is Mr. Kelly's confidential lawyer, and, if you want to keep anything quiet from him, I think you had better get some one else." After mentioning some other lawyers, she concluded to go up and see Mrs. Kelly, her nephew's wife, who lived up-town. It does not appear from the evidence that William Kelly heard or knew of this conversation between Ann Daily and Clark. She then took the Thirty-Fourth street cars to go up to Mrs. Kelly's, and Dorans and Clark accompanied her. At this time she appears to have had no idea of going to Beach's office. On the way up Dorans suggested Beach as a lawyer who could draw the paper for her, and at Thirty-Fourth street they left the car they were in and took a Sixth-Avenue car down to Beach's office, at No. 46 Sixth avenue, where the will was drawn and executed.

If she had desired to cut off her husband's relatives, the will was the most equitable one she could possibly have made. It gives her husband all the personal property absolutely, and the use of the real property for life, and at his death she devises it equally among her relatives *per capita*. After the will was drawn and executed, she, not desiring her husband to know about or see it, intrusted it to Dorans, being ignorant of his character, and only knowing him as an acquaintance of her nephew, to be kept by him in secrecy for a year after her death, which, under all the circumstances, does not seem to have been an unnatural thing to do. The ignorance on Kelly's part of the making of the will, and the ignorance of both Dorans and Clark of the death of Ann Daily, accounts for its non-production about the time of her death. Kelly did not know she had made a will, and Dorans and Clark did not know she was dead. I am inclined to believe, from the evidence, and from what I have seen of him, that the character of the witness Dorans is as bad as the counsel for the proponents of the first will seems to regard it; but I am inclined to give credence to so much of his testimony in this matter as relates to the preparation and execution of the paper in question. The material testimony of the witness Clark and the lawyer, Beach, is undisputed, and in my opinion is entitled to full credit.

It does not seem possible or credible to me, especially in view of the amount of the estate, that this elaborate conspiracy should have been entered into by so many people, where the chief conspirators can derive no possible advantage from it, and the share of those deriving any benefit is so small as to be unlikely to induce them to risk the penalty attending forgery and perjury. Therefore I have decided to admit to probate the paper last propounded.

TINSLEY *et al.* v. WEIDINGER.

(City Court of New York, General Term. November 1, 1889.)

SALE—DAMAGE IN TRANSIT—RIGHTS OF BUYER.

A bill of sale was of "five hundred (500) to six hundred (600) tons kainit in bulk, * * * delivered *ex vessel* in New York harbor. Shipment to be made from a German port by sailing vessels." During the voyage the kainit was damaged by the seas. *Held*, that the purchasers were entitled to recover from the seller the difference between the contract price and the market price of the kainit when received.

Appeal from trial term.

Action by James G. Tinsley and others against Paul Weidinger to recover the sum of \$627.40, being the difference between the market price and the contract price of 502 tons of kainit in December, 1888, agreed to be sold by the defendant to the plaintiffs under a contract in writing dated May 17, 1888; and \$50.20, the cost of the schooner hired pursuant to the terms of said contract, to carry the kainit from New York to Richmond, Va. The contract under which the questions arise is in these words: "New York, May 17th, 1888. Sold to Messrs. Jas. G. Tinsley & Co., Richmond, Va., for account of Mr. Paul Weidinger, New York, five hundred (500) to six hundred (600) tons kainit in bulk, testing minimum twenty-three (23) per cent. sulphate potash, per German analysis, at eight dollars and fifty cents (\$8.50) per ton of 2,240 lbs., German invoice weight, delivered *ex* vessel in New York harbor. Shipment to be made from a German port by sailing vessel or vessels, in August ^{or} and September, 1888. In event of foreign war preventing shipment, this contract to be canceled. Buyers to receive goods when vessel is ready to discharge. Terms, cash on delivery at New York. Seller hereby guaranties that, should he sell any kainit for shipment named above at a lower price than herein named, the price for this contract shall be the same. Buyers to furnish the vessel to carry the goods, which shall be consigned to seller's order at Richmond, Va. CHAS. F. GARRIGUES." Written across the face: "Accepted. PAUL WEIDINGER." When the kainit arrived, it was found that 100 tons had been pumped overboard, and that the balance of the cargo had been damaged by the seas upon the voyage. What remained of the cargo upon its arrival was tendered to the plaintiffs, who refused to take the same, upon the ground that the goods were neither of the quality nor quantity called for by the contract. The plaintiffs were ready to receive the kainit, and pay for it; but the defendant, for the reason stated, was unable to perform his contract. The papers are in evidence showing the European weight return, the German analysis, and the bill of lading, dated September 28, 1888. There is no question of fraud or identification of the cargo involved. The court directed a verdict in favor of the plaintiffs for \$687.56, the amount claimed, with interest, and from the judgment entered thereon the defendant appeals.

Argued before MCADAM, C. J., and EHRLICH and HOLME, JJ.

Johnston & Johnston, for appellant. *Billings & Cardozo*, for respondents.

PER CURIAM. This was not a sale of goods "to arrive," within the proper meaning of that term. The goods were not purchased to be shipped from Germany under the direction or at the risk of the purchasers; nor were the goods purchased while in transit on the ocean. By the contract, the defendant sold 500 tons of kainit, to be delivered from a vessel in New York harbor, and the plaintiffs agreed to pay for it on such delivery. In this respect the case differs from *Heller v. Manufacturing Co.*, 39 Hun, 547. The contract here was an absolute present sale, and, for failure to deliver, the defendant is liable. The fact that part of the kainit was pumped overboard, and the balance was injured, while at sea, simply proves that the defendant, without any fault on the part of the plaintiffs, was unable to perform his part of the contract in regard to delivery in New York harbor. The plaintiffs had no interest in the shipment of the goods, nor the method of shipment. These matters did not concern them. The contract expressly provided, in unmistakable language capable of no other meaning, that the kainit should be delivered by the defendant from a vessel in New York harbor, and that the terms of payment were cash on such delivery at New York. All the risks in regard to performance devolved upon the defendant, and could not be cast upon the plaintiffs, who assumed the mere risk of being able to pay for the property when tendered to them in New York, and then only upon tender of the proper quality and quantity of kainit. In order to make a tender to the

plaintiffs in New York, it was necessary for the defendant to have the property present, so that this duty rested on him. He failed to have the property here, and was consequently in default, for the consequences of which he is answerable; for the causes which led to the failure are not within any exception allowed by the contract as ground for excuse. By this construction of the contract, the legal propositions involved are simplified, and freed from the technicalities which appear in many of the reported cases. In short, the case resolves itself into the ordinary one of breach of contract to deliver; and this is what we think it is. There was no request to go to the jury, and no dispute as to the amount of the damages sustained. It follows that the judgment appealed from must be affirmed, with costs.

CARRIGAN v. WASHBURN *et al.*¹

(City Court of New York, General Term. October 31, 1889.)

EXECUTION AGAINST THE PERSON—CHANGE IN FORM OF ACTION.

Where plaintiff in an action on a contract so amends his complaint, by alleging fraud and deceit, as to change the action into one for tort, he acquires the right, on recovering judgment, to issue an execution against the person of defendant, whether an order of arrest had issued in the action or not.

Appeal from special term.

Action by George Carrigan against Henry L. Washburn and others on a promissory note. Plaintiff appeals from an order vacating execution issued against the person of defendant Washburn.

Argued before MCADAM, C. J., and EHRLICH and HOLME, JJ.

Harrison & Langdon, for appellant. William L. Van Derzee, for respondent.

PER CURIAM. If the court below had contented itself with passing on the question whether a *supersedeas* should have been allowed, and the defendant discharged from arrest, there might have been sufficient in the affidavits to have upheld his order, the parties being in conflict as to the cause of the delay in issuing final process; but the court did not do this. It went upon other grounds, and held that the final process was void *ab initio*. This action was commenced upon contract. An order of arrest was issued, which was subsequently vacated. This would have prevented an arrest upon final process, if the record had remained the same; but it did not. The plaintiff moved for and obtained leave to amend his complaint by changing the action from contract into tort, by alleging fraud and deceit; and in this form of action, after issue joined and a trial on the merits, the plaintiff recovered a judgment against the defendant, and with it acquired the right to arrest the defendant, independently of the question whether an order of arrest had issued in the action or not. *Roeber v. Dawson*, 3 N. Y. Supp. 122. The amended pleadings superseded the originals, which, for all practical purposes, ceased to form part of the record. The amended pleadings, when interposed, became the only pleadings in the case for all subsequent purposes. The dishonored notes of the defendant did not pay the judgment, or change its character. An unperformed and broken promise pays nothing, changes nothing. See *Haggerty v. Simpson*, 1 E. D. Smith, 67. The execution against the person was not void, *ab initio* or otherwise. It follows that the order appealed from must be reversed, with costs, on payment of which the defendant will be permitted to renew his application for a *supersedeas*, to the end that the special term judge may pass on the conflict in the evidence as to the laches imputed to the plaintiff, and to the truth and sufficiency of the excuse offered for the delay in issuing the execution against the person.

¹Reversing 2 N. Y. Supp. 616.

GUGGENHEIMER v. STEVENS.

(City Court of New York, Special Term. October 10, 1889.)

JUDGMENTS—SUPPLEMENTARY PROCEEDINGS—PRIORITY.

Where supplementary proceedings are commenced by two judgment creditors, and, on the application of the junior judgment creditor, a receiver is appointed, whose authority is subsequently extended to the senior judgment, his appointment relates back to the commencement of supplementary proceedings on the senior judgment, and money coming into his hands from the sale of the debtor's lands will be *in custodia legis*, and will, for the purpose of determining the priority of liens thereon, be treated as the land, and first applied to the payment of the senior judgment.

Motion by Randolph Guggenheimer to have certain moneys applied to a judgment recovered by him. It appeared that Guggenheimer had, in May, 1877, recovered a judgment against defendant, Mark S. Stevens, and also in December, 1887, another judgment, of which William H. Moynan is the assignee. In 1884 defendant inherited an interest in land from his mother, and in August, 1886, supplementary proceedings were begun on Guggenheimer's judgment. In February, 1887, supplementary proceedings were commenced on the Moynan judgment, and Frank E. Smith appointed receiver of the judgment debtor, and afterwards of Guggenheimer. The land in which the judgment debtor had an interest, having been incumbered, was sold. A surplus remained after payment of the liens, and the share of the debtor came into the hands of the receiver, where it is held to await an order of court. The motion is resisted on the ground that the application for the appointment of receiver was made first in supplemental proceedings on his judgment, and that, more than 10 years having elapsed since the rendition of the judgment, they have ceased to be liens on the property of the debtor.

George P. Gough, for plaintiff. *W. H. Townley*, for W. H. Moynan, Jr., judgment creditor. *F. E. Smith*, receiver, *pro se*.

MCADAM, C. J. Surplus moneys arising from the sale of real estate are, for the purpose of determining the priority of the liens thereon, regarded as the land from which the fund emanated. Such liens are transferred from the land to the surplus, and the moneys must be applied to the discharge of such liens according to their priority. *Averill v. Loucks*, 6 Barb. 470; *Matthews v. Duryee*, 45 Barb. 69, 17 Abb. Pr. 256; *Blydenburgh v. Northrop*, 13 How. Pr. 289. So considered, the judgment recovered by the plaintiff, being prior in time, is prior in right, notwithstanding the order appointing the receiver. *Bank v. Risley*, 19 N. Y. 369. If both judgments are to be treated as if they had ceased to be liens, more than 10 years having elapsed since their recovery, (*Floyd v. Clark*, 2 Law Bull. 36,) the result is the same, as the extension of the receivership to the judgment recovered by the plaintiff made the title of the receiver relate back to the time the plaintiff's supplemental order was served, (Code, § 2469, subd. 1.) The evident object of this provision was to preserve the rights and liens of the different judgment creditors according to their respective priority, in conformity to the rule that different proceedings against the same debtor, or in pursuit of the same property, shall take precedence according to the respective dates of their commencement. The fund in the receiver's hands is not, however, to be deemed the property of the party at whose instance he was appointed, but it is *in custodia legis* for those who shall establish a right to it according to the respective priorities. *Banks v. Potter*, 21 How. Pr. 474, and cases cited. The rights and priorities of the respective parties having been preserved intact, it follows that, as the service of the order in supplementary proceedings, as well as the judgment recovered by the plaintiff, were first in point of time, the moneys in the hands of the receiver must be applied to the payment thereof as of right.

BECK v. ENNIS.

(Supreme Court, General Term, Fifth Department. October 19, 1889.)

WILLS—CONSTRUCTION—NATURE OF ESTATE.

Testatrix bequeathed to plaintiff, her daughter, certain personal property, and of the residue of her property, consisting of a farm and personalty, she gave one-half to plaintiff, if she should remain unmarried, and the other half in equal shares to the other two children, but in case of plaintiff's marriage it should be equally divided between the three children. The third clause of the will was as follows: "If my daughter K. [plaintiff] should marry, and die without children, or die previous to her brother and sister, then the property given or bequeathed her shall revert to her brother B. and her sister C., or their heirs, and to share alike." Later in the will testatrix provided: "By this I intend that the bequest to K., circumstanced as above stated, shall pass," etc. The fourth clause provided that these bequests were conditioned on the support of testatrix's husband by "my three children conjointly," and appointed K. executrix. *Held*, that plaintiff, having married, took a base or conditional fee in the undivided one-third of the real estate, and of the personalty mentioned in the third clause, defeasible by her death without issue, before the death of her brother or sister.

Appeal from judgment on report of referee.

Argued before BARKER, P. J., and DWIGHT and MACOMBER, JJ.

Wm. A. Sutherland, for appellant. S. B. McIntyre, for respondent.

DWIGHT, J. The judgment gives construction to the will of Mrs. Phebe A. Ennis, the mother of the two parties to this appeal. The other parties defendant in the action were the husband and another daughter of the deceased. By the first clause of her will the testatrix gives to the plaintiff absolutely all her household goods, including furniture, carpets, and silver-ware. By the second clause she gives the residue of her property, consisting of a farm and all her personal property other than that included in the first bequest, one-half to the plaintiff, if she remains unmarried, and the other half in equal shares to the other two children, the appellant, and a daughter, Mrs. Charlotte Olivia Pendry; but, in case of the marriage of the plaintiff, the property mentioned in this clause is to be equally divided between the three children, share and share alike. The third and fourth clauses of the will are as follows: "*Third*. If my daughter Kate S. should marry, and die without children, or die previous to her brother or sister, then the property given or bequeathed her shall revert to her brother B. Franklin, and her sister C. Olivia, or their heirs, and to share alike. *Fourth*. The foregoing bequests are based upon the provision that my three children conjointly or by mutual arrangement make suitable and adequate provision for the support and maintenance of my husband, Elijah Ennis, their father, during his life, and that suitable tombstones be procured and set up at his and my graves. Likewise I make, constitute, and appoint my daughter Kate S. Ennis to be executrix of this my last will and testament. * * *

The plaintiff married after the death of her mother, and before the commencement of this action, but has remained thus far without issue. The question is of the nature and extent of the plaintiff's estate and interest in one-third of the real estate, and of the personal property, aside from that included in the first bequest,—whether such estate and interest is absolute or conditional. It is unnecessary to review, or even to cite, the numerous authorities establishing the rule which the referee has applied to this case. The cases are well collated and classified by ANDREWS, J., in *Vanderzee v. Slingerland*, 103 N. Y. 47, 8 N. E. Rep. 247, where the rule, with its limitations, is clearly stated; and the same views are expressed, and the same result is reached, by RAPALLO, J., in the case of *In re Railway Co.*, 105 N. Y. 89, 11 N. E. Rep. 492. The rule is that when there is a devise to one person in fee, and, in case of his death, to another, the contingency referred to is the death of the first devisee in the life-time of the testator; and if such devisee survives the testator he takes an absolute fee. Judge RAPALLO says in the

latter case: "This construction is uniformly adopted unless there is some language in the will indicative of a different intention on the part of the testator;" and Judge ANDREWS, in the former case, says that the rule "applies only where the context of the will is silent, and affords no indication of intention other than that disclosed by words of absolute gift, followed by a gift over in case of death, or of death without issue, or other specified event. Indeed, the tendency is to lay hold of slight circumstances in the will to vary the construction and to give effect to the language according to its natural import." Such indications were discovered in both of the cases referred to, and in both advantage was taken of slight circumstances in the will to justify giving effect to the language according to its natural import. The remark is obvious that a rule so willingly avoided, and apparently as much honored in the breach as in the observance, must be a very artificial one, and founded largely upon authority, rather than upon principle. We are led to inquire, therefore, what is the reason, if any, which is supposed to be at the foundation of this rule of construction. The inquiry is answered, in both of the opinions referred to, as follows: "The reason assigned for this construction has been that, as death is a certain event, and the time only is contingent, the words of contingency in a devise of this description can only be satisfied by referring them to a death before some particular period; and, no other being mentioned, the time referred to must be presumed to be that of the testator's own death." This reason, if not very forcible, at least serves the useful purpose of furnishing a test of the applicability of the rule to the case in hand. Applying that test, we seem to find this case not within the rule, because the event prior to which the death of the devisee must occur to constitute the contingency mentioned in this devise is not left to be supplied by construction, but is fixed by the terms of the devise itself. It is the death of the brother or sister. The language of the provision is: "If my daughter Kate S. should marry and die without children, or die previous to her brother or sister." Here, we think, the phrase "previous to her brother or sister" qualifies both the alternatives of the provision quoted, and that the contingency intended might be more clearly stated in this form: "If my daughter Kate S. should die—either married and without children, or unmarried—previous to her brother and sister;" the object being apparently to exclude the case of the death of the plaintiff leaving children to inherit from her. In other words, the whole scheme and tenor of the will forbids the idea that the testatrix intended to disinherit the children whom her daughter Kate might leave surviving her, whether she died before or after her brother or sister. If so, then the contingency referred to is fully defined by the express terms of the will, and there is no room to suppose an intention to limit it upon the death of the testatrix, or any other event not mentioned in the will.

But, even if our construction of the alternative provision of the devise were not the true one, we think "other circumstances in the will" are sufficient to take this case out of the general rule laid down by the authorities referred to. There is the reiteration of the intention of the testatrix, in the third clause, which is a circumstance of the same character, and of at least equal significance, with that which seems to have warranted the judgment of the court in the case of *In re Railway Co.*, *supra*. The language here is: "By this I intend that the bequest to Kate S., circumstanced as above stated, shall pass to my son and daughter," etc. "Circumstanced as above stated" is equivalent to "under the circumstances, or upon the contingencies, above expressed," and the language serves to exclude the idea that other contingencies were to be added by legal construction or otherwise. The reiteration was made—as is said by RAPALLO, J., in *Re Railway Co. Case*—"as if to indicate that no other contingency was contemplated than the one which she had expressed." Moreover, all the provisions of the fourth clause of the will are such as to indicate an expectation on the part of the testatrix that the plaintiff would sur-

vive her, and that none of the provisions of her will had been made in contemplation of the plaintiff's dying in her life-time. This circumstance may be slight, but we have seen that the courts seize upon slight circumstances to justify an avoidance of the highly artificial rule of construction which we have had under consideration. We conclude that the contingency contemplated by the third clause of this will will arise whenever the plaintiff shall die without children, and previous to either her brother or her sister; that in that case her estate in the farm and her interest in the personal property (other than that embraced in the first bequest) will pass to her brother and sister, or to either of them then surviving, and the heirs of either then deceased, to be divided equally between them,—*per stirpes* in the case of heirs of either; but that, in case the plaintiff survives both her brother and her sister, her estate and interest in all the real and personal property will become absolute. In other words, to adopt the phraseology of the decision in the case of *In re Railway Co.*, *supra*, we hold that the plaintiff took under her mother's will a base or conditional fee in the undivided one-third of the real estate, and a corresponding interest in one-third of the personal estate, left by her mother, (aside from that mentioned in the first clause of the will,) defeasible by her dying, without leaving issue, before the death of either her brother or her sister; that her issue, should she have any, would take by inheritance from her, but a conveyance by her in her life-time would be effectual against them; that, should she survive both her brother and her sister, her title would become indefeasible, and that at any time during the life-time of her brother and sister an indefeasible title in fee could be conveyed by their joining with her in a conveyance.

The judgment appealed from adjudges that the three devisees take their respective shares and interests in the residue of the property, subject to the duty and obligation enjoined by the fourth clause of the will, to make suitable provision for the support and maintenance of their father during his life; and it directs that they make such required provision within two months from notice of the judgment, or, in default thereof, the executrix make such provision out of the estate of the testatrix in her hands. Neither party seems to be content with this provision of the judgment, although the plaintiff has not appealed therefrom. The defendant concedes the correctness of the judgment to the effect that all the devises and bequests of the will are subject to the requirement of the fourth clause, but objects that, in case of disagreement between the three devisees, the making of such provision should not be left to the sole judgment and discretion of the plaintiff; and he suggests, in case of such disagreement, a reference to ascertain what would be a suitable and adequate provision for the purpose in question. We think the suggestion a proper one, and such a direction will be given in the order for the modification of the judgment. The judgment should be modified in accordance with the views expressed in this opinion; the order for such modification to be settled by DWIGHT, J. All concur. So ordered.

WEBSTER *et ux.* v. GRAY *et al.*

(Supreme Court, General Term, Fifth Department. October 19, 1889.)

DESCENT AND DISTRIBUTION—ADVANCEMENTS.

A testator, after giving certain property to his wife, gave his farm and the rest of his personal property to his children; providing that all advancements made to his children, as shown by his books, should be charged up against their several interests in division of the estate. Two years after the will was made, the testator entered on his books against the accounts of three of his children a memorandum of a settlement in full of advancements made to them. *Held*, that no advancements were chargeable to either of them on the division of the property, but they took their shares without deduction.

Appeal from judgment on report of referee.

Milo Webster and wife sued Ann Gray and others for the partition of real estate under the terms of a will, and appeal from the interlocutory judgment.

Argued before BARKER, P. J., and DWIGHT and MACOMBER, JJ.

Andrews & Hill, for appellants. *Goff & Warren* and *W. Martin Jones*, for respondents.

DWIGHT, J. The action was for the partition of the real estate mentioned in the second clause of the will of Charles Webster, late of Ridgeway, in the county of Orleans. That clause, after giving to his four children, Fanny, Ann, Lucius, and Milo, the farm in question, and all the personal property, except what had, by a previous clause, been given to his wife, proceeds: "The above bequests to my children of the farm and personal property are to be so divided that same equal division shall be made between my children above named, by charging each of my children above named with what I have heretofore advanced to them, and each of them, and compound interest on such advancements; so that, with such advancements and compound interest, their respective amounts shall be equal. * * * In order to determine the advancements made to my children above set forth, reference shall be made to my book or books in which I have charged over to my children such advancements made them, and the time such advancements were made." The will was made in 1877. The testator died 10 years later. Before the execution of his will, he had made to his three children Fanny, Ann, and Lucius advancements, varying in total amounts from \$1,800 to \$2,300; all of which were charged in detail, as matter of account, in the book or books referred to by the testator in his will. Two years after the execution of the will, the testator had entered at the foot of each of the three accounts a memorandum of a settlement of such account in full. This was done with the undoubted intention of canceling and discharging the account and demand in favor of his estate against each of such children; and so the accounts stood canceled and discharged at the time of the death of the testator. The facts were so found by the referee, and the conclusion of law that no advancements were chargeable to either of the devisees for the purpose of the division of the real estate in question, but that they took their several shares therein without deduction by reason of such advancements. Exceptions to this conclusion of law, and to the refusal to find otherwise, as requested, furnish the ground of the plaintiff's appeal. His contention is that the entries in the book or books of account, referred to in the will, existing at the time the will was executed, and capable of certain identification as the matters referred to, were made by such reference a part of the will, because ingrafted upon, and a material element in, the testamentary disposition of the real estate in question, and, as such, could not be revoked or changed, except with the formalities requisite to a testamentary act.

We think the contention cannot be sustained. The answer to it is that the will speaks only from the death of the testator, and the estate disposed of is that only of which he dies seised and possessed. The effect of the provision of the will was to give to the four children the claims against the three, to be divided equally between them with other property, real and personal. Another disposition of these claims, by the testator in his life-time, has the effect of an ademption of the legacy so far as the claims for advancements are concerned. It may be conceded that the entries in the books of account became, by the reference thereto in the will, a part of the will; but the case is not different from what would have existed if the claims had been promissory notes of his children, particularly described in the body of the will. That it would have been competent for the testator in his life-time to accept payment of the notes, or to surrender or discharge them, notwithstanding the other disposition indicated by his will, which had not yet taken effect, will hardly be questioned. The argument of counsel for the appellant proceeds upon the theory that the act of the testator was a revocation of a part of his will. But.

such is the case only as an ademption of a specific legacy is a revocation of it. Even the devise of the farm itself might have been, in that manner, revoked by a valid conveyance, executed and delivered in the life-time of the testator; and no one will contend that such a conveyance would have required, in its execution, the formalities of a will, to render it valid. Indeed, it is plain that the acts affecting the disposition of a will, which requires to be executed with the formalities of a testamentary act, are those which are in their nature testamentary acts, *i. e.*, which are to take effect only on the death of the testator. A man's disposition of his property in his life-time is not in any manner controlled, nor his right to dispose of it limited, by any testamentary disposition of it which he has previously indicated. A will is not a contract, and the devisee takes no vested rights until his deviser is dead. We regard the conclusions of the referee as correct. The judgment should be affirmed. All concur. Interlocutory judgment affirmed, with costs to be paid out of the fund.

ALLISON BROS. CO. v. ALLISON *et al.*

(Supreme Court, General Term, Fifth Department. October 19, 1889.)

1. INJUNCTION—VIOLATION OF CONTRACT.

Two brothers assigned to one C. a one-third interest in two patents, one for an improvement in cigarettes and one for an improvement in cigarette machines, and "any improvements, renewals, or reissue of said cigarettes, cigarette machines, or" patents, "meaning hereby to invest in" C. "an undivided one-third of said patents, extension, or improvements thereof." By another agreement an undivided one-fourth interest was conveyed to A. by the brothers and C. in the patents and stock owned by them under the firm name of A. Bros. & Co., "as well as new patents, machines, etc., which may be" used in the business; the intent being to give A. a one-fourth interest in all "the patents and improvements on the same, which may hereafter be made, machines, stock," etc., of A. Bros. & Co. This firm, and all the above parties, transferred to plaintiff all the property of the firm, "together with all patents owned by any or either of said firm for improvements in cigarettes and cigarette machines." By a fourth agreement the brothers and C. transferred to plaintiff the "respective interests which we have heretofore enjoyed as members of said firm" in two patents for cigarettes and machines, "this transfer to include any improvements, renewals, or reissues" of the patents. *Held*, that these agreements did not so clearly transfer to plaintiff or assure to it the right to any interest in any invention of one of the brothers not already patented, or which should be patented as improvements on the former patent, as to justify a temporary injunction for violation of the contract by using any improved machine of defendant's invention pending the trial of such issue.

2. SAME—REFORMATION OF CONTRACT.

Where a contract, as set out in a petition for a preliminary injunction for its violation, is not sufficient to justify its issuance, one will not be granted under a second count in the complaint, alleging a mistake in the contract, and asking for its reformation where equities alleged as ground for its reformation are denied in the answer, but plaintiff must await the reformation of the contract before he can obtain affirmative relief based on the contract as reformed.

3. SAME—TEMPORARY INJUNCTION—DISCRETION OF COURT.

Where the answer was not interposed when the preliminary injunction was granted by a county court *ex parte*, the discretionary power of the court in granting or refusing the injunction is for the first time exercised by the court, after issue joined, on appeal to the special term.

Appeal from special term, Monroe county.

Action by Allison Bros. Company against Oscar M. Allison and others. Plaintiff obtained from the court a temporary injunction against defendant Allison for the violation of a contract. The injunction was vacated by the special term, and plaintiff appeals.

Argued before BARKER, P. J., and DWIGHT and MACOMBER, JJ.

John Van Voorhis, for appellant. Theodore Bacon, for respondent.

DWIGHT, J. The injunction, *pendente lite*, restrained the defendant Allison from using, or permitting others to use, and from receiving pay for the

use of, any machine of his invention for the manufacture of cigarettes, and it restrained the other defendants from paying Allison, or any person other than the plaintiff, for the use of such machines. It was granted solely on the ground, as stated in the order, that the plaintiff was entitled to the exclusive use of all such machines by virtue of agreements of the defendant Allison with the plaintiff and its assignors, which agreements, as we find by reference to the complaint and proofs, were four in number. By the first of these instruments, made in October, 1882, Allison and a brother, J. A. Allison, each assigned to one F. Dewitt Clarke an undivided sixth of his interest in two patents owned by them jointly, one for an improvement in cigarettes and one for an improvement in cigarette machines, "and," to quote the language of the instrument "any improvements, renewals, or reissue of said cigarettes, cigarette machines, or letters patent, * * * to the full end of the term for which said letters patent are granted, and for the term of any improvements therefor, reissue, or reissues thereon, * * * meaning hereby to invest in said F. Dewitt Clarke an undivided third of said patents, extension, or improvements thereof;" and the parties agreed that neither should "sell, dispose of, or license or grant any portion of our interest in and to the same," to anybody without the written consent of the other two. By the second agreement, in February, 1883, the two Allisons and Clarke sold to one Frederick P. Allen "an undivided one-fourth part of all patents, machines, machinery, stock, etc., now used and owned by the said parties of the first part in the manufacture of tobacco, cigarettes, etc., under the firm name of Allison Bros. & Co., as well as new patents, machines, machinery, or appliances which may be obtained or used in connection with said business, * * * the intention of this agreement being that each of said parties of the first and second parts shall have an undivided one-fourth interest in all the patents and improvements on same which may hereafter be made, machines, stock, and business of the firm of Allison Bros. & Co." The third agreement, executed November 9, 1883, by the firm of Allison Bros. & Co. and the four individuals above named, who are described as composing the firm, transferred to the plaintiff, described as a corporation duly organized, etc., all the property of the firm, machinery, tools, manufactured stock, material, etc., "together with all patents owned by any or either of said firm for improvements in cigarettes and cigarette machines, and machinery for manufacturing same." The fourth agreement, under date of November 19, 1883, ran from the two Allisons and Clarke to the plaintiff, and, after reciting that the firm of Allison Bros. & Co. had theretofore "used and enjoyed cigarette machines and improvements thereon, as well as improvements in cigarettes covered by letters patent of the United States, numbers 231,947 and 261,576," purports to assign to the plaintiff corporation "our, and each of our, respective interests therein which we have heretofore enjoyed as members of said firm, and which have been used by said firm, this transfer to include any improvements, renewals, or reissues of said patented improvements or letters patent numbers 231,947 and 261,576."

The foregoing extracts contain all the provisions of the several agreements, as executed between the parties, relating to the transfer of or the title to any patents for cigarette machines, issued or to be issued to, or improvements to be made thereon by, any of such parties. The complaint alleges "that by reason of the premises the plaintiff became and was and is the owner of the patents hereinbefore mentioned, and entitled to have assigned to it any invention or device which the said Oscar W. Allison, or any other of said parties, had theretofore invented or should thereafter invent or devise or obtain patents for." The latter branch of the conclusion seems scarcely to result from the premises above stated. It is at least doubtful whether any or all of the agreements executed between the parties purport to assure the right to or transfer any interest in any invention not already patented, or such as should

thereafter be patented strictly as improvements upon the former; and so the plaintiff seems to have apprehended, for in the second count of the complaint it is alleged that the agreements as executed did not express the intention of the parties in this particular respect, but that a provision was omitted, by mutual mistake, from each of those agreements, to the effect that the assignee or assignees in each case should have the absolute and exclusive right to any and every invention which should thereafter be made by the assignors, or either of them, for use in the manufacture of cigarettes, and the plaintiff demands judgment that each of said agreements be reformed by incorporating such a provision therein. The acts of the defendant Allison, alleged to be in contravention of his agreements with the plaintiff and his assignors, which are relied upon as furnishing ground for this action, consist in making and furnishing to the other defendants cigarette machines of his invention not yet patented, without the consent of the plaintiff, and in receiving compensation for the use of such machines by way of royalty on the product manufactured thereby. It is alleged in the complaint that these machines "are the same machines covered by the letters patent aforesaid, but, if they differ in any respect from the machines referred to in said letters patent, such alteration or improvement, or improved machine, and the exclusive right to use the same, are the property of this plaintiff." The positive allegation of the identity of the machines in question with those covered by the letters patent owned by the plaintiff might create the impression that the plaintiff intended to charge the defendant with an infringement of the patent, and that the action was, in effect, to restrain such infringement; and this impression seems to have been received by the court at special term, where the injunction was vacated solely on the ground of the want of jurisdiction in the courts of the state, to enjoin the infringement of a patent even in, and pending, an action to determine the title to a patent alleged to be infringed. But this we do not understand to be the character or purpose of the plaintiff's action. Indeed, upon the argument here counsel for the plaintiff entirely disclaim the intention to charge an infringement, and frankly admit that the machine furnished by Allison to the other defendants is not an infringement of any patent already transferred to plaintiff, but, on the contrary, that it is a new and independent machine, of novel device, and not to be denominated an improvement on that of the plaintiff unless in the sense of being a better machine. Neither does the plaintiff contend that the use of the new machine by the defendant Allison, and his license of its use by the other defendants, is an infringement of any patent which the plaintiff is entitled to have assigned to it, for the obvious reason that a patent for the new machine has not yet been issued. In short, as counsel for the plaintiff not only admit, but insist, there is no question of infringement in the case; but the plaintiff relies upon its alleged right, by virtue of the agreements of Allison, to the exclusive use and benefit of any and every invention made by him in the line of cigarette machinery, whether patented or unpatented, and whether an improvement upon or independent of those in existence when the agreements were made; and the plaintiff contends that, pending its action to establish this right, it was entitled to the provisional remedy granted by the county judge. To this conclusion there are several objections, which, though not reached in the consideration of the motion in the court below, we think justified its action in dissolving the injunction, and require an affirmance of its order to that effect. The first of these has already been indicated. The language of the agreements in this respect is very inartificial, and sometimes, perhaps, of doubtful sense, but nowhere do we find in them a clear expression of an intent to assure to the assignee the right to future inventions disconnected with and independent of those already secured by letters patent, and assigned to the plaintiff. Without finally adjudicating the question of the proper construction of the instruments in this respect, we are of opinion

that a case was not made upon the terms of the instruments themselves which warranted the granting of an injunction in advance of a trial of the issue. To justify the exercise of that power of the court a clear case should be made, at least by the allegations of the complaint. If it be conceded that a case was not made for a preliminary injunction upon the terms of the agreements as they stand, it is very clear that such remedy was not allowable under the second count of the complaint. The equities there alleged as ground for the reformation of the contracts are fully denied by the answer, and the evidence afforded by the writings themselves, under the hands and seals of the parties, is not easily overcome by *ex parte* affidavits which the defendant has had no opportunity to meet. The plaintiff must be content to await the reformation of the contracts before it can have affirmative relief based upon the contracts as reformed. It is to be observed that the answer had not been interposed when the injunction was granted *ex parte*, and that the merits of the application were not considered at special term, so that the discretionary power of the court in granting or refusing the preliminary injunction is for the first time since issue joined exercised on this appeal. A more radical objection is made to the maintenance of the injunction in this case to the effect that, whether the action is to be determined upon the agreements as they stand, or as the plaintiff may procure them to be reformed, the fact remains that the right which the plaintiff seeks to maintain is to an invention not patented, and in which, therefore, no right of property can exist which can be enforced by law. It is not questioned, in this connection, that a valid contract may be made for the sale of an invention before it is patented, and that such a contract may assure to the purchaser the right to an assignment of letters patent after they are issued. But it is contended that no property right is acquired until the issue of the letters patent, there being no such thing as property in an unpatented invention; but, as this objection goes to the maintenance of the action, and would not affect the disposition to be made of the preliminary injunction, we are not disposed to pass upon it on this appeal. For the reasons previously stated, we are of the opinion that the order dissolving the injunction *pendente lite* was properly made, and should be affirmed. All concur. Order affirmed, with \$10 costs and disbursements.

SHAW *et al.* v. LIGHTHOUSE.

(Supreme Court, General Term, Fifth Department. October, 19, 1899.)

SALE—WAIVER OF DEFECTS.

Retention by the purchasers of goods shipped to them under a contract for the sale of all the goods of a certain description then owned by the seller, but which contains no warranty of quality, without offering to return the goods or notifying the seller, after inspection, that part of the goods do not answer the description contained in the contract, constitutes a waiver of their right to damages on that ground.

Appeal from circuit court, Monroe county.

Action by Francis M. Shaw and another against John C. Lighthouse. Judgment for plaintiffs, and defendant appeals.

Argued before BARKER, P. J., and DWIGHT and MACOMBER, JJ.

Walter G. Hubbell, for appellant. W. E. Edmunds, for respondents.

BARKER, P. J. This action was brought to recover damages for the breach of a written contract, by the terms of which the appellant agreed to sell and deliver in the city of Boston, to the respondents, a quantity of scrap leather. The defendant contends that upon the trial parol evidence was received to contradict and vary the terms of the written agreement, and for this reason the judgment should be reversed, and a new trial granted. We are unable to find in the record any exception which fairly presents this question. The

appellant, a tanner, doing business in the city of Rochester, had a contract with the United States government for the making of leather mail-bags, which were manufactured at the appellant's establishment in the city of Rochester, mostly from leather which he tanned. When the leather was finished and ready to be used for that purpose, a side of leather, which was one-half of the entire hide as taken from the animal, was spread on the cutting table, and a pattern for a mail bag laid thereon, and so much of the side of leather as was suitable for any part of a bag was cut out and the remnants were called in the trade "mail-bag scrap," which had a market value, and was mostly used for soles for boots and shoes. Before any pieces were cut out from a side of leather for a mail-bag the back line of the side was straightened and brought to a true line. In doing this sometimes narrow strips or strings were cut off, varying in length from 6 to 24 inches. When all of the side suitable for mail-bags was cut out, the remnants were removed from the table, and this refuse material was put in sacks, and stored in the defendant's warehouse. The plaintiffs were manufacturers of shoes, doing business in the city of Boston. When the agreement was made, the defendant had a large amount of this class of stock on hand, not weighed. The contract recites that the purchaser had bought of the seller "his whole stock of mail-bag scrap, not to exceed 50 tons, at the rate of 15 and 8-4 cents a pound, delivered in Boston. * * * Each shipment to be drawn on by sight draft, with bill of lading attached." The stock was shipped in separate car-load lots, and was paid for by the purchasers before the goods were received by them. They now insist that each shipment contained several sacks of pieces of leather not included in the contract, which were of much less value than the article known as "mail-bag scrap," and the evidence produced by them tended to show that the contents of those sacks was made up, in part at least, of "straightenings," or "strings," so called, and were not mail-bag scraps, within the meaning of that term as used in the contract.

On the trial the question was sharply contested whether all the pieces or remnants of a side of leather left after getting out the part suitable for a mail-bag was included in the term "mail-bag scrap," or was limited to the large pieces so left, excluding strings or straightenings, as before described. No objection was made by the defendant to any of the evidence on the ground that it tended to contradict the written contract. As to the kind and amount of property sold, the contract was definite and certain. The dispute is not as to the terms of the contract, but as to what was included within the meaning of the words used descriptive of the article sold. The plaintiffs did not seek to change the contract so as to exclude from the purchase any article that would come within the term "mail-bag scrap."

The learned counsel for the appellant insists that the court in effect ruled that parol evidence might be used to modify or contradict the written agreement, by refusing to charge this proposition, to-wit, that the jury must find from the evidence in the case that the plaintiffs purchased the whole stock of mail-bag scrap, not to exceed 50 tons, belonging to the defendant. If the defendant sought by this request to have the jury instructed that by the terms of the written contract the plaintiffs purchased all the mail-bag scrap then owned by the defendant, not exceeding 50 tons, he was entitled to the instruction, for such was the plain meaning of the contract, unless the court had already informed the jury that such was the import of the agreement. I think he had in effect so instructed the jury before this request was made. It is unnecessary, in this connection, to repeat the portions of the charge referred to, as it cannot be doubted, after a perusal of the same, that the jury must have understood that such was the meaning of the contract from the remarks of the court, referring to the nature and character of the agreement. It is manifest, when the request to charge is read in connection with the charge as made, to which the defendant took no exception, that the purpose of the ap-

pellant in making the request to charge was to secure a ruling from the court that the term "mail-bag scrap" included strings and straightenings, as claimed by the defendant. It is unnecessary to pursue this question further, as we think the plaintiffs by their action on receipt of the stock shipped to them are precluded from claiming that the same was not of the kind and quality purchased. The entire amount of stock shipped was about 38 tons, in 3 car-loads; the first car being started from Rochester May 7th, and the third, the last of June or the 1st of July following. By the plaintiffs' special direction, the last car-load was consigned to them at Boston, where it was received by them. At the time the contract was made the stock was sacked and in store in the defendant's building, which one of the plaintiffs and their agent visited with a view of ascertaining the quality of the stock, and they opened and inspected the contents of some of the bags. These persons testified as witnesses that they then discovered that some of the sacks were filled with pieces of leather which were not mail-bag scrap, and, as they understood from statements made by a person in the employ of the defendant, were not to be shipped under the contract. The plaintiffs claim, and their evidence tended to show, that 95 of the sacks shipped, containing about 10 tons in all, contained strings and pieces of leather not "mail-bag scrap" within the meaning of that term as used in the contract. It was also proved on the trial that the material in those sacks was worth less in market value than the contract price mentioned in the contract, and was also of less value than the material known as "mail-bag scrap."

The rule of damages adopted on the trial was the difference between the value of the goods in view of their actual quality and the market value of goods answering the description of those purchased. When the first car-load was received by the plaintiffs and unloaded at their factory, one of the plaintiffs personally inspected the goods, and he discovered that several sacks were filled with "chips and stuff," and they were weighed and stored in a room separate and apart from the sacks which contained mail-bag scrap proper. This entire car-load was afterwards sold by the plaintiff to a manufacturer, and shipped to Salem, Mass., who, upon inspection of the goods, returned to them two tons, and used the balance in his business. On the receipt of the second car-load some of it was used by the plaintiffs in their own factory, and some of it sold to third parties. The evidence tended to show that some of this consignment was not mail-bag scrap, but was refuse of very little value; but it is admitted that most of the stock which was condemned was used by the plaintiffs in their business, and the rest consumed as fuel. When the third car-load was received in Boston it was forwarded unopened to Rowley, a place 50 miles distant. On its arrival there the goods were inspected by the plaintiffs, and they discovered that several sacks were filled with refuse material, not of the kind and quality purchased. All of this car-load was either sold or used by the plaintiffs, and their proofs tended to show that there were ten or eleven thousand pounds of rejected goods.

Upon these undisputed facts the legal proposition is presented whether the plaintiffs, by not returning or offering to return the goods, after discovering that the goods were not of the kind or quality purchased, waived all objections on account of defects of quality. We think they did, and for that reason failed to make out a cause of action. It was their duty, in view of the facts and features of this transaction, to accept the goods as answering the contract, or, on inspection, to return each shipment as rejected by them because the quality was defective, and not such as was contracted for. The contract of sale was executory, and no title passed to the purchasers on the execution and delivery of the written agreement. After delivery of the contract, the goods owned by the defendant and on hand at that time, of the kind mentioned therein, were to be separated from the entire stock then on hand, and delivered to the plaintiffs, the freight prepaid, in the city of Boston. The

sale was not limited to the contents of a particular number of sacks pointed out and designated by a mark, nor did the contract exclude from the purchase pieces of leather which would answer the description of "mail-bag scrap," although at the time of the sale they were in sacks mingled with scraps and remnants not "mail-bag scrap" within the meaning of that term. The contract contained no warranty as to the quality of the property; therefore a breach of the contract was not a breach of warranty, but a mere non-compliance with the contract that the defendant had agreed to fulfill. In cases of executory contracts for the sale and delivery of the personal property, the remedy of the vendee to recover damages on the ground that the article furnished does not correspond with the contract does not survive the acceptance of the property by the vendee after opportunity to ascertain the defect, unless notice has been given to the vendor, or the vendee offers to return the property. The retention of the property by the vendee is an assent on his part that the contract has been performed. The delivery of the property corresponding with the contract is a condition precedent to the vesting of the title in the vendee; the parties understanding that the vendee is not bound to accept the property tendered, except upon this condition. This the vendee is to determine upon the receipt of the property. There is no intention that a defective article should be accepted, and that the vendee should rely upon some kind of a covenant for his indemnity. The latter is not bound to receive and pay for a thing that he has not agreed to purchase; but if the thing purchased is found on examination to be unsound, or not to answer the order given for it, he must immediately return it to the vendor, or give him notice to take it back, and thereby rescind the contract, or he will be presumed to have acquiesced in its quality. He cannot accept the delivery of the property under the contract, retain it after an opportunity of examining its quality, and recover damages if it be not of the quality or description called for by such contract. These are elementary propositions, and are found stated in *Reed v. Randall*, 29 N. Y. 358. See, also, *Fisher v. Samuda*, 1 Camp. 190; *Hargous v. Stone*, 5 N. Y. 73; *Shields v. Pettee*, 2 Sandf. 262.

When, in an executory contract for the sale of goods, there is a warranty as to the quality of the goods contracted for, the vendee, on receipt of the article and subsequent discovery that it is defective in quality, is not bound to return or offer to return the property, but may retain and use the same, and have his action for damages upon the contract of warranty. Such was the case of *Day v. Pool*, 52 N. Y. 416, where the contract was for the sale of an article known as "Rock-Candy Syrup" "that could not crystallize, or the sugar fall down," in its use. The goods were shipped to and received by the purchasers in small parcels, at different times; and before it was all received they discovered that the syrup did not answer the warranty or recommendation, but used the same; and it was held that the warranty survived the delivery, acceptance, and use of the goods by the buyer. The case at bar and the material facts are similar to the case of *Sprague v. Blake*, 20 Wend. 61, and the principle upon which that case was decided has never been questioned. The proof there was that the defendant had agreed to purchase the whole of a crop of wheat belonging to the plaintiff, estimated to amount to between three and four hundred bushels, to be delivered at a place mentioned, for which the vendee agreed to pay a stated price. By the terms of the agreement the wheat was to be merchantable. After a portion of the wheat was delivered, it was agreed that the balance should be delivered at another point, and the plaintiffs delivered at that point a quantity of wheat, which was accepted and not paid for. The purchaser used the wheat. In an action for the price of the wheat last delivered, the purchaser attempted to set up the inferior quality of the wheat as a partial defense, and offered to prove its real value, and the evidence was rejected. A verdict for the contract price was sustained, the court laying down the proposition that the buyer must refuse to accept the

property at the time of its delivery, or, if its inferiority be subsequently discovered, he must return it to or require the purchaser to take it back. In *Hargous v. Stone*, *supra*, it was held that if the contract was an executory one to furnish goods of a particular description the purchaser was bound to examine them when received and opened, and to return them if the quality was not such as was promised. Not having done so, he waived all objections on account of defects of quality.

In the contract before us the thing sold was "mail-bag scrap," as that article was known in the trade. It was simply an agreement to sell so much of mail-bag scrap as he had then on hand, not exceeding 50 tons. The seller shipped the goods as answering the description "mail-bag scrap," and if the purchasers, on receiving the goods, discovered that any portion of the shipment was not of the kind of goods purchased, and they were unwilling to receive the same as complying with the contract, it was their duty to have returned the same, or notified the seller; and, not having done so, they deprived themselves of the right to claim damages on account of inferiority of the article. The learned judge who presided at the trial, and who heard and denied the defendant's motion for a new trial, disposed of the point now under consideration by citing *Meagly v. Hoyt*, 12 N. Y. St. Rep. 357, as authority that the right of action survived the acceptance of the goods. We think that case not in point. There it was alleged by the buyer that the defendant warranted and agreed to sell tallow of a quality or a grade known as "prime tallow," but in violation of that agreement they delivered an article which contained 30 per cent. of foreign matter. The plaintiff recovered a verdict, which was sustained by the general term. Although the contract in that case was executory, it contained a warranty as to the quality, and belonged to the class of actions in which *Day v. Pool*, *supra*, is a leading one in this state.

We have examined with care the correspondence which took place between the parties concerning the third car-load before its receipt by the plaintiffs at Boston, and we find nothing in it which amounts to a warranty, or makes the case any different as to the rights of the parties than as the same stood before the correspondence was opened. The judgment and order should both be reversed, and a new trial granted, with costs to abide event. All concur.

BARNARD *et al.* v. BARNARD *et al.*

(Supreme Court, General Term, Fourth Department. September 19, 1889.)

WILLS—CONSTRUCTION—WORDS CREATING TRUST.

Testator devised property to H., "to hold for the benefit of his children, if he so elects." H., at the time the will was made, and at testator's death, had children. The will was signed by H. as a witness, and it was probated on his testimony. Rev. St. N. Y. (8th Ed.) p. 2549, § 50, provides that if one to whom any beneficial devise is made shall be a subscribing witness to the will, and the will cannot be proved without his testimony, the devise shall be void, and he shall be competent to prove the will. *Held*, that the words "if he so elects" applied only to the office of trustee given to H., and that the will created a trust for the benefit of H.'s children, leaving it optional with H. to accept or refuse the trust, and that, as he had no beneficial interest, the devise was not rendered void by the fact that he testified to the execution of the will, this construction being adopted to carry out the testator's intention to provide for H.'s children, and to prevent intestacy as to the property devised.

Appeal from special term, Oneida county.

Argued before HARDIN, P. J., and MARTIN and KENNEDY, JJ.

William Kernan, for appellants. Miller, Fincke & Brandage, for respondents.

KENNEDY, J. The controversy in this case arises as to the construction to be given the following clause in the will of one Harvey Barnard: "Third. I do give, devise, and bequeath to my brother, Henry Barnard, my one-fourth

interest in the store No. eighty-five Genesee street, Utica, and running through to Catherine street, for him to hold for the benefit of his children, if he so elects." Henry Barnard, the devisee, signed the will as a witness, and was a necessary one to prove it, and on the probate thereof was sworn and examined as such. If by the above bequest an absolute estate in the land devised was given to the said Henry, then, by the provisions of the Revised Statutes, (8th Ed. p. 2549, § 50,) the same is void. On the other hand, if by the same a trust-estate was created for the children of said Henry, and he took the same in trust for them, it is valid notwithstanding he was a witness to, and one necessary to prove, the will. The language adopted by the testator is at least awkward, and leaves the question of his actual intent resting upon the words used alone somewhat in doubt. If, however, from it a conclusion can be safely reached as to what such intent was, it is the duty of the court to adjudge the same, and see that it is carried out. On the other hand, if upon the examination of the instrument, taken as a whole, the intention of the testator appears clear, but its plain and definite purposes are endangered by inapt and inaccurate modes of expression, the court may, and it is its duty to, subordinate the language to the intention. It may reject words and limitations, supply or transpose them, to get at the correct meaning. *Phillip v. Davies*, 92 N. Y. 199. It seems to us that any construction which may be given the clause in question must be somewhat strained because of the obscurity thrown around the testator's intent by the language selected. He had one of two objects in view,—either to vest an absolute estate in Henry, or to create a trust-estate in and for the benefit of Henry's children at that time; there being three of those who at the time the will was made survived the testator and are now living; a fourth, born after that, was living at the time of the testator's death, dying, however, soon after that. It was found by the learned court at special term that the first of the purposes existed.

The contention on the part of the appellants, children of said Henry Barnard, on the other hand, is that the testator's intent was to create a trust-estate for them, and that the father was simply nominated a trustee, subject to his acceptance of the office. A solution of the question will be found only in the conclusion whether the language "if he so elects" properly relates to the subject-matter of the devise, or whether it is to be construed as relating alone to the office of trustee. A familiar rule of construction is that, when the language of a written instrument is subject to two interpretations, the one sustaining and the other tending to defeat its provisions, that shall be adopted which shall validate the writing. If the construction given by the court below is correct, the effect is to entirely thwart the purpose of the testator, and to deprive both Henry and his children of the property, and, as to it, to adjudge that he died intestate. In construing an instrument of this nature partial intestacy, if possible, should be avoided. *Vernon v. Vernon*, 58 N. Y. 357. It may be fairly assumed that both the testator and Henry knew the law governing the question, and that the former, if he did not understand that he was making a valid bequest and creating an estate alone for the benefit of Henry's children, would not have requested Henry to become a subscribing witness to his will; or, on the other hand, that Henry would have intentionally defeated the purpose of the testator in doing this. It may be further suggested in this connection, if the trial court was correct in finding that the devise to Henry was absolute, subject to his election to convert it into a trust-estate for his children, that, at the time the will was executed, by becoming a subscribing witness he thereby declared his election to treat the estate as a trust-estate for the beneficiaries named. If it be held that the words referred to relate to the estate, then they become superfluous, since without them Henry could of his own volition at any time have converted it into a trust-estate for his children. The language adopted does not amount even to a request by the testator that Henry should so treat the subject of the

devise. On the other hand, if it is held that the words "if he so elects" refer to the office of trustee, we shall find meaning in the expression, and by so doing serve to accomplish one of the apparent purposes the testator had in view, and thus avoid the embarrassment and injustice which would follow a finding that as to this part of the estate the decedent died intestate. Nor can we see that this construction is forced or unnatural. That the testator meant to dispose of this part of his estate for the benefit of Henry or his children is apparent. Each was a proper object of his bounty; and, if we hold that the estate was in trust, we shall carry out one design he had in view. On the other hand, a different holding will serve to wholly defeat his purpose. Without the added words "if he so elects" a trust-estate was created for the children of Henry, he being appointed a trustee of the same. Suppose the sentence is made to read, as it may be without doing violence to the expression, "if he elects to act as trustee," and he refused the office, such refusal would not defeat the purposes of the testator, or destroy the trust. The law will not allow a trust to fail for want of a trustee. *Perry, Trusts*, (3d Ed.) § 38, and cases cited. We are therefore disposed to hold that it was the intent and purpose of the testator to create, and therefore he did create, a trust-estate for the children of Henry; that he nominated him as trustee, making it optional with him whether he accepted the office or not, but, in case of his refusal to do so, leaving it with the court to provide a proper trustee. This construction, while it tends to carry out the purpose of the testator, and prevents an absolute failure of the devise, at the same time serves to do justice to the contemplated beneficiaries. We have examined carefully the many authorities cited by the learned counsel for the plaintiffs, and find in them general rules for construing wills, but nothing tending specially to elucidate the question in hand, and are therefore left to give this clause in the will such interpretation as to us seems best calculated to meet the intent of the testator and to accomplish the purpose which it appears from the language used he had in view. It follows that a new trial should be granted. New trial granted, with costs to abide the event. All concur.

TUTTLE *et al.* v. LA DOW *et al.*

(Supreme Court, General Term, Fifth Department. October 19, 1889.)

1. PATENTS FOR INVENTIONS—ASSIGNMENT—LICENSE.

A clause in a written contract read as follows: "And the parties of the first part do hereby sell, assign, and transfer to the said parties of the second part all other patents they may have a right to use, so far as they may be used in the territory named, in the manufacture and sale of harrows without wheels or poles," and "all harrow patents, patents for improvements, and reissue of harrow patents which may be obtained by them by purchase or otherwise, to be used in the manufacture and sale of harrows made without wheels and poles." *Rev. St. U. S. § 4898*, provides that every patent, or an interest therein, shall be assignable in law by an instrument in writing, and the patentee or his assigns, etc., may in like manner grant and convey an exclusive right under said patent to the whole or any specified part of the United States. *Held*, that the contract was not for an assignment, but for grants of licenses only, since it reserved to the owners the exclusive right to manufacture and sell within the territory named harrows on wheels, and horse-rakes, to be made under the patent, and since an assignment with such reservation was not authorized by statute.

2. SAME.

The contract gave to the party of the second part no rights which he could assign, as a license is not assignable unless expressly so stated.

Appeal from special term.

Argued before BARKER, P. J., and DWIGHT and MACOMBER, JJ.

J. H. Metcalf, for appellants. *A. Chester*, for respondent.

DWIGHT, J. The action was for the specific performance of a contract of the defendants the Wheeler & Melick Company and the demurrant La Dow,

with certain parties under the firm name of J. M. Childs & Co., which had been assigned by Childs & Co. to the plaintiffs, under the firm name of G. B. Olin & Co. The performance sought to be enforced was the assignment of certain patents for inventions, relating to spring-tooth harrows, alleged to have been issued to the defendants, some of them before, and some of them since, the execution of their contract with Childs & Co. It is alleged that by such contract, which is set out in the complaint, the defendants agreed to assign all such patents to Childs & Co., and that by virtue of the assignment of such contract by Childs & Co. to the plaintiffs, the latter are entitled to have such patents assigned to them. The defendant La Dow demurred on the ground that the complaint did not state facts sufficient to constitute a cause of action; and the demurrer was sustained on the ground, as indicated by a brief memorandum of the judge at special term, that the contract of the defendants with Childs & Co. did not provide for a grant or assignment of the patents in question, or of any share or interest therein; but only for a license under such patents, and that such license was not assignable. The questions thus presented turn upon the construction of the contract of the defendants with Childs & Co. and were, we think, decided in accordance with the law as established in the courts of the United States. The paragraph of the contract under which the action was brought—being preceded by provisions in respect to other patents not here in question—reads as follows: "And the parties of the first part do hereby sell, assign, and transfer to the said parties of the second part all other patents they may have a right to use, so far as they may be used, in the territory named, in the manufacture and sale of harrows without wheels or poles, and do hereby agree to assign to said parties of the second part all harrow patents, patents for improvements and reissue of harrow patents which may be obtained by them by purchase or otherwise, to be used in the manufacture and sale of harrows made without wheels and poles. * * *" The "territory" referred to in this provision was defined by a former paragraph of the contract as the New England states and a certain portion of the state of New York.

The statute of the United States relating to the assignment of patents is in the following words: "Every patent, or an interest therein, shall be assignable in law by an instrument in writing, and the patentee or his assigns * * * may in like manner grant and convey an exclusive right under his patent to the whole or any specified part of the United States." Rev. St. U. S. § 4898. As the monopoly secured to the patentee is a creation of the statute, so the right to transfer or share that monopoly is given only, and is strictly controlled by, the same legislative authority. *Gayler v. Wilder*, 10 How. 477, 494. That authority is found in the statute just quoted. It has received frequent construction at the hands of the courts of the United States, and has been uniformly held to embrace only three classes of assignments or grants, viz.: (1) Of the entire monopoly for the whole of the United States; (2) of an undivided share or interest in the entire monopoly for the whole of such territory; (3) of an exclusive right to enjoy the entire monopoly within a specified portion of such territory; and any concession or conveyance short of one of these is not a grant or assignment, but only a license. However exclusive the right conveyed, however unlimited the territory over which it extends, if it be not the right to exercise all the privileges secured by the patent, if it leave any interest in the monopoly in the patentee within the territory defined, it is a license only. *Curt. Pat. §§ 212, 213*, and the cases cited; *Blanchard v. Eldridge*, 1 Wall. Jr. 337; *Theberath v. Manufacturing Co.*, 3 Fed. Rep. 143; *Suydam v. Day*, 2 Blatchf. 20; *Hamilton v. Kingsbury*, 17 Blatchf. 265; *Telegraph Co. v. Brooklyn*, 14 Fed. Rep. 255. The cases cited variously illustrate the rule above stated. In several of them the fact which determined the character of the conveyance was that of the limitation of the exclusive right to make, use, and sell the patented invention to a particular purpose, and

such was the peculiarity of the contract of the defendants with Childs & Co. The limitation here was to such use as might be made of the patents referred to "in the manufacture and sale of harrows made without wheels or poles," and it plainly reserved to the owners of the patents the exclusive right to manufacture and sell, within the territory covered by the proposed conveyances, all harrows on wheels, and horse-rakes, to be made under such patents. If we correctly apprehend the force and application of the rule so far considered, the judge at special term was right in his conclusion that the conveyances contemplated by the contract in this case, with Childs & Co., were not assignments or grants, but licenses merely.

This brings us to the second proposition involved in the decision below, which seems to be equally well established, viz., that, as licenses, those conveyances are not assignable. The rule in this respect seems to be that in order to give the quality of assignability to a mere license it must contain express words to that effect, it must run to the licensee and his assigns, or by other equivalent language indicate the intention to make the privilege transmissible by the licensee. *Curt. Pat. § 218; Walk. Pat. § 310; Oliver v. Chemical Works*, 109 U. S. 75, 3 Sup. Ct. Rep. 61; *Curran v. Craig*, 22 Fed. Rep. 101; *Windmill Co. v. Windmill Co.*, 24 Fed. Rep. 650; *Lock v. Lane*, 35 Fed. Rep. 289. There are no words of assignability in the contract of the defendants with Childs & Co., and we regard the cases cited as authority for the holding by the court below that Childs & Co. took under that contract no right in respect to the patents in question which they could transfer to the plaintiffs. If so, the complaint did not state facts sufficient to constitute a cause of action in favor of the plaintiffs, and the demurrer was properly sustained. The judgment must be affirmed. All concur. Judgment affirmed, with costs.

ROCHESTER, H. & L. R. CO. v. HARTSHORN *et al.*

(*Supreme Court, General Term, Fifth Department. October 19, 1889.*)

1. ESTOPPEL—IN PAIS.

The owners of land agreed with a railroad company, in view of a proposed condemnation of it, and in consideration of a bond of the company to pay the damages awarded in such a proceeding, to permit it to enter and construct its road on the land "required for its right of way and for the construction of its railroad in accordance with its map on file." The company took possession of the land so described, and built its road thereon. *Held*, that the owners were estopped to object that the land so appropriated was not such as the company had a right to condemn for the purposes for which it was used.

2. EMINENT DOMAIN—PROCEDURE—WAIVER OF OBJECTIONS.

Laws N. Y. 1850, c. 140, § 15, provides that on presenting a petition for the condemnation of land, with proof of service, all persons affected thereby may show cause against granting the petition. If no sufficient cause is shown the court shall appoint commissioners. *Held* that, where the owners of land made no answer to the petition, and no objection to the proceedings, until after the award of the commissioners, to whose appointment they consented, such objection came too late.

3. SAME—SECOND APPLICATION.

Where the finding of the commissioners was set aside on appeal, a second application to the special term was a continuance of the original proceeding; and the addition of the receiver of the company, who had been appointed meantime, did not make it necessary to file a new petition, nor give the owners of the land a right to file an answer, which they had waived by proceeding under the original petition without objection.

Appeal from special term, Monroe county.

Application of the Rochester, Hornellsville, and Lackawanna Railroad Company against Charles H. Hartshorn and others for the condemnation of land under the general railroad act. From several orders of the special term Hartshorn and others appeal. For opinion on former appeal, see 2 N. Y. Supp. 457.

Argued before BARKER, P. J., and DWIGHT and MACOMBER, JJ.

D. L. Benton, for appellants. *Frank S. Smith*, for railroad company, respondent. *De M. Page*, for the receiver, respondent.

DWIGHT, J. Of the four appeals the first is said to have been taken only *pro forma*; the second raises the question of the necessity or propriety of bringing in the receiver of the petitioner, appointed since the proceedings were commenced, as a party to the proceedings; the third is from an order denying the appellants' motion for leave to file an answer, after an award and an order, on appeal, for a rehearing; and the fourth is from an order appointing commissioners for such rehearing. The third appeal presents the principal question in the case.

The facts are as follows: Charles Hartshorn, the husband of one and the father of the other of the present land-owners, had entered into an agreement with the railroad company to sell to it a right of way, at a price agreed upon, over the lands in question, by the route which was finally adopted. After his death the appellants, who took title to the lands as his widow and heir at law, declined to carry out that agreement. Negotiations between the parties resulted in an arrangement by which the railroad company were to take immediate possession of the lands in question, and proceed with the construction of their road thereon, upon giving a bond to pay to said owners such damages as should be finally awarded to them within 20 days from the date of the final order confirming the report of commissioners, in proceedings to be instituted for the condemnation of such lands. The bond was given and accepted. The grant or license was duly executed under the hands and seals of the appellants, granting to the petitioner the right to enter upon and take possession of such of the appellants' lands "as are included in and required for its right of way and for the construction of its railroad in accordance with its map on file;" and the company entered into possession of the lands, and proceeded to construct its road thereon. The condemnation proceedings were commenced by the presentation of the petition herein at special term in November, 1887. As was contemplated by the agreement between the parties, the appellants duly appeared at such term, and, without answering or objecting to the petition, consented to the appointment of commissioners to appraise their damages; the appellants themselves naming one of the commissioners thus appointed. They also appeared before the commissioners at the time fixed by the order, and, without any objection to the proceedings on their part, made their proofs in respect to the value of the lands, which had already been appropriated by the petitioner to the purposes for which they were sought to be condemned. The commissioners having made their award, the land-owners opposed the confirmation of their report, and appealed to this court from the order of special term confirming the same. On such appeal that order was reversed, and the report set aside, on the ground that the agreement of Charles Hartshorn, the ancestor of the appellants, was improperly received in evidence by the commissioners. See *In re Railroad Co.*, 2 N. Y. Supp. 457. The order of the general term also directed a rehearing of the petition, and a new appraisal by new commissioners, with costs of the appeal to be paid by the petitioner. In pursuance of that order the petitioner moved at special term for the appointment of new commissioners. The application was met by the objection on the part of the land-owners that the receiver of the petitioner (appointed since the commencement of the proceedings) was a necessary party to further proceedings; and by an application, on the part of the land-owners, for leave to file an answer to the petition. In response to the objection stated an order was made bringing in the receiver as an additional party petitioner, leave to file an answer was denied, and new commissioners were appointed.

We think there was no just ground for either of the appeals now before us.

First. The appellants are estopped to deny the right of the petitioner to

condemn the lands in question. They had granted to the petitioner, in anticipation of proceedings to acquire the necessary title, and in consideration of the bond of the latter to pay the damages to be awarded in such proceedings, the right to enter upon those lands, and construct their road. The lands referred to in the license—being those “required for its right of way and for the construction of its railroad in accordance with its map on file”—were the same as those described in the petition. The petitioner had gone on under that license, had taken possession of the lands so described, and constructed its road thereupon at great expense. The appellants could not afterwards be heard to object that the lands so appropriated were not such as the petitioners had a right to condemn for the purposes for which they were appropriated and used under such license. It is not considered necessary to cite authorities for so clear an application of the principle of estoppel.

Second. The appellants had effectually waived all objections to the proceedings for condemnation taken by the petitioner. They interposed no answer to the petition, and made no objection to the proceedings, until after the award of the commissioners, to whose appointment they had consented. They exercised an undoubted right in appealing from the order confirming that award, and the order of this court, on such appeal, which, besides reversing the order appealed from, directed a new appraisal by new commissioners, determined the rights of the parties in that respect. The statute (Laws 1850, c. 140, § 15) provides that “on presenting such petition to the supreme court as aforesaid, with proof of service, * * * all persons whose estates or interests are to be affected by the proceedings may show cause against granting the prayer of the petition. * * * The court shall hear the proofs and allegations of the parties, and, if no sufficient cause is shown against granting the prayer of the petition, it shall make an order” for the appointment of commissioners. And there are many authorities to the effect that, after the appointment of commissioners, and especially after a hearing upon the merits, it is too late to object to the regularity of the proceedings and the petition. See *Dyckman v. City of New York*, 5 N. Y. 484; *Railroad Co. v. Corey*, 5 How. Pr. 177; *In re Railroad Co.*, 45 Hun, 126.

The second application to the special term was not a proceeding *de novo*, but a continuance of the original proceeding in pursuance of the order of the general term. The fact that a receiver of the petitioner had been appointed in the mean time did not change the *status* of the proceeding. It might still, no doubt, have been prosecuted by the receiver in the name of the original petitioner, and the addition of the receiver as a party petitioner did not prejudice or affect any right of either party. It did not make it necessary that a new petition should be filed, nor give to the appellants the right to file an answer, which they had waived by proceeding under the original petition without objection. We do not consider it necessary to consider the objections now sought to be raised to the petition. We may remark that they do not seem to us serious, even if taken by a party who had the right to raise them, and in time. It is enough, we think, for the purpose of this appeal, that they were waived by the appellants. The orders appealed from should be affirmed. All concur. Orders appealed from affirmed, with \$10 costs and disbursements in each case.

ANDERSON v. CARR *et al.*

(Supreme Court, General Term, Second Department. September, 1889.)

1. JUDGMENT—BY CONSENT—OPENING—ADVICE OF COUNSEL.

Where, in compromise of a claim, judgment has been rendered against defendant with his consent, he cannot, in the absence of proof of fraud, have it vacated on the ground that he acted on the erroneous advice of counsel.

2. SAME—JURISDICTION.

A judgment which is entered by a court without jurisdiction will not be vacated at the instance of defendant if he has consented to its entry.

Appeal from circuit court, Westchester county.

Action by John Charles Anderson against Walter S. Carr and others. Judgment was rendered for plaintiff, and from an order refusing to vacate the judgment defendants appeal.

Argued before PRATT and CULLEN, JJ.

John J. Leary, for appellants. *North, Ward & Wagstaff*, for respondent.

CULLEN, J. We think that the defendant did not show a case entitling him to have the judgment entered in this action vacated. That judgment was entered upon his consent. His daughter, Mrs. Watson, had brought ejectment against the plaintiff's grantees, alleging that the will under which the plaintiff claimed title was void. She succeeded in that action at circuit, and an appeal was taken to the general term. Pending that appeal this action was instituted to establish the will. Negotiations were had for the settlement of the daughter's claim. When the time for the settlement of the daughter's claim arrived, the plaintiff refused to consummate the settlement unless the defendant Carr would consent to the entry of judgment against him in this action. Accordingly the daughter's husband obtained from defendant such consent, stating that the counsel were of opinion that he had no interest in the property. He now seeks to avoid that consent on the ground that such advice was wrong. Assuming that the defendant had a right of curtesy in the property in case the will of the grandfather was void, the opinion given by the counsel, though erroneous, was not necessarily dishonest or fraudulent. The daughter's case had been once at the general term, on appeal from an adverse judgment, and she had finally recovered at the circuit without the point that the father had his curtesy being raised,—a point which, if well founded, would have been fatal to her action. That there was a possibility of such claim was apparent, for Carr was made a party to this action to bar any such claim. The plaintiff's counsel made it a condition of the settlement that the defendant's claim, if any, should be barred by his consent to the judgment. The nature and effect of the consent was understood by the defendant, and, though he was told he had no valid claim, he must have been aware that the only object of the consent was to cut off the possibility of a claim. On this consent the plaintiff paid for the daughter's interest. The plaintiff and defendant dealt at arms-length. While there are intimations of collusion between the defendants' attorney and the plaintiff, there are no facts shown to prove such averments, and they are explicitly denied by the parties charged. If such, however, be the fact, the defendant can avoid the judgment for fraud in a direct action brought for that purpose; but, in the absence of proof of fraud on the plaintiff's part, he should not be deprived of the benefits of his settlement; certainly not without an offer to restore to him what he has paid on account of that settlement.

It is objected that, as the court of appeals has held that this action will not lie,¹ the judgment was entered without jurisdiction, and is void. Such result does not follow. But, if the judgment be void, defendants can assail it collaterally whenever it may be set up as a bar to his rights. It has been repeatedly held that a party is entitled to have a void judgment or order vacated, and not be remitted to his collateral attachment. This is true where the order or judgment complained of was made against his opposition, or without his authority; but that principle cannot apply where the party has consented to the entry of the judgment or order. The order appealed from should be affirmed, with \$10 costs and disbursements.

¹19 N. E. Rep. 427.

In re HOOVER'S ESTATE.

(Supreme Court, General Term, Fifth Department. October 19, 1889.)

WILLS—CONSTRUCTION—RESIDUARY LEGATEE.

Testatrix in her will provided as follows: "After all my lawful debts are paid and discharged, I give and bequeath to Mary F. Emerson * * * my house and lot in the village of Dundee, if I am possessed of one at my death, or, if I am not possessed of one, I order my executor * * * to pay to the said Mary F. Emerson, \$2,000, on condition," etc. After sundry money bequests, the will continued: "I order that, in case my estate exceeds the amount of the above bequests to each individual, then my executor must pay to the above persons the excess in the proportion as the amounts of the bequests are to the whole amount," etc. *Held*, that Mary F. Emerson was a residuary legatee, and entitled to share with the other beneficiaries in any moneys remaining undistributed after the payment of the particular legacies.

Appeal from surrogate's court, Yates county.

Upon the judicial settlement of the accounts of Calvin J. White, executor of Sarah Hoover, a decree was entered adjudging that Mary F. Emerson, one of the beneficiaries under the will, was not a residuary legatee, and hence not entitled to share in the sum remaining in the hands of the executor undistributed. From this decree she appeals.

Argued before BARKER, P. J., and DWIGHT and MACOMBER, JJ.

William H. Smith, for appellant. *Charles S. Baker*, for respondent.

MACOMBER, J. The first provision of Mrs. Hoover's will is as follows: "First. After all my lawful debts are paid and discharged, I give and bequeath to Mary F. Emerson, wife of B. K. Emerson, or her heirs, my house and lot in the village of Dundee, if I am possessed of one at my death, or, if am not possessed of one, I order my executor, hereinafter named, to pay to the said Mary F. Emerson \$2,000, on condition that the said Mary F. Emerson pay a yearly or annual payment to my brother John Emerson of sixty dollars as long as he survives me; and the said Mary Emerson must, at the time of the payment of the \$2,000 to her, or the conveyance of my house and lot to her, execute a bond of security to satisfy my executor that the sixty dollars will be paid annually to my brother John Emerson." After making sundry small money bequests, and the appointment of the executor, the will continues: "I order that, in case my estate exceeds the amounts of the above bequests to each individual, then my executor must pay to the above persons the excess in the proportion as the amounts of the bequests are to the whole amount; and, in case my estate falls short, then each of the above bequests must share in the shortage in the same proportion. In other words, the excess or shortage must be shared *pro rata* as the bequests are."

If, under these provisions of the will, the appellant is to be deemed a residuary legatee, she is entitled to a proportionate share of the moneys now remaining in the hands of the executor; but if, on the other hand, the gift to her of a house and lot was a specific devise only, she is not entitled to receive anything more from the estate. The inquiry is, of course, from the beginning to the end of the case, what was the true intent of the testatrix in respect to these matters as disclosed by the will itself? It will be observed that the testatrix does not use words of gift aptly, or in their technical sense. She says: "I give and bequeath to Mary F. Emerson, etc., my house and lot in the village of Dundee." Yet this failure to use technical language, and using the word "bequeath" where she meant "devise" would be of very little importance if subsequent or other portions of the will made clear a contrary intent. But they do not. The gift of the house and lot to the appellant was not absolute. It was conditional upon the ownership and possession of the same by the testatrix at the time of her death, and this, too, not of any particular house and lot, but the house and lot, if any, of which she might be possessed at the time of her death. But the most important provision, and which seems to

be quite conclusive of the intention of the testatrix, is that, in case she should not be possessed of such house and lot, the executor was required to pay to the appellant the sum of \$2,000, on the condition above mentioned. The brother having died intermediate the execution of the will and the questions here arising, the appellant of course was not required to execute the bond. Taking all these provisions together, there seems to be disclosed an intent on the part of the testatrix to give to the several beneficiaries the sums named; that is to say, in the proportion of the \$2,000 to the appellant to the several sums mentioned for the other legatees.

This construction finds strong corroboration in the subsequent paragraph of the will above quoted, where all of the persons receiving gifts from the deceased are mentioned as a class as "the above persons" who were to receive the excess in proportion as the amounts of the bequests severally were to the whole estate. There is nothing to show that the expression "the above persons" was designed to exclude any one who had received by previous provisions of the will any benefit thereunder. The circumstance that, in case the estate had fallen short of giving each one the sum mentioned in the will, there would have been difficulty in adjusting the claim of the appellant, can have very little weight where these words of unmistakable import are used. Had the testatrix left no real estate, no embarrassment would have ensued in the event of the estate falling short of paying these several sums. Had it become necessary to charge over any deficiency against this appellant, in the event of there being insufficient moneys to pay each of the legatees, an easy way could have been found in this court, even if not in the surrogate's court. Taking all the provisions of the will together, it seems to us to be the plain intent of the testatrix that the appellant should share with the other beneficiaries in any moneys remaining undistributed after the payment of the particular legacies. It follows, therefore, that the decree of the surrogate should be reversed, with costs of all parties to be paid out of the estate, and the case remitted to the surrogate of Yates county, with direction to proceed thereon in accordance with this opinion. All concur.

GREENE v. GREENE *et al.*¹

(Supreme Court, General Term, Fifth Department. October 19, 1889.)

WILLS.—CONSTRUCTION.—PERPETUITIES.

A testator, after making various bequests, appointed three of his sons executors of his will and trustees of his estate, and declared: "I direct that my said trustees shall take and hold my said property and estate * * * for a period of six years from and after my decease, the estate being chargeable with the foregoing bequests and legacies. * * * After the payment of said legacies, said property and estate shall be managed for the benefit of my said three sons, * * * who shall annually render to each other a statement of the rents and profits, and of all transactions relating to such estate; and "at the expiration of the said six years the rest and residue of my estate, real and personal, * * * shall belong to my said sons, * * * share and share alike." There was also a clause forbidding partition of the estate "so devised and bequeathed to my three sons in trust as aforesaid, until the expiration of six years;" and providing that, "in case either of said three sons" shall attempt to partition or divide the land, he shall forfeit all claim to the estate. The last clause of the will authorized the "said three sons" to mortgage the real estate in order to pay the legacies. *Held*, that it was not testator's intention to vest the title in his sons as trustees, thus suspending the power of alienation in violation of the law against perpetuities, (1 Rev. St. N. Y. p. 723, § 15;) but he intended them to be tenants in common of the estate, and absolute owners thereof, subject to the charge of the payment of legacies.

Appeal from special term, Erie county.

Action by William B. Greene against John B. Greene and others, heirs of William H. Greene, for partition of certain real estate. The court dismissed the complaint, and plaintiff appeals.

¹ Affirming ante, 30.

Argued before BARKER, P. J., and DWIGHT and MACOMBER, JJ.
T. M. Tyng, for appellant. *Sherman S. Rogers*, for respondents.

MACOMBER, J. So much of the action as resulted in the judgment appealed from is brought in pursuance of section 1537 of the Code of Civil Procedure, which permits an heir of a person dying while holding and in possession of real property to maintain an action for the partition thereof, whether he is in or out of possession, notwithstanding an apparent devise thereof to another by the decedent, and possession under such devise. The plaintiff claims as one of the children and heirs at law of William H. Greene. He bases his right upon an alleged invalidity of the clauses of the will of his father, which attempted to devise the property in question wholly to other persons than himself. By the will of William H. Greene, which bears date the 17th day of September, 1881, after the direction of the payment of debts, the testator devised the homestead and personal property on Niagara square, in the city of Buffalo, to his wife. By clauses 3 and 4 he devises to his sister certain lands in Ohio, with remainder to the plaintiff. By the fifth clause, he gave all the residue of his estate, including the premises in question, to his three sons, the defendants John B. Greene, Harry B. Greene, and Samuel B. Greene, as trustees, to carry out the provisions of the will. These persons were also appointed executors of the will. He directed these so-called trustees, by the provisions of the will from clause 6 to clause 13, inclusive, to pay over certain moneys to certain persons, but these clauses are not of any materiality on this appeal. The residue of the will is as follows: "Article 14. I declare it to be my will, and I direct that my said trustees shall take and hold my said property and estate, and the whole thereof, (except the said Ohio tracts, and my said house and lot on Niagara square,) for the period of six years from and after my decease, the estate being chargeable with the payment of the foregoing bequests and legacies, and it being, as I now believe, with the moneyed securities on hand, and with prudent management, amply sufficient to pay said legacies in full, together with the taxes, repairs, and insurance on my real property, so that, at the expiration of said period, the residue of said real estate not herein before devised should remain unincumbered and intact. After the payment of said legacies the said property and estate shall be managed for the joint benefit of my said three sons, John B. Greene, Harry B. Greene, and Samuel B. Greene, who shall annually render to each other a just and full statement of the rents, issues, and profits, and all transactions relating to said property and estate. During this period of six years said trustees, my said three sons, shall not, nor shall either of them, sell, alienate, mortgage, incumber, or dispose of, or contract to sell, alienate, or dispose of, the lands and premises now owned by me, and situated on Main, North Division, and Washington streets, or any part or parcel thereof, or any share or interest therein; but any or all of my other real estate not hereinbefore specifically devised I give my said trustees power to sell, convey, and dispose of, on condition that the proceeds of such sale or sales, or the securities taken thereon, shall not be distributed or divided between them until the expiration of the said period of six years, but shall be kept by them, unless it becomes necessary to use the same for the purpose of paying off the legatees afore mentioned, in which contingency they are authorized to resort to such proceeds and securities. And I do will and enjoin that no partition or division of my estate so devised and bequeathed to my said three sons in trust as aforesaid shall be made, or attempted to be made, until the expiration of said term of six years; and that, in case either of my said three sons shall attempt so to do, or to defeat or contravene the terms and intent and conditions of this trust, he shall forfeit all interest, right, title, or property in my estate. (15) At the expiration of said period of six years, the rest and residue of my said estate, real and personal, remaining after the payment of said legacies

and debts, shall belong to my said three sons, John B. Greene, Harry B. Greene, and Samuel B. Greene, share and share alike, their heirs and assigns, forever. (16) (Explanatory and qualifying clause.) In the plight of the estate as at present situated, a partition would be detrimental to my said three sons. In the present condition and aspect of affairs, the moneyed securities, together with the moneys on hand, would nearly suffice to pay off and discharge all the legacies, and leave the real estate in the hands of my said three sons unincumbered. Of course, if I live some years longer, this view of the estate may be changed, but probably not in a manner to weaken it. At any time, in case an exigency should require it, I am willing and do authorize my said three sons to mortgage the real estate in order to pay off and discharge said legacies, although I cannot now anticipate any necessity for so doing."

The testator died on the 22d day of April, 1882. He was a lawyer of long and extensive practice, yet he has left a will the construction of which is difficult and doubtful. In behalf of the plaintiff it is contended that the estate which was so devised to the three younger sons was merely in expectancy, and the possession of that postponed to a future period, thus constituting it a future estate, and was limited to commence only at the expiration of six years from the death of the testator; that during such six years the legal title to the estate was not vested in any person capable of alienating the same; and that therefore during those years an attempt has been made by will to suspend the power of alienation of the real estate, in contravention of the statutes against perpetuities. 1 Rev. St. p. 723, § 15. Consequently, it is contended that this property, after the payment of the debts and legacies, is in law deemed undisposed of, and must descend to the heirs at law. The testator manifestly intended that the land in controversy should ultimately go to these three sons. This intention, however, cannot prevail, if he has attempted to carry the same into effect by means of an illegal trust unknown to the Revised Statutes, and the general scheme of the will is dependent thereon. The question, therefore, is whether or not the title of the three sons, to whom this property was attempted to be given, is dependent upon what it is argued by the appellant's counsel was the purpose of the testator,—namely, that the title of the same should remain in them during such period, not as devisees, but as trustees, thus suspending the power of alienation. The learned judge at the special term in his opinion says that certain sentences from the fifth clause, and others from the fifteenth clause, of the will indicate that it was his intention to vest the title during the period of six years in them as trustees, and thus suspend the power of alienation for that time, though from other portions of the will he arrives at a different conclusion. Was there a trust in fact created by the terms of this will for any purpose? It does not seem to us that a trust was created for the payment of legacies except by way of mortgaging the real estate, under the last sentence of the will, though clearly enough all of the legacies are made a charge upon the real estate, including this portion of it. Nor was there any trust created for the collection and paying over of the rents and profits of this real estate. The rents and profits all belonged to these three sons. It is true that they were required to account to each other, by the terms of the will, for the amount thereof, which they should respectively receive, yet this is no more than a declaration of the testator of a familiar rule of law governing tenants in common of real estate. There is undoubtedly contained in the will strong expressions of a desire that these lands should not be alienated or partitioned, or anything done with them except as they might be charged with the payment of debts; but this by no means prevents the immediate vesting of the title of the lands in the devisees. The primary purpose of the testator being apparent, which was to vest the whole of this property in these three beneficiaries, not as a mere remainder depending upon an illegal future estate, but absolutely, we can safely, without doing violence to the terms of the will, reject, as merely ad-

visory only, all clauses or expressions from which it is argued that an illegal trust was created for a period of six years. Indeed, the testator himself, by imposing a penalty upon either of his sons who should attempt to partition or divide the lands, seems not to have supposed that he had suspended the power of alienation for any length of time. This case is *sui generis*; and, in the multitude of cases arising upon last wills, that of *Rice v. Barrett*, 102 N. Y. 161, 6 N. E. Rep. 898, is largely relied upon by the learned counsel for the appellant. But in that case the so-called trustees were not given personally the rents and profits of the real estate, as has been done in this instance, but were charged with the duty of receiving the interest upon the residuary estate, and investing the same, and holding it for the benefit of certain persons other than those named as trustees in the will; and it was there held that the trust was in contravention of the statute, inasmuch as the accumulated fund furnished the only support for the devises subsequently made, and the whole scheme of distribution failed, and the title to the residuary real estate upon the death of the testator vested in his heirs at law, as in the case of intestacy. In the case at bar, however, there was no trust save that given by virtue of the power to mortgage for the payment of legacies, inasmuch as the duty devolved upon the so-called trustees was to themselves only, and not to other persons. This gave them a legal estate in fee, under the Revised Statutes, (1 Rev. St. p. 727, § 47,) which is as follows: "Every person who, by virtue of any grant, assignment, or devise, now is, or hereafter shall be, entitled to the actual possession of lands, and the receipt of the rents and profits thereof, in law or in equity, shall be deemed to have a legal estate therein of the same quality and duration, and subject to the same conditions, as his beneficial interest." See *Ring v. McCoun*, 10 N. Y. 271; *Downing v. Marshall*, 23 N. Y. 379; *Adams v. Perry*, 43 N. Y. 487.

Upon the whole, we are of the opinion that it was not the intention of the testator to vest the title of the real estate in these persons as trustees, but in them as tenants in common; and that he intended that these sons should receive and enjoy the rents, issues, and profits of the property for their own use and benefit, making them, to all intents and purposes, absolute owners of the property, subject only to the general charge upon the real estate of the payment of the legacies, and the power to mortgage the same for a like purpose. The judgment should be affirmed. All concur.

SHAY v. NATIONAL BENEFIT SOCIETY.

(Supreme Court, General Term, Fifth Department. October 19, 1899.)

MUTUAL INSURANCE—ASSESSMENTS—WAIVER.

One of the rules under which an insurance company issued its policies was as follows: "The form of notice to, and the process of collection from, each of the members of the assessment above named, shall be as follows: A notice shall be sent announcing such assessment, and the number thereof, to the last post-office given to the society by each member; and if the assessment is not received within thirty days from the mailing of said notice it shall be accepted and taken as sufficient evidence that the party has decided to terminate his connection with the society, which connection shall thereupon terminate, and the party's contract with the society shall lapse, and be void; but * * * for valid reasons to the officers of the society * * * he may be reinstated by paying assessment arrearages." Such a notice was sent to one of the members on June 1st, and, the assessment not being paid within 30 days, a second notice was sent on July 5th, and the assessment was paid July 21st, but after the death of the insured; and the officers of the society, knowing of such death, gave a receipt in due form for the payment. Held, that the sending of the second notice was a waiver of the forfeiture occurring upon failure to pay the assessment within the required time after the first notice, and, having received such payment unquestioned, the society cannot repudiate its liability on the policies.

Motion for new trial on exceptions.

Action by Emily J. Shay against the National Benefit Society of the city of New York to recover upon policies of insurance issued by the defendant to James Shay for the benefit of plaintiff. There was a verdict directed for the plaintiff, and defendant's exceptions and motion for new trial were ordered to be heard at the general term in the first instance.

Argued before BARKER, P. J., and DWIGHT and MACOMBER, JJ.

E. G. Lapham, for plaintiff. *William H. Smith*, for defendant.

MACOMBER, J. One of the rules (the third) of the company, and under which the assured received the policies, is as follows: "The form of notice to, and process of collection from, each of the members of the assessment above named, shall be as follows: A notice shall be sent announcing such assessment, and the number thereof, to the last post-office given to the society by each member; and if the assessment is not received within thirty days from the mailing of the said notice it shall be accepted and taken as sufficient evidence that the party has decided to terminate his connection with the society, which connection shall thereupon terminate, and the party's contract with the society shall lapse, and be void; but said party may again renew his connection with the society by a new contract, made in the same manner as the first, or, for valid reasons to the officers of the society, (such as a failure to receive notice of the assessment,) he may be reinstated by paying assessment arrearages." On the 31st day of May, 1886, a notice to pay a death rate to the company for the death of one of the members was mailed to James Shay. It was dated June 1, 1886. It was therein stated that the assessment was made "to provide for this claim, and your assessment of \$16.80 is now due, and payable within thirty days from the date hereof." Annexed to the notice was what is called a coupon, which was a summary statement of the number of the policy, and the name of the insured, and the amount and the time of the expiration for the payment of the assessment, which was there stated to be July 1, 1886. This sum was not paid within the month of June by the deceased, or by anybody else in his behalf. The same blank notice, filled up in the same manner, was again mailed to the deceased July 5th or 6th. This was marked in conspicuous letters "Second Notice." When this last or second notice, so called, was sent to the deceased the time for the payment, by the terms of the notice itself, had passed by about five or six days. If any forfeiture had been worked by the failure to pay the assessment it was before the sending of such last notice. Under the phraseology of the third provision or rule above quoted it seems to us that the company, by sending out a second notice, intended to and did, in fact, waive any forfeiture which had been incurred by the assured by reason of his failure to pay the assessment on or before July 1st. This act of waiver was not done by any subordinate officer of the company, but by the company itself through its treasurer. Under the rules of the company it was doubtless competent for the defendant to treat the failure to pay within the previous 30 days sufficient evidence that the party had decided to terminate his connection with the society, and for the company, on its part, to take the position that the policy had lapsed, and was void. It is there provided that the "party may again renew his connection with the society by a new contract made in the same manner as at first; or, for valid reasons to the officers of the society, (such as a failure to receive notice of an assessment,) he may be reinstated by paying the assessment arrearages." Here was, therefore, an invitation to the deceased necessarily involving a waiver of a previous forfeiture to pay, within the usual time after the service of such notice, the assessment which was claimed from him; and there was impliedly a promise on the part of the company that if such payment was made within 30 days from the time of the reception of the second notice there should be no forfeiture. Payment was made by express within that period, namely, on the 21st day of July, 1886, and was received by the defendant on

the 22d of that month, but not until after the death of the insured. A receipt in due form was given for such payment, and was written upon the face of the second notice. Subsequently to this payment the company undertook to retire from the obligation which it assumed by receiving unquestioned the money, and giving a receipt therefor, to repudiate such payment, and to insist upon the previous opportunity to work a forfeiture. In this respect also the action of the defendant cannot be upheld. The officers, at the time of the receipt of the money, knew that James Shay was dead. On the 22d day of July, 1886, the defendant returned, by express, addressed to L. L. Shay, a daughter of the deceased, money orders for \$16.80, and \$7.80 for the assessments, alleging as follows: "The assessments were due and payable on or before July first; and, not having been paid then, the certificates lapsed and became void by the conditions therein, and reinstatement can only be made under the terms of our certificates and by-laws upon satisfactory evidence of good health at the time, or by new contract made in the same manner as at first. Certificate of health must accompany remittances." This communication contains no intimation that the clerk, who had been furnished proper receipts, had no power or right to receive and to retain the assessments. On the contrary, it places the rights of the company upon a ground utterly untenable with respect to the third rule above quoted.

Under these circumstances, there being no request on the part of the defendant to go to the jury, but both sides participating in a motion for a direction of a verdict respectively, we think the direction of the trial court was correct, and the judgment should be granted to the plaintiff upon the verdict, as directed, with costs. All concur.

In re BUDLONG.

(Supreme Court, General Term, Fifth Department. October 19, 1889.)

1. WILLS—UNDUE INFLUENCE—EVIDENCE.

On the issue whether a will was procured by undue influence, declarations made by the proponents, who were charged with exerting the influence, which declarations demonstrated the attitude of proponents towards the contestant in respect to the subject matter at issue, and the intent with which each performed the acts attributed to him, some of them being letters showing a disposition to influence testator, are admissible, and a conspiracy need not first be established.

2. SAME—INSTRUCTIONS.

The jury were instructed that "if, under all the circumstances of the case, they find that this will was unnatural in its provisions, and inconsistent with the duties and obligations of the testator to the different members of his family, it imposes upon the proponents the duty of giving some reasonable explanation of its unnatural character, or at least of showing that it was not the result of mental defect, obliquity, or perversion." *Held* correct.

3. WITNESS—COMPETENCY—TRANSACTIONS WITH DECEDENTS.

Testimony of the widow of testator as to the contents of letters written by her to contestant at the instance of the testator is not testimony as to transactions with decedents, forbidden by Code Civil Proc. N. Y. § 829.

4. SAME—INTEREST.

Contestant's husband having testified for her on the trial before the surrogate, and contestant having died thereafter, this testimony of the husband, though he became interested in the result of the action by his wife's death, may be read on the trial at the circuit, under Code Civil Proc. § 880, providing that, where a party has died since the trial of an action, decedent's testimony, or that "of any person who is rendered incompetent by the provisions of the last section, taken or read in evidence at the former trial," may be given in evidence at a new trial.

5. APPEAL—OBJECTIONS NOT RAISED BELOW.

A party who has submitted to, and conceded, the jurisdiction of a court to determine a motion for judgment, cannot, on appeal therefrom, object to its jurisdiction.

Appeal from circuit court, Monroe county.

Argued before BARKEE, P. J., and DWIGHT and CHILDS, JJ.

J. A. Stull, for appellants. E. A. Nash, for respondents.

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DWIGHT, J. A decree of the surrogate of Monroe county, in December, 1883, admitted the will to probate. On appeal to this court, in June, 1887, that decree was reversed, and an order was made for a trial by jury, at the Monroe circuit, of the following issues: *First.* Was Milton Budlong, at the time of the execution of the instrument in question, of sound and disposing mind and memory? *Second.* Was the same procured to be executed by fraud, circumvention, undue influence, and deceit, practiced upon him by Isaac Budlong, or the other proponents of the will, or persons acting in their behalf, while there was a loss of natural affection by the decedent for his daughter Mrs. Cole, occasioned by the falsehoods, fraud, deceit, and evil practices of proponents, perpetrated on him for the purpose of unduly prejudicing him against her? On the trial had, as prescribed by such order, in March, 1888, the questions so propounded were both answered in the affirmative. At the same time a motion was made by the proponents for a new trial on the judge's minutes, which was denied; and in November following, a motion was made by the contestants, at a special term held by the same judge before whom the issues were tried, for judgment on the verdict. On the hearing of that motion,—counsel for the proponents appearing, and expressly consenting to the jurisdiction of the court to hear and determine the same,—an order was made for judgment accordingly; and judgment was thereupon entered, in favor of the contestants, that the instrument propounded as the will of Milton Budlong, deceased, was void and of no effect, and requiring the surrogate of Monroe county to annul the record and probate thereof. The proponents' appeal from the judgment, and from the order of the circuit denying their motion for a new trial, brings the case a second time before this court. When it was here before, on appeal from the decree of the surrogate admitting the will to probate, this court, upon testimony substantially the same, and in large part identical, with that adduced before the jury, were led "to doubt the correctness of the surrogate's conclusion upon the question of deception and undue influence," by which, as it was alleged, the will was procured to be executed, and accordingly reversed the decree of the surrogate, and directed that the issues, which were thereupon framed by the court, as stated above, should be tried by a jury at the circuit. 45 Hun, 588, *mem.* The evidence upon which this decision was reached was reviewed at much length in the opinion of the court, as then pronounced by Mr. Justice HAIGHT, and it seems to have been in all material respects similar to that which was given on the trial before the jury; indeed, to a large extent, it constituted the evidence which was adduced on the latter trial, being read from the minutes of testimony given before the surrogate. A very careful perusal of the whole evidence in the record before us fails to show that there was any additional or different evidence given on the last trial which would require a different conclusion from that reached by the court on the former review, and none is pointed out in the very elaborate brief and argument of counsel for the proponents. We find ourselves concluded, therefore, by the former judgment of this court, to the extent of holding that the case was one which ought to be submitted to a jury for its decision upon the issues proposed; and that a finding in favor of the contestants upon either of those issues, if not vitiated by error on the trial, must, so far as the judgment of this court is concerned, be conclusive against the probate of the will in question.

We are brought, therefore, to the inquiry whether any exception of the proponents, taken on the trial, points to error in the admission or exclusion of evidence, or in the instructions to the jury under which the issues were submitted for decision. A numerous class of the exceptions found in the case relate to the admission of certain declarations of the several proponents, who are charged with the acts and representations which constitute the undue influence and deceit said to have been practiced upon the testator. It is to be noticed that none of the declarations objected to and received are in the nature

of admissions by the several declarants of those acts charged against them, but are, rather, declarations made by them during the course of the transactions and events which led up to the result complained of, and which either constituted a part of the *res gesta*, or demonstrated the attitude of the proponents towards the contestant in relation to the subject-matter of the inquiry, and the intent with which each performed the acts attributed to him. This being the case, it was not necessary to establish an actual conspiracy between the actors, in order to make their several declarations of the character described admissible in evidence. Such declarations come within the rule well stated by Judge Redfield, as follows: "There can be no question that where those opposing the probate place their case upon the theory that the testator was made the dupe of a conspiracy, or of undue influence in any form, it is competent to show the declarations of the agents in such alleged imposition, made in connection with their acts, as important and essential, not to say indispensable, in the transaction or *res gesta*, without which it would be impossible to place the case before the jury in any intelligible form," (1 Redf. Wills, 4th Ed. 572;) or as was said by BRADFORD, surrogate, in *Brush v. Holland*, 3 Bradf. Sur. 240, 248: "When a party is accused of having effectuated a certain act by undue means, if the facts show an opportunity for the accomplishment, I cannot say that the predisposition of the party to produce that precise result is immaterial, or that his declarations, evincing his intention, are incompetent evidence." A large share of evidence received under this class of exceptions consisted of oral and written communications of the brothers, the proponents of the will, and especially of Isaac, the oldest and most influential of them, with Mrs. Cole, the principal contestant, during a period of several years, from the time of her marriage down to the date of the will. These communications were, no doubt, admissible, under the principles above indicated. The letters of Isaac, for example, are luminous with evidence of his feeling towards his youngest sister and her husband, and of his disposition to influence the feeling and conduct of his father towards them. Letters written by the step-mother as the amanuensis, or under the direction, of the testator, to Mrs. Cole, were received in evidence, under the objection of the proponents that they were within the exclusion of section 829 of the Code of Civil Procedure. The objection was not well taken. The communications were not personal between the deceased and the contestant. They were made to the wife of the deceased, to be transmitted by her to the contestant. The directions from the deceased to his wife to write, and what to write, were testified to by the widow, and not by the contestant, while the latter merely produced the letters, and identified them as those received from her step-mother.

On the trial before the surrogate, the husband of the contestant, Mr. Cole, testified, as a witness in behalf of the contestant, in relation to personal transactions and communications between himself and the deceased. After that trial, and before the trial at the circuit, Mrs. Cole died. On the latter trial, the minutes of the former testimony of her husband were read by the contestants under objection. Counsel for the proponents concede that the testimony was competent on the first trial, while the wife of the witness was living, but contend that by the death of his wife he became interested in the result of the action, and therefore incompetent to testify to the matters referred to. The objection is fully answered by section 830 of the Code, which provides that, "where a party has died since the trial of an action, on the hearing upon the merits of a special proceeding the testimony of the decedent, or of any person who is rendered incompetent by the provisions of the last section, [section 829,] taken or read in evidence at the former trial or hearing, may be given or read in evidence at a new trial or hearing by either party, subject to any other legal objection," etc. The provision would have been more clearly expressed if the portion italicized had read "or of any person rendered incompe-

tent thereby, [i. e., by such death,] under the provisions of the last section;" but such is the evident meaning and effect of the provision. Under it, the testimony of Cole, competent when it was given on the first trial, was properly received in evidence on the second trial, notwithstanding that he had in the mean time been rendered incompetent to give such testimony by the death of his wife. The provision, though new to the Code in 1879, was not then new to the law of evidence. *McKnight v. Lewis*, 5 Barb. 681, 685, and the cases cited; *Morehouse v. Morehouse*, 17 Abb. N. C. 407, 415; *Lawson v. Jones*, 1 Civ. Proc. R. 247; *Comins v. Hetfield*, 80 N. Y. 261. See, also, *Galbraith v. Zimmerman*, 100 Pa. St. 374, and *Pratt v. Patterson*, 81 Pa. St. 114. The rule at common law, as exhibited by the cases cited, is much more general than that embraced in the section of the Code above cited, and rests upon the evident principle that the interest which disqualifies testimony must exist at the time the testimony is given.

The charge of the court contained a very clear and correct exposition of the legal principles which should govern the jury in their consideration of the case; and, so far as the evidence was referred to, a very impartial statement of its character and possible effect. The proponents' requests to charge were mostly granted; and when they were declined, except as charged, we think the court had already covered the propositions as far as the proponents were entitled to have them stated. None of the exceptions to the charge seem to us to have been well taken.

The submission to the jury of the question whether the letter of Levi, written to his sister Mrs. Hunt,—and which he, in effect, requested her to show or read to his father,—was written for the purpose of influencing the latter in making his will, was, we think, warranted by the evidence. The character of the letter itself, the suggestion that it be read or shown to his father, together with the evidence, by his own declarations, of his feeling towards his sister, and particularly in respect to her sharing in his father's estate, was such as would not have justified the court in withholding that question from the jury. It was very cautiously submitted, and in terms quite as favorable to the proponents as the character of the evidence required.

The submission of the question of conspiracy was made with sole reference to the effect of the evidence of the declarations of the several proponents; the court properly instructing the jury that the fact of conspiracy was not necessary to the finding of undue influence. We think the evidence was such as would have warranted the finding that there was a common purpose on the part of two or more of the proponents to procure the exclusion of Mrs. Cole from her father's bounty by improper means. But we have already indicated our opinion that most, if not all, of the evidence in question, was properly received, upon grounds which did not involve the existence of a conspiracy; so that, as we think, the charge of the court in respect to the effect to be given to that evidence was even more favorable to the proponents than they were entitled to ask.

The court charged the jury that "if, under all the circumstances of the case, they find that this will was unnatural in its provisions, and inconsistent with the duties and obligations of the testator to the different members of his family, it imposes upon the proponents the duty of giving some reasonable explanation of its unnatural character, or at least of showing that it was not the result of mental defect, obliquity, or perversion." The instruction is not if the jury should regard the will as unnatural, etc., abstractly considered, or on the face of its provisions, but that if they should find it to be so under all the circumstances of the case; that is, upon all the proofs which they accept as establishing the truth of the case. The charge was, in effect, that, if the jury shall find evidence that the will was contrary to the dictates of natural affection, of justice, and of duty, that will be, so far, evidence of mental defect, obliquity, or perversion of mind, which will require evidence to rebut

or explain it. The proposition seems to be entirely sound. It does not necessarily involve any shifting of the burden of proof, but only declares that certain circumstances are presumptive evidence of certain facts. Judge Redfield, in his treatise, goes so far as to say: "But gross inequality in the dispositions of the instrument, where no reason for it is suggested, either in the will or otherwise, may change the burden, and require explanation on the part of those who support the will, to induce the belief that it was the free and deliberate offspring of a rational, self-poised, and clearly-disposing mind." 1 Redf. Wills, 537.

The appellants here question the practice by which, after a motion for a new trial, made by them at the circuit, and denied, a motion was made by the contestants at special term, and granted, for judgment on the verdict of the jury, and thereupon a judgment of the supreme court was entered accordingly. The practice seems not to be entirely settled. See *Martin v. Martin*, *43 N. Y. 9; *In re Hatton*, 22 Abb. N. C. 66; *In re Campbell*, 1 N. Y. Supp. 231. The statute (Code Civil Proc. § 2588) is silent as to the court to which the application for judgment on the verdict shall be made. The section cited does provide, by reference to section 2548, that a motion for a new trial after such verdict may be made either in the surrogate's court, in the court in which the trial was had, or, in case the trial was had at the circuit, in the supreme court, by which, no doubt, is intended the special term; and it would seem to be fairly inferable that the motion for judgment might also be made in either of those courts. But, whatever may be the correct or the better practice, the question cannot be entertained in this case, since the proponents here, as is shown by the order of the special term, expressly submitted to, and conceded, the jurisdiction of that court to hear and determine the motion for judgment and for costs. We find no other question presented by the brief or argument of counsel, and are of the opinion that the judgment and order appealed from should be affirmed, with costs to the respondents payable out of the estate. All concur. So ordered.

SHAW v. BROADBENT.

(Supreme Court, General Term, Fifth Department. October 19, 1889.)

1. JUDGMENT—RES ADJUDICATA.

S. sued B. on account, and attached certain land. The attachment was dissolved, and B. sued on the indemnity bond, alleging loss of sale and depreciation in value caused by the attachment. S. answered that the land was purchased for her by B. under an agreement by which the title was assured to S., and credit for the price was to be given to B., and she asked judgment for specific performance. On the trial evidence of the counter-claim was rejected on the ground that by bringing the action on account, and giving no credit for the price of the land, S. had waived performance of the agreement, and elected to sue on account, and include the consideration for the agreement. B. procured judgment. *Held*, that S. was estopped by the judgment from afterwards suing for specific performance of the contract.

2. SAME.

After the entry of the judgment in the action on the bond, S. was allowed, over the objection of B., to amend her complaint in the action on account so as to give credit for the price of the land, and to give evidence, also objected to, to establish the agreement mentioned above. The referee found that the agreement was made, but the credit, together with others, overcame the claims of S., and judgment was entered dismissing the complaint. *Held*, that the judgment did not estop B. from contending against a specific performance of the agreement, as the question was not at issue, since the complaint admitted the credits; also because, the judgment being in favor of B., he could not have the finding reviewed by appeal.

Appeal from special term, Orleans county.

Action by Sophia Shaw against Miles Broadbent. Judgment was entered for plaintiff, and defendant appeals.

Argued before BARKER, P. J., and DWIGHT and CHILDS, JJ.

J. D. Decker, for appellant. D. C. Barnum, for respondent.

DWIGHT, J. This action, commenced in 1887, was for the specific performance of an alleged oral agreement, made in 1880, to convey a house and lot in the village of Holley. Two questions of estoppel by judgment arise in the case, one claimed by the plaintiff, the other by the defendant. In July, 1883, the plaintiff brought an action against the defendant, on account, for board, services, money lent, and other charges, extending over a series of years, and amounting to more than \$5,000. She gave credit to the defendant for money paid from time to time to the amount of nearly \$3,000. She made no mention of any agreement concerning the house and lot in question, and gave no credit for the purchase price or value of that property. The action was commenced by attachment, which was levied upon certain personal property of the defendant, and upon the house and lot in question. The defendant moved, successfully, to vacate the attachment, and in September, 1883, brought an action against the plaintiff, Mrs. Shaw, and her surety in the undertaking given on procuring the attachment, for the indemnity secured thereby, alleging damages sustained by him by reason of the cloud on the title of the real estate attached, and a consequent loss of sale and depreciation in the value of the property. The answer of the defendant, Mrs. Shaw, averred that the real estate mentioned in the complaint was purchased for her by the plaintiff, Broadbent, (defendant in this action,) under an agreement with her, set out in her answer, which was the same agreement as that alleged in her complaint in this action, viz., an agreement by which title to the house and lot in question was to be assured to the plaintiff herein, and credit for the price and value thereof was to be given to the defendant herein, on the account she had against him; and, in her answer in that action, the defendant, (plaintiff here,) by way of counter-claim, demanded judgment for the same specific performance of such agreement which she demands by her complaint in this action. Issue was joined on the counter-claim by a reply, and that issue, with the others in the action, was tried in February, 1884, by the court, a jury being waived. On the trial, evidence was offered by the defendant, Shaw, in support of her counter-claim, but it was excluded by the court on the ground, specifically stated and entered on the record, viz., that by bringing her action on account against Broadbent, and giving him no credit for the price or value of the house and lot, but alleging and verifying that the whole of such account was due to her after crediting only the payments of cash allowed in her complaint, she had waived performance of the alleged agreement of Broadbent, and elected to sue him for the whole sum of money due to her, which included what, according to the averments of her answer, was the consideration for such agreement. The court thereupon found that none of the averments of the answer were sustained, and directed judgment for the plaintiff for an amount of damages assessed. Judgment was entered accordingly, in February, 1884, from which no appeal was ever taken, and it stands at present as the judgment of this court. That judgment was pleaded by the defendant herein as a bar to this action, but the plea was overruled by the court at special term. The second judgment, upon which a question of estoppel arises in this action, was that which was finally entered in the action on account. After the entry of the judgment in the action on the undertaking, Mrs. Shaw, as plaintiff in the action on account, applied to the court for leave to amend her complaint in that action so far as to give credit to the defendant for the price and value of the house and lot, although she had in the mean time given testimony on the trial of that action, before the referee, on both direct and cross examination, in support of her account as presented by her complaint, without mention of the credit which was now proposed to be given. The application was opposed by the defendant, but it was granted with the proviso that such amendment should not in any way impair the effect upon the rights of the parties of the decision and adjudication made in the action on the undertaking. Thereupon an amended

complaint was served, which set up the alleged agreement for the transfer of the house and lot, and gave the defendant credit for the additional sum of \$1,200, as the price and value of that property. The trial proceeded before the referee, and the plaintiff was permitted, under the objection of the defendant, to give evidence tending to establish the alleged agreement. The report of the referee contained a finding to the effect that the alleged agreement was made substantially as set out in the amended complaint, and that a credit was due to the defendant accordingly. Other findings reduced the amount of the plaintiff's charges to a sum less than the total of the credits allowed by the complaint, and judgment was directed in favor of the defendant, dismissing the complaint with costs. The defendant entered judgment accordingly. The court at special term, in this action, held, in effect, that the existence of the agreement in question was *res adjudicata* by the judgment last described, and that the defendant was estopped thereby to deny it; and, without other evidence of the facts, found the agreement established, and that the plaintiff had performed on her part, and gave judgment to the plaintiff for the relief demanded in her complaint.

We think the court below erred in respect to the effect to be given to both of the judgments in evidence in this action.

1. The judgment last described did not conclude the defendant as to the fact of the agreement in question for several reasons: *First*. Because that fact was not in issue in that action. The action was on an account. The complaint set out many items of alleged indebtedness, and admitted certain items of credit. The defendant was not called upon to admit or deny any of those credits. They were established by the admission of the complaint, and the source from which they sprang, or the facts upon which they were based, or the reasons for which they were admitted, were immaterial, and not issuable facts in the action. For that reason the general denial of the answer (except as thereafter admitted) did not raise an issue upon any allegations of the character referred to. All the evidence offered by the plaintiff to substantiate those allegations of her amended complaint was objected to by the defendant as immaterial, and it is not apparent why the ruling by which it was at first excluded was not adhered to. It was clearly immaterial as not relating to any issue in the action. The statement by counsel for the plaintiff as to the object of the evidence, which seems to have induced the change in the ruling of the referee, is unintelligible as it is given in the record; but no statement of counsel could have changed the nature of the issues in the action, or made evidence admissible which related only to a non-issuable allegation of the complaint. *Second*. The finding in the former action did not conclude the defendant in this action, because, though the finding was adverse to him, he could not procure it to be reviewed on appeal, because the judgment was in his favor, and there was nothing from which he could appeal. *Canhapa v. Parke*, 46 Hun, 306.

2. On the other hand, we are unable to see why the judgment in the action on the attachment undertaking was not a prior adjudication of the issues in this action, and why the defendant's plea in bar ought not to have been sustained. The answer in that action contained substantially the same averments in respect to the agreement in question and its part performance as the complaint in this action, and the affirmative relief asked for in that answer is the same as in this complaint, viz., judgment for the specific performance of such agreement by the execution and delivery of a proper conveyance of the premises in question. Issue was joined upon this counter-claim by a reply, and the issue was tried, so far as that evidence was offered, in support of the allegations of the answer in that regard, and was excluded by a ruling which involved the merits of the defendant's cause of action and counter-claim. It is no answer to the plea in bar to say that the counter-claim was one which could not properly have been pleaded in the action on the under-

taking. It was well pleaded unless it was objected to. The facts alleged as constituting the counter-claim did make out a cause of action which it was competent for the parties to try in that action if all consented to do so; and there is nothing in the record to show that any objection was made. There was no demurrer to the answer, and the evidence offered in support of it was not objected to on the ground that the defense or counter-claim was not properly interposed in that action, but on the ground that the record evidence in the case showed that it had been previously waived and relinquished by the defendant. In point of fact, the defendant's counter-claim was tried in that action without objection, and it was held that she could not recover thereupon because she had elected another remedy in a previous action, which, as the court held, involved the waiver and abandonment of her right to enforce the agreement upon which that cause of action was based. We see no respect in which this falls short of being a prior adjudication of the same issues as those presented by the plaintiff here. It was between the same parties, and must be a bar to the present action. Upon both or either of the grounds considered we think this judgment must be reversed, and a new trial granted.

Judgment reversed, and new trial granted, with costs to appellant, to abide the final award of costs. All concur.

JEMMERSON v. KENNEDY.

(Supreme Court, General Term, Fifth Department. October 19, 1889.)

1. PLEADING—WAIVER OF OBJECTIONS.

Under Code Civil Proc. N. Y. § 499, an objection that plaintiff has no legal capacity to sue must be pleaded either by demurrer or answer.

2. INDIANS—RIGHT TO SUE.

Laws N. Y. 1845, c. 150, § 2, provides for the appointment by the governor and senate of an attorney for the Seneca Nation of Indians, who, among other duties, should "prosecute and maintain all actions, suits, and proceedings for them, or any of them, as he might find necessary or proper." Laws 1843, c. 87, § 4, provides that any Indian who is a freeholder shall be subject to the civil jurisdiction of the courts in the same manner, and to the same extent, as a citizen thereof. Laws 1847, c. 365, § 14, provides that any Indian of the Seneca Nation whose claim exceeds the jurisdiction of the "peace-makers" of the nation, established at \$100 by section 8, may sue and be sued "in the same manner, and with like effect, as between white citizens." *Held*, that a Seneca Indian could sue, either in person or by his chosen attorney, for a claim which the jury found to exceed \$100, and was not bound to employ the attorney appointed for the nation.

Appeal from circuit court, Erie county.

Argued before BARKER, P. J., and DWIGHT and CHILDS, JJ.

F. J. Blackman, for appellant. *C. W. Sickmon*, for respondent.

DWIGHT, J. This was an action for assault and battery. The parties were both members of the Seneca Nation of Indians. The jury estimated the damages of the plaintiff at the sum of \$325. The only exception in the record is that taken by the defendant to the denial of his motion for a nonsuit, which was made on the sole ground that the plaintiff had brought his action by attorneys other than the "attorneys for the Seneca Nation of Indians." There are several reasons why the ruling excepted to was correct.

1. The defendant's objection was, in effect, that the plaintiff had not legal capacity to sue; for, unless he was under some manner or measure of legal disability as a suitor, he might bring his action either in person or by the attorney of his choice. The objection was that the plaintiff had not legal capacity to sue, as he had done in this action; that the action, to be maintained, must be brought by the attorney for the Seneca Nation. But this objection is one which must be pleaded either by demurrer or answer, or it is waived. Code Civil Proc. § 499. In this case the objection could not have been taken by

demurrer, because it did not appear on the face of the complaint, but it might have been taken by answer; and, not having been so taken, it was waived, and it was therefore properly overruled.

2. The objection was founded upon a provision of the act of 1845, (Laws 1845, c. 150, § 2,) which provides for the appointment by the governor and senate of "an attorney for the Seneca Nation of Indians," and prescribes his powers and duties as follows: "He shall from time to time advise the said Indians respecting controversies between themselves, and between them, or any of them, and any other person. He shall prosecute and maintain all such actions, suits, and proceedings for them, or any of them, as he may find necessary and proper." The question is whether this provision is exclusive, or whether other actions, which the attorney for the nation does not find "necessary and proper" to bring, may be brought by the Indian himself in person, or by such attorney as he may choose. In the early case of *Jackson v. Reynolds*, 14 Johns. 335, a similar provision of statute in respect to the Brothertown, Oneida, and Stockbridge Indians (Laws 1813, c. 92, § 27) was held to be exclusive of the right of the Indian to sue, except by the attorney of his tribe; but the reasons assigned for the holding are not applicable to the present *status* of the Indians, especially of the Seneca Nation, under legislation, long subsequent to the date of that decision. That decision we find to have been based upon an assumed condition of tutelage and dependence of the tribes in question which rendered them incapable of alienating land or making contracts. The court, by SPENCER, J., says: "The power of the legislature to restrain these Indians from suing or being defended except exclusively by the attorney appointed for them is as unquestionable as is the right to prevent them from alienating their lands, or declaring them disqualified from contracting. Indeed, assuming that they are incapacitated, from their mental debasement, to sell their individual lands, or to contract, it would seem essentially just and proper to provide for them a person learned in the law to manage their suits," etc.

Without stopping to inquire whether the legal *status* of the Indians was at that time one of such complete disability as that indicated by the language quoted, it is apparent that such is not the case at present. Much legislation has intervened, the object of which has been to elevate the character and improve the condition of these wards of the state by encouraging in them a spirit of self-reliance, and cultivating habits of industry, thrift, and providence. See opinion of BARKER, P. J., in *Crouse v. Railroad Co.*, 2 N. Y. Supp. 453. Of these legislative acts two of the most important are those of 1843 (chapter 87) and 1847, (chapter 365,) which illustrate the progressive character of our legislation on this subject, and the great advance already made upon the conditions existing at the date of the decision in *Jackson v. Reynolds*. Section 4 of the act of 1843 (*supra*) provides: "Any native Indian may, after the passage of this act, purchase, take, hold, and convey lands and real estate in this state in the same manner as a citizen; and, whenever he shall have become a freeholder to the value of \$100, he shall be liable on contracts, and subject to taxation and to the civil jurisdiction of the courts of law and equity of this state, in the same manner, and to the same extent, as a citizen thereof;" while the act of 1847 (section 14) removes the last restriction upon the right of those Indians with whom we are concerned to sue each other in the courts of the state on all demands and rights of action exceeding the jurisdiction of the peace-makers of the nation, which, by the same statute, (section 8,) was fixed at the sum of \$100. The text of section 14 is as follows: "For any demand or right of action which any Indian of the said nation may have against any other Indian, and which, according to the provisions of this act, exceeds the amount which may be awarded by the peace-makers, actions may be maintained and prosecuted in the courts of this state, in the same manner, and with the like effect, as between white citizens." There can, it would seem, be no

question of the effect of this provision upon the rights of the Seneca Indians in the courts of this state. The enactment was subsequent to that which provided for the appointment of an attorney for the nation, (act of 1845, *supra*.) The last-mentioned provision, if not more radically affected, must at least be rendered subordinate and auxiliary, merely, to that quoted from the act of 1847.

We conclude that the right of the plaintiff to sue the defendant in this action for a claim, which, on the verdict of the jury was found to be in excess of \$100, either in person or by his chosen attorney, was not subject to question; and accordingly that, even had the defendant's objection been pleaded, it could not have been sustained.

The judgment should be affirmed. All concur. Judgment affirmed.

In re LOOK.

(Supreme Court, General Term, Fifth Department. October 19, 1889.)

1. WILLS—EXECUTION.

A will was subscribed by testatrix in the presence of one of the attesting witnesses, and was declared by her in the presence of both of them to be her last will and testament. The two witnesses subscribed it as such at her request. Testatrix's signature was plainly visible to the attesting witnesses on the face of the will. *Held*, a sufficient compliance with 2 Rev. St. N. Y. p. 63, § 40, requiring the subscription to be made by testator in the presence of each of the attesting witnesses, or to be acknowledged by him to have been so made to each of them, and that there shall be at least two attesting witnesses, each of whom shall sign, etc.

2. CHARITIES—VALIDITY OF BEQUEST.

A bequest "to the American Bible Society, * * * to be used by said society for the promulgation of the Holy Bible," is not void as a gift in trust, without a definite or ascertainable beneficiary capable of enforcing the trust, since the gift was limited to the precise use for which the society was incorporated. *Laws N. Y. 1841, c. 68.*

Appeal from surrogate's court, Chautauqua county.

Argued before BARKER, P. J., and DWIGHT and MACOMBER, JJ.

H. Aplington, for contestants. *Sherman S. Rogers*, for proponents.

DWIGHT, J. The only requirement of the statute which the appellants contend was not complied with in the execution and attestation of this will is that of the acknowledgment of the subscription of the testatrix to both of the attesting witnesses. 2 Rev. St. p. 63, § 40. The will was subscribed by the testatrix in the presence of one of the attesting witnesses, was declared by the testatrix in presence of both witnesses to be her last will and testament, and the two witnesses subscribed it as such, at her request. We think the case is fairly within the authority of the decision in *Re Higgins*, 94 N. Y. 554. In that case the will was executed in the presence of neither of the witnesses, but was exhibited to both for their attestation. One of them, Stoker, testified that the signature of the testator was specifically acknowledged to both; the other, Jones, that the acknowledgment was of the instrument as the testator's last will and testament. The court, after remarking upon the effect of Stoker's testimony, said: "Aside from what has been already remarked, we think that the testimony of Jones, who swore positively that the testator acknowledged the will to be his last will and testament, was an acknowledgment of his signature, and sufficient, with the other evidence given by him, to establish a due execution of the will. The signature was plainly visible upon the instrument itself; and the testator having requested Jones and Stoker to subscribe their names to it as witnesses, and he having acknowledged the same to be his last will and testament, the statute was fully complied with in this respect, within the decisions of this court." To the same effect was the much earlier case of *Baskin v. Baskin*, 36 N. Y. 416, which was curiously like this case in the details of its facts; and the same

doctrine has been applied in several subsequent cases. See *In re Phillips*, 98 N. Y. 267; *In re Austin*, 45 Hun, 1; *In re Trenor*, 4 N. Y. Supp. 466. In the *Case of Higgins, supra*, it will be observed the court refer to the fact, as important, that the signature was plainly visible to the attesting witnesses on the face of the will; and such was the fact here. It was directly over, and less than one inch removed from, that of Mrs. Clarke, the second witness. The referee finds that Mrs. Clarke saw the signature of the testatrix. Mrs. Clarke says she did not. She had left her glasses at home, and, for the purpose of signing her name, she borrowed the glasses of the other witness, Dr. Chase: She says: "I could not see very well with the doctor's glasses, and did not see the signature to the will when I signed it,—did not see it with those glasses." And yet she saw sufficiently well to write her own name, in unusually small characters, and very carefully on the line which was pointed out for her signature. The doctor's glasses, therefore, if not precisely fitted to her eyes, did not have the effect to intercept her sight, and the signature of the testatrix was within the field of her vision. As a proposition in optics, then, it may be said that she saw the signature. To see is to receive a visual impression of an object upon the retina of the eye. That impression must have been made upon the eye of the witness; because there was the object and the eye and the rays of light passing, unobstructed, from the one to the other. That impression may not have been recognized by the consciousness, or it may not have been retained in the memory, but the signature was seen in the sense of having been exhibited to the sight of the witness; and this seems to be all that the statute requires to be done in connection with the acknowledgment of the signature by the testator. It is to be observed that the first three subdivisions of the statute prescribe certain formalities to be observed by the person executing the will, and make no requirement of the witnesses. These formalities are (1) a subscription by the testator; (2) made or acknowledged in presence of witnesses; (3) a declaration that the instrument is his last will and testament. It would seem, on principle,—and we think the authorities cited support the proposition,—that, these formalities being observed, the valid execution of the will does not depend upon the correctness of vision, or the degree of attention of the witness, any more than upon the retentiveness of his memory.

It is urged that this case is distinguished from those cited by the fact that in each of the latter there was an attestation clause, and here there was none. But the statute does not mention or require an attestation clause. The use of such an appendage to a will has grown up as a convenient means of refreshing the memory of the attesting witnesses in respect to the formalities actually observed in the execution and publication of the will to which it is attached. We know of no authority for the position that such a memorandum of itself furnishes any evidence of the facts; and, if it creates any presumption in aid of the testimony of the witnesses, the cases cited do not rest upon the effect of any such evidence or presumption. The case of *Will of Mackey*, 110 N. Y. 611, 18 N. E. Rep. 433, relied upon by the appellants, is distinguished from this in the precise respect here disclosed, viz., by the fact that in that case the signature of the testator was never exhibited to the witnesses, but (if it existed at that time) was concealed from their view; and the court say in that case: "There would have been a formal execution of the will, in compliance with the statute, if the witnesses had at the time seen the signature of the testator to the will;" although in that case, as in this, there was no specific acknowledgment of the signature by the testator, but only that the paper was his will. So in the case of *In re Gunstan, Blake v. Blake*, L. R. 7 Prob. Div. 102, the present master of the rolls said: "When the signature is there, and they [the witnesses] see, or have the opportunity of seeing, it, then, if the testator says, 'This is my will,' or words to that effect, that is sufficient acknowledgment, although he does not say, 'This is my sig-

nature." We think the surrogate was right, under the authorities, in holding that the evidence established a valid execution of the will in question.

The only question remaining relates to the validity of a bequest in the will to the American Bible Society. The bequest was in the following terms: "*Third.* After the payment of all my just debts and funeral expenses, * * * I give and bequeath all the residue of my property to the American Bible Society, * * * to be used by said society for the promulgation of the Holy Bible." We are asked to hold that this bequest was void as being a gift in trust, without a definite or ascertainable beneficiary capable of enforcing the trust. The answer to this proposition is that the gift was limited by the donor only to the precise use for which the donee was incorporated. Laws 1841, c. 68. Such a limitation does not invalidate the gift. *Wetmore v. Parker*, 52 N. Y. 450, 458. The decree of the surrogate should be affirmed. All concur. Decree affirmed, with costs to the respondent to be paid out of the estate.

SMITH v. ATHERTON *et al.*

(*Supreme Court, General Term, Fifth Department. October 19, 1889.*)

1. WILLS—LEGACIES—IMPLIED CHARGE ON LAND SPECIFICALLY DEVISED.

A general legacy is not charged on land devised specifically by a former clause of the will, simply from the fact that the devisee is also made executor and legatee of the residuum of the estate (which entirely consists of personalty) after all claims against the estate are paid.

2. SAME.

The fact that the devisee was also appointed executor, and accepted the trust, did not make him personally liable for the legacy, nor create a charge on the devised land, as he was not directed personally or as executor to pay the legacy, which was simply given to the legatee generally, with no direction to any one to pay it.

Appeal from judgment on report of referee.

Argued before BARKER, P. J., and DWIGHT and MACOMBER, JJ.

Adelbert Moot, for appellants. *G. W. Harding*, for respondent.

BARKER, P. J. The question presented by this case is whether the bequest of \$600 to the plaintiff, given by the fourth clause of the last will and testament of William Atherton, was made a charge upon the real estate specifically devised by a previous clause of the same will to the appellant, John Atherton. The appellant was the only son of the testator, and the respondent was his granddaughter, who had during many years of her infancy resided with him as a member of his family. The testator at the time of making his will, and at the time of his death, resided on the premises, a farm containing about 75 acres, and he owned no other real estate. The wife of the testator survived him, and she has a right of dower in the premises. The personal property which came to the hands of the executor was sufficient in value to pay all the testator's debts, but not to pay off the legacies in full. By the first clause of the will, the testator gave to his wife during her natural life the use of the house on the premises, and the furniture therein, "together with everything necessary to make her comfortable." By the second clause he devised to his son, the appellant, the fee of the premises in question. By the third, fifth, and sixth clauses of the will he made small bequests to his children and grandchildren; and by the fourth clause he gave to the respondent the legacy in question, in language as follows: "*Fourth.* I give and bequeath to my grandchild Anna Maria Brady \$600, to be paid to her at her arriving at the age of twenty-one years, or sooner if she shall marry, and want it before arriving at that age. The interest on the above to be paid to her yearly. I also give to her the balance of my household furniture after my wife, Elenor Atherton, is through with the same." The residuary clause is as follows: "*Seventh.* I give and bequeath to my son John Atherton, before mentioned, the balance

of my personal property after his paying all just claims and demands against said estate; and I hereby appoint him to be sole executor to this, my last will and testament, hereby revoking all former wills by me made." This will was executed on the 3d day of May, in the year 1869. On the 15th day of September, 1871, the testator added a codicil, in which he recited that he had paid off a legacy of \$600 to his daughter Lydia, and for that reason he revoked the same; and that another of the legatees had died, and for that reason he revoked that bequest. He then, in some respects, changed the character of the bequest to his daughter the plaintiff, giving her, however, a legacy of \$600, in the precise language in which that sum was given by the fourth clause of the original will, which has been quoted; and then made some special bequests of household furniture, which it is unnecessary to mention. The appellant caused the will to be probated, and received letters testamentary, and entered upon the discharge of his duties as executor, and accepted the devise of the real estate.

The rule is well established that the personal estate of the testator is the primary fund for the payment of general legacies, and it is the only fund out of which the same can be paid, unless express direction or a clear intention otherwise is found in, or may be gathered from, the will, in connection with surrounding circumstances. *Lupton v. Lupton*, 2 Johns. Ch. 614; *Bevan v. Cooper*, 72 N. Y. 317. Following this rule as a guide, we will inquire if the terms of the will, and the extrinsic facts and circumstances connected with the case, indicate an intention on the part of the testator that the legacy to the plaintiff should be paid at all events, and, if the personal property was insufficient for that purpose, then that the same should be a charge on the real estate devised to his son, the appellant. I am unable to discover an intention on the part of the testator, from the terms of the will, that it was his purpose to diminish the value of the gift of the fee of the land to his son by the payment of the whole or any part of the legacy in question. Nor do the extraneous facts and circumstances connected with the provisions of the will produce on my mind the contrary impression. It is to be observed that the devise of the land is specific, and precedes in the order of the gifts all the legacies except the provisions for the support and maintenance of his widow. This is a controlling circumstance, and distinguishes the case from those which have been cited in support of the respondent's contention. It is not sufficient that the debts or legacies are directed to be paid, to make them a charge upon the real estate devised to other persons. That alone does not create a charge; but they must be directed to be first or previously paid, or the devise declared to be made after they are paid. There is no such language here, nor is there any in the residuary clause which supports the respondent's argument. It may be asserted that it has never been decided in any of the courts of this state, where there has been a specific devise of real estate, that general legacies have been made a charge thereon, unless by the will the devisee has been directed to pay the same, or the devise was made upon the condition that the legacy should be paid. When the devise of land is specific, it is in the nature of a grant, and the devisee takes an absolute and unconditional title, unless there is something in the other provisions of the instrument containing the devise indicating a contrary intention on the part of the deviser. In such a case extraneous facts and circumstances alone cannot be resorted to for the purpose of creating a charge on the premises devised for the purpose of paying off legacies. The nature and extent of the gift or devise must be indicated by the terms of the instrument. If these propositions are accepted as true, there is nothing upon which an argument can be based in support of the plaintiff's position. The cases cited by the learned counsel for the plaintiff in support of the judgment involved more than is found in this will; for in those cases there is a direction that the legacies be first or previously paid, or the devise is to a person with directions that he pay the

legacy. It is insufficient to create a charge where the direction simply is that the legacy be paid. The cases in this state settle and affirm this proposition: that general provisions in a will giving legacies, followed by the usual residuary clause devising real estate, are alone insufficient to charge the legacies on the land devised. *Brill v. Wright*, 112 N. Y. 135, 19 N. E. Rep. 628. As the legacy in question was general, and the devise was specific, the proposition stated determines that the legacy cannot be held a charge on the lands devised by reason of anything appearing on the face of the will. The case last cited also states the further proposition that where the legacy is general, and the devise is by the usual residuary clause, such language will justify such charge if it is made to appear by extraneous circumstances, such as may be under the rules of law resorted to to aid in the interpretation of written instruments, that it was the testator's intention that the legacy should be charged on the land. But this proposition, taken as a whole, does not permit the respondent to found an argument thereon in support of the judgment, for the devise of the land is not contained in the residuary clause of the will. The counsel for the respondent does not contend against the propositions just stated, but relies mainly upon the point that the devise was upon the condition that the devisee pay the general legacies. The only provision in the will upon which this point can rest for support is found in the residuary clause. There, the gift to the devisee was the balance of the testator's personal property after payment of "all just claims and demands against his estate." This provision has no relation whatever to the real estate previously devised, for all he owned of that kind of property he had given by a previous clause in the will to his son, and the bequest contained in the last and residuary clause related wholly to personal property.

It is also contended by the respondent that, as the devisee was appointed executor of the will, and he accepted the devise, he became personally liable to pay the legacy, and the same may be made an equitable charge upon the land. He relies upon this proposition, as stated in *Brown v. Knapp*, 79 N. Y. 142: "That, when a legacy is given and is directed to be paid by the person to whom real estate is devised, such real estate is charged with the payment of the legacy; and the rule is the same when the legacy is directed to be paid by the executor, who is the devisee of real estate." In the case before us the legacy is not directed to be paid by the devisee John Atherton, nor is he as executor personally required to pay the same. The legacy is a common, pecuniary one; for the language of the bequest is: "I give and bequeath to my grandchild Anna Maria Brady \$600, to be paid to her on her arriving at the age of 21 years, or sooner if she shall marry, and want it before coming of that age. The interest on the above sum to be paid to her yearly." This is nothing but a simple gift, fixing the time of payment, and that the same bear interest until paid. If the direction had been that the legacy be paid by John Atherton, or that the executor named in the will should pay the same, then the case would be brought within the rule as before stated; for by the use of the word "executor" it would indicate that the testator intended and referred to the devisee, as thereafter named, as the executor of the will. To make the devisee personally liable, or to charge the legacy upon the land devised, the language must be clear and certain, containing a personal direction or request that the devisee pay the legacies; otherwise the devisee of real estate would be made personally liable for the payment of common or general legacies in every instance where he accepted the land devised. An examination of the cases will show, as we think, that in every instance where the proposition has been held to apply, and the lands charged with the legacy, the devisee was expressly and personally required or directed to pay the legacy. In *Harris v. Fly*, 7 Paige, 421, the testator devised to his son in fee a tract of land, and this was followed by a bequest to his daughters of pecuniary legacies to be paid by his son, the devisee of the real estate; and it was held that the leg-

acies were a charge upon the premises. The chancellor stated the rule to be that the personal estate is the primary fund for the payment of debts and legacies. "If the testator, therefore, gives a legacy, without specifying who shall pay it, or out of what fund it shall be paid, the legal presumption is that he intended it should be paid out of his personal estate only; and if that is not sufficient the legacy fails. So, if he directs his executors to pay a legacy without giving to them any other fund than the personal estate out of which they can pay it. But where the real estate is devised to the person who, by the will, is directed to pay the legacy, it has frequently been decided that such legacy is an equitable charge upon the real estate so devised, although the devisee is also the executor, or is the residuary legatee of the personal estate, unless there is something in the will itself to indicate a contrary intention on the part of the testator. Thus, in the case of *Alcock v. Sparhawk*, 2 Vern. 228, where the testator devised his real estate to his brother, and then gave a legacy of £200 to the complainant, to be paid by his executor within five years, and appointed the devisee the sole executor of his will, desiring him to see it performed, it was held that the real estate devised to the brother was charged with the payment of the legacy, the personal estate proving insufficient for that purpose." In *Brown v. Knapp*, *supra*, the bequest was: "I give and devise and bequeath to my grandson, Samuel Herbert Brown, the sum of \$3,000, and direct my executor hereinafter named to pay to him the said sum when he shall attain the age of 21 years;" and the residuary clause of the will was as follows: "The rest, residue, and remainder of my real and personal estate I give, devise, and bequeath to my son William S. Brown, and I constitute and appoint him sole executor of this, my will;" and it was held that the devisee of the real estate was personally liable for the payment of the legacies to the grandson, and that the same would become a charge in equity upon the real estate devised.

From the language used in the will, it cannot be fairly held that the devise was conditional, or any exception expressed that the devisee should make payment of any of the legacies, or that he should, as executor, pay the same, except from the personalty. The testator was a small farmer, and his personal estate was not large; and it may be assumed that when he made his will, and added thereto the codicil, he was familiar with the condition of his personal property, and that he intended that all the legacies should be paid in full. There is no presumption that when the will was made his personal estate was not adequate for that purpose. If it was not, and the fact was material, the burden of establishing it was upon the legatee, who is seeking to charge the real estate devised to another with the payment of the legacy. There is much evidence tending to show that, as a matter of fact, the testator believed and acted upon the assumption that his personal property would pay off the legacies; and it has not been found as a fact that the personal property was insufficient to pay the debts and legacies at the time of the making of the will, and also of the codicil. Between the time of the making of the will and the date of the codicil the testator had paid off the legacy of \$600 to his daughter Lydia, and by his codicil revoked it. The referee has found that the personal property which came to the hands of the executor amounted to \$256 more than the debts and funeral expenses, and the costs and charges of administering the estate; so that it appears that at the time of the death of the testator there was enough of the personal property to pay debts and legacies in full within \$444, which is a sum so small that it is fair to presume that the testator believed when he made his will, and also at the time he added the codicil, that his personal property would pay the legacies in full, and that his son would enjoy the real estate free from the charge to pay the legacies, or any part thereof, as the fact is not found that at the time of making of the will the personal estate was not ample to pay debts and legacies in full. *Brill v. Wright*, 112 N. Y. 136, 19 N. E. Rep. 628. Judgment should be reversed,

and new trial granted before another referee, with costs to the appellant to abide the final award of costs.

Nota bene. Examine *Olmstead v. Brush*, 27 Conn. 530; *Lypet v. Carter*, 1 Ves. Sr. 500; and cases cited by Chancellor WALWORTH in *Harris v. Fly*, 7 Page, 425.

WILLIS v. MORSE.

(Supreme Court, General Term, Fifth Department. October 19, 1899.)

1. PLEADING—COMPLAINT—GOODS SOLD AND DELIVERED—CONTRACT OR TORT.

The complaint in the first count alleged that plaintiff contracted with defendant to sell and deliver goods for the agreed price of \$165.50, delivery and payment to be postponed to a certain date; and that on said date defendant refused to pay plaintiff as agreed for the aforesaid property; whereupon said plaintiff demanded his pay therefor as agreed, and also demanded of the said defendant his aforesaid property, which the said defendant then and there claimed to have in his possession, all of which said defendant refused. He refused to pay for the same as agreed, and refused to let said plaintiff have said property, the same being this plaintiff's, and has ever since wrongfully detained the same and converted it to his own use, all to the plaintiff's damage of \$125. The second count was for the conversion of other personal property, and, as alleged, to plaintiff's damage of \$25. The third count was for fraud and deceit, by means of which plaintiff was induced to deliver the property described in the first count to defendant, and by that means he gained possession of the property. Plaintiff gave evidence of the sale and delivery of the property, the terms and price, and that the same remained unpaid. On defendant's motion the court struck out all parts alleging fraud, and stated that, to save all defendant's rights, he would hold that plaintiff could recover only on a contract of sale. *Held*, that the complaint as amended stated a cause of action for goods sold and delivered.

2. SAME—ANSWER—AMENDMENT—COUNTER-CLAIM.

An application to amend an answer by setting up a counter-claim, which is not accompanied by any proof that defendant had been misled, and that he would suffer an injury if the application was denied, may be properly refused in the discretion of the trial court, and such refusal cannot be reviewed on appeal.

Appeal from Chautauqua county court.

Action by Henry W. Willis against Harvey Morse, for goods sold and delivered. The action was originally commenced in justice's court, and a retrial was had in the county court upon the pleadings as returned by the justice. In the first count the plaintiff alleges that he entered into an executory contract with the defendant by which he agreed to sell and deliver to him articles of personal property at the fixed and agreed sum of \$165.50; that delivery and payment was postponed until the 21st day of February, on which day the property was to be delivered and paid for. Then follows this averment: "That the said defendant, on the said 21st day of February, and at the time agreed upon as aforesaid, refused to pay this plaintiff as agreed for the aforesaid property. Whereupon said plaintiff demanded his pay therefor as agreed, and also demanded of the said defendant his aforesaid property which the said defendant then and there claimed to have in his possession, all of which said defendant refused. He refused to pay for the same as agreed, and refused to let said plaintiff have said property, the same being this plaintiff's, and has ever since wrongfully detained the same and converted it to his own use, all to the plaintiff's damage of \$125." The second count was for the conversion of other articles of personal property, and, as alleged, to the plaintiff's damage of \$25. The third count is for fraud and deceit, by means of which the plaintiff was induced to deliver the property described in the first count to the defendant, and by that means he gained possession of the property. This count specifically alleges that he did deliver the property to the defendant. On the trial the plaintiff gave evidence of the sale and delivery of the property described in the first count, and the terms and the price to be paid therefor, and that the same remained unpaid. The defendant did not offer any proof. Verdict for plaintiff. Defendant appeals.

Argued before BARKER, P. J., and DWIGHT and MACOMBER, JJ.

F. W. Stevens, for appellant. *Arthur C. Wade*, for respondent.

BARKER, P. J. For reasons which I will briefly state I think this appeal cannot stand. The appellant makes but one point, and that is that the cause of action set out in the complaint was not proved, and the plaintiff should have been nonsuited. He contends that the cause of action proved was upon contract, and the one alleged in the complaint was in tort. It is a well-settled rule, as stated by the learned counsel for the appellant, that the character of the action must be determined by the complaint; and also, if the same states a cause of action *ex delicto*, it is not competent for the court on the trial to convert it into one *ex contractu*. *Neudecker v. Kohlberg*, 81 N. Y. 296. It may be conceded, for the purposes of this appeal, that the complaint, before it was amended on the trial, stated a cause of action *ex delicto* only. I think, however, that the amendments which were allowed on the trial, on the motion of the appellant, permitted a recovery for a cause of action for goods sold and delivered. The plaintiff was permitted to prove, without objection, the sale and delivery of the goods described in the first count at a fixed and agreed price to be paid therefor by the defendant, and he then rested his case. The defendant offered no proofs. He thereupon moved to strike out the count alleging fraud, which was granted without objection being interposed by the plaintiff. The court, upon its own motion, ordered that all parts of the complaint alleging fraud be struck out; directing the clerk to make an entry in the minutes to that effect, which was done. To this ruling no exception was taken by either party. The defendant's counsel then moved to strike out the second count, stating the grounds therefor, and the court in reply to the motion stated that, in order to save all the defendant's rights, he would hold that the plaintiff could only recover upon a contract of sale, to which the plaintiff assented, and the defendant took no exception. The counsel for the defendant then moved that the complaint be stricken out so far as it purports to state a cause of action upon contract, on the ground that it does not state facts sufficient to constitute a cause of action. This motion was denied, and the defendant excepted. The motion in this respect should not have prevailed, however defective the complaint may have been in the respect mentioned. If the motion had been granted, the complaint would not have contained any averment whatever indicating a cause of action either in tort or upon contract. The defendant's counsel then made the further motion that the plaintiff be nonsuited, on the ground that no proof had been given in support of the allegations set forth in the complaint. This was denied, and the defendant excepted. This ruling presents the simple question whether the complaint, after the amendments which had been allowed, stated in form and substance a cause of action for goods sold and delivered. We are of the opinion that it does. It is not distinctly stated in the cause of action first set forth in the complaint before any amendments were allowed that the property agreed to be sold and delivered to the defendant under the executory contract had in fact been delivered to him, but it is inferentially so alleged; for the right to payment depended upon a delivery, or an offer to deliver. In the subsequent parts of the original complaint a delivery was distinctly averred, and the same remained therein when the proofs were given without any objection being interposed by the defendant. This case was submitted to the jury with a statement to them by the learned county judge that it was conceded by the parties that the property contracted to be sold had been delivered to and received by the defendant, and, if they believed the plaintiff's evidence, he was entitled to recover. To this charge no exception was taken. The cause seems to have been tried upon the merits, and, in view of the amendments made to the pleadings on the trial, on the defendant's motion, the plaintiff was entitled to recover upon the executory contract of sale, it appearing that the goods had been delivered as agreed, and the price therefor never paid. Such parts of

the original complaint which remained in what is termed the first count after the amendments, and which charged that the defendant wrongfully detained the property, and converted the same to his own use, may be treated as surplusage. *Conaughty v. Nichols*, 42 N. Y. 83. The amendments struck from the complaint every distinct averment of wrong or fraud charged upon the defendant, and the remaining averments were such that it may be fairly held to state a cause of action based upon contract.

The refusal to allow an amendment to the answer setting up a counter-claim was not accompanied by proof in any form that the defendant had been misled, and that he would suffer an injury if the application was denied. This ruling did not deprive the defendant of any strict right, and cannot, therefore, be reviewed in this court if we were of the opinion that the motion should have been granted, as it rested in the discretion of the court below. On an appeal from a judgment rendered in a county court we cannot reverse the same except for legal error. *Thurber v. Townsend*, 22 N. Y. 517; *Reilley v. Canal Co.*, 102 N. Y. 383, 7 N. E. Rep. 427; *Stebbins v. Cowles*, 30 Hun. 523; *Wapel v. Wiles*, 24 N. Y. 635; *Osborn v. Nelson*, 59 Barb. 375. Judgment and order affirmed. All concur.

BABBAGE v. POWERS.

(Supreme Court, General Term, Fifth Department. October 19, 1889.)

1. MUNICIPAL CORPORATIONS—DEFECTIVE SIDEWALK—LIABILITY OF ABUTTING OWNER.
Where an excavation under a sidewalk in a city is made by the owner of the abutting premises, and the excavation is covered with flag-stones, with the consent of the municipal authorities, the owner is not guilty of maintaining a nuisance so long as the spaces are securely covered.

2. LANDLORD AND TENANT—DEFECTIVE SIDEWALK—LIABILITY OF LANDLORD.
An abutting owner who has leased the premises to a tenant while the sidewalk was safe, and long before it became out of repair, and who does not undertake, by the terms of the lease, to keep the sidewalk in repair, is not liable for injuries caused to a pedestrian by the defective condition of the sidewalk.

Motion for new trial on exceptions.

Action by Edwin W. Babbage against Daniel W. Powers to recover damages for personal injuries sustained by the plaintiff, by reason of the sidewalk in front of premises owned by the defendant being in an unsafe and insecure condition. At the time of the accident, and for a long time prior thereto, the premises were in the actual possession of one Davis Harris, a tenant, under a lease from the owner. Under the sidewalk there was an excavation connected with the cellar under the building, the same being covered with flag-stones, one of which became displaced or broken, and when the plaintiff stepped through he fell from the sidewalk into the excavation, and broke his leg. The court directed a nonsuit.

Argued before BARKER, P. J., and DWIGHT, J.

Theodore Bucon, for plaintiff. Albert H. Harris, for defendant.

BARKER, P. J. On the undisputed evidence, two facts were established on the trial, which, in law, exempt the defendant from liability for the injuries which the plaintiff sustained, and justified the ruling, granting a nonsuit, although the plaintiff was the owner of the premises on which the accident occurred. The first is that the excavation under the sidewalk was made and covered with flag-stones, with the consent of the municipal authorities of the city of Rochester. The evidence bearing on this question was of such a character, and so conclusive, that there was nothing for the consideration of the jury. The store in front of which the injury happened was located in the central part of the city, and on one of the principal business streets, and in constant use by the public. The building was constructed in 1876, and at that time the area under the pavement was excavated to the depth of the cellar,

and extended to the curb, and was covered with flag-stones supported on iron girders and firm stone walls. In the walk there was an opening for the purpose of elevating and lowering goods from and to the cellar. Prior to the building of the store there was a stone sidewalk which had its foundation on the solid earth. The year the building was erected the public streets and sidewalks were in charge of an executive board, consisting of several members, who possessed the powers of highway commissioners, and they kept a record of their doings, in which entries were made by the clerk of the board. For some time previous to the erection of this building it was a common practice in the business part of the city to make excavations under the sidewalks, and to cover the same with flag-stones, with openings therein as means of access to the excavations, and to cellars under the stores. The clerk of the board, who was also during the time the store was being erected a member of the executive board, knew of the excavation under the sidewalk, and the manner in which it was covered; and one of the members of the board erected the building under a contract with the owner. There was no entry made in the records kept by the executive board showing that a permit was given the owner to make the excavation, nor was there any proof of a consent in writing that the same might be done. It was a custom of the members of the board to go about the city and inspect the condition of the streets and sidewalks. There is no proof that the owner or occupant of the premises was requested to fill up and discontinue the area; nor is there proof that complaint of any kind was made by individuals, or the city authorities, against the use of the space under the sidewalk for the purposes to which it was devoted. While it does not appear by positive proof that the owner obtained a license or permit from the municipal authorities to excavate the space under the sidewalk, such authority may be reasonably inferred from the use of the same, for the period of nine years without objection, with actual knowledge on the part of the city officials that the same existed. *Robbins v. Chicago City*, 4 Wall. 657; *Jennings v. Van Schaick*, 108 N. Y. 580, 15 N. E. Rep. 424. It is well known that the space under the sidewalks in the most important streets in large cities is generally excavated, and devoted to some practical use in connection with the business carried on in the building with which it is connected; and such custom must be well known to the officers having charge of the public streets. No doubt can be entertained but that the city did consent that the space under the sidewalk might be excavated, and devoted to the use for which it was intended. The city having consented to the use of the public street for the purpose indicated, the owner was not guilty of maintaining a nuisance so long as the space was securely covered. Although the city authorities gave their consent, the duty was imposed upon the owner or occupant to safely cover the area under the sidewalk so as to make it secure for the public to pass over the same; and, if not performed, the area became an unlawful obstruction to that portion of the streets, and a nuisance.

The other controlling fact established by the evidence is that the sidewalk in front of the store was in a safe and secure condition up to about the time of the accident. There is no proof of negligence on the part of the owner or occupant up to that time. There is no pretense that the sidewalk in front of the store was out of repair and was not entirely safe up to near the time of the accident. Conceding that the sidewalk was out of repair and in a dangerous condition at the time the plaintiff received his injuries, we have to inquire if the defendant was guilty of any negligence which charges him with liability to the plaintiff. This question must be answered in the negative, for the reason that he was not in possession and did not have control of the premises at the time the sidewalk became insecure, nor when the plaintiff was injured. The defendant purchased the premises in 1881, and at that time they were occupied by Mr. Harris, under a lease from the defendant's grantor which had not expired. The tenant attorned to the defendant, and when

the time expired the defendant, by an oral agreement, renewed the lease for an indefinite term, at the same rental, which was paid by him to the defendant. The plaintiff contends that this arrangement was, in law, a new demise of the premises. This is conceded, and it must be admitted that the relation of landlord and tenant existed at the time of the accident between the defendant and Harris. The terms of the original lease, under which Harris entered, were not disclosed on the trial. Harris had been in possession under that lease before the defendant made his purchase, and the renewal of the lease was made two or three years before the plaintiff was injured. It is an undisputed fact that the premises were in the sole and actual possession of Harris, as the defendant's tenant, when the sidewalk became out of repair, and in an unsafe condition. As it is not disclosed that the defendant agreed to keep the sidewalk in repair, he was under no obligation to his tenant or the public to keep the same in good repair, and in a secure condition, so that the same could be used with safety, nor was he in possession of the premises; and for these reasons he was not guilty of negligence, although he was the owner of the property. In *Clancy v. Byrne*, 56 N. Y. 129, it is held that if the premises are in good repair when demised, but afterwards become ruinous and dangerous, the landlord is not responsible therefor, either to the occupant or the public, unless he has expressly agreed to repair, or has renewed the lease after the need of repair has shown itself. See, also, *Swords v. Edgar*, 59 N. Y. 28; *Wolf v. Kilpatrick*, 101 N. Y. 146, 4 N. E. Rep. 188; *Ahern v. Steele*, 22 N. E. Rep. 193.

As the pavement was safe and secure when the defendant demised the premises to Harris, he is not responsible for an after-occurring nuisance, unless in some manner he is in fault for its creation or continuance. His bare ownership, and receiving rent for the use of the premises, will not produce that result. Such is the current of all the authorities in this state. See *Ahern v. Steele*, *supra*, and cases there cited. There is no evidence indicating what caused the injury to the pavement, or how long the sidewalk had been in an unsafe condition before the accident, but it is conceded that it happened long after the reletting by the defendant to Harris, and that it had not long existed when the plaintiff fell through the pavement into the area. Motion for a new trial denied, and judgment ordered for the defendant on the nonsuit.

WEIDMAN v. BOARD OF EDUCATION.

*(Supreme Court, General Term, Fifth Department. October 19, 1899.)***SCHOOLS AND SCHOOL-DISTRICTS—EMPLOYMENT OF JANITOR—REMOVAL.**

Under Laws N. Y. 1856, c. 129, creating the defendant board of education, the board had power "to contract with and employ all teachers in the school under their charge, and also a janitor and librarian, and at their pleasure to remove them." By a resolution of the board plaintiff was appointed janitor, "to hold that position during the pleasure of the board at an annual salary," etc. These terms were embodied in a contract which plaintiff signed. *Held*, that the board had power to remove the janitor at their pleasure, which power became a term of the contract with plaintiff; and his removal before the end of the year gave plaintiff no cause of action.

Appeal from Wayne county court.

Action by Theodore Weidman against the Board of Education of the Village of Lyons. The plaintiff was appointed janitor by the defendant, took charge of the school-rooms in the school-district for the period of one year, and, after serving one-half of the time, he was discharged, and the action was brought to recover his salary for the balance of the year. Verdict and judgment for plaintiff. Defendant appeals.

Argued before BARKER, P. J., and DWIGHT and MACOMBER, JJ.

Thomas Collins, Jr., for appellant. *J. W. Dunwell*, for respondent.

BARKER, P. J. By chapter 129, Laws 1856, the defendant was created a corporation by the name of "The Board of Education of the Village of Lyons." The management of the affairs of the corporation is intrusted to a board of trustees, consisting of three members, who have charge and control of the property of the corporation, and the superintendence and supervision of the public schools within the territorial limits mentioned in the act. One of their specified powers is "to contract with and employ all teachers in the said school under their charge, and also a janitor and librarian, and at their pleasure to remove them." By a resolution of the board, adopted July 25, 1887, the plaintiff was chosen and appointed janitor, "to hold that position during the pleasure of the board, at an annual salary of four hundred dollars, payable in monthly installments," and one of their number was named to enter into a written agreement with the appointee, and the same was prepared, in which the terms of the resolution were stated, and his labors and duties mentioned, which was signed by the plaintiff, and the execution thereof reported to the board, and the same was by it adopted, and the plaintiff entered upon the discharge of his duties. The resolution and memorandum signed by the plaintiff constitute the agreement under which he entered into the employment of the defendant as janitor of the school building. Some six months thereafter complaint was made to the board that the plaintiff did not discharge his duties in a satisfactory manner, nor care for the school-room as specifically provided for in the agreement. Without notice to the plaintiff, and without any opportunity of being heard in his defense, the board dismissed him and appointed another in his place. The defendant contends that it appeared on the trial from the undisputed evidence that the plaintiff failed to perform all the services at the time and in the manner which he promised to do by the terms of his agreement, and for that reason the board was justified in removing him from his position. We do not need to examine nor determine that question, as we are of the opinion that the board of trustees had the right under the statute, as well as by the express terms of the contract, at any time during the year, to dismiss the plaintiff, and terminate the agreement, without assigning any cause for their action. This corporation was created as an instrument to be used in managing and carrying into effect in the village of Lyons the system of public schools established by the state. The plaintiff, while acting as janitor, was engaged in the public service, though not in a

strict sense an officer of the government. The act of incorporation creates the offices of collector and treasurer, who are to be annually appointed by the board, and who may be removed for misconduct or neglect of official duty upon written charges and opportunity being given the accused to be heard in his defense. It is thus made clear that it was the intention of the legislature to make a distinction as to the power of the board to make removals and the manner of exercising the same between persons who are employed as teachers or janitors and those who hold the offices of collector and treasurer. The former may be removed at the pleasure of the board; the latter only for cause, of which the accused shall have notice, and an opportunity to make a defense. The rule is well settled that where the power to remove at pleasure is conferred in general terms upon an official or a board of managers such power may be exercised without assigning a cause, and without any notice to the incumbent. *Ex parte Hennen*, 13 Pet. 225; *People v. Commissioners*, 73 N. Y. 437; 1 Dill. Mun. Corp. § 188; *Long v. Mayor, etc.*, 81 N. Y. 425; *People v. Board*, 3 Hun, 177; *Gildersleeve v. Board*, 17 Abb. Pr. 207. If, as is contended by the plaintiff, the service to be performed by him was under a special contract with the board stipulating his duties and labors, and the compensation to be paid therefor, and in no sense whatever was he holding a public place or office, then the same result must follow, for, by the terms of the agreement, the defendant reserved the right to terminate the agreement at the will of the board of managers.

The manner of employing and removing a janitor is regulated, to some extent, by the statute, and it is clear that it was the intention of the legislature to confer upon the board the power to remove the janitor at their pleasure, and they could not by agreement deprive themselves of that power. It was the duty of the board, when satisfied that the public interests demanded it, to remove that officer, and appoint another person in his place. In *Gildersleeve v. Board*, *supra*, the general term of the court of common pleas held that the power to employ teachers necessarily implied the right of the appointing power to remove them. The case of *People v. Board*, 3 Hun, 177, is a decision to the same effect. In the act under consideration the place of janitor is classed with that of teachers so far as the power of appointment and right of removal exists. The act does not contemplate that proceedings to remove a teacher or a janitor should be formal, partaking of the features of a judicial investigation. The power to remove at pleasure conferred upon the board of management became a term of the contract, and the refusal to continue the arrangement for the entire year gave the plaintiff no cause of action. The judgment and the order are reversed, and a new trial ordered, with costs to abide the event. All concur.

WHITMAN v. FOLEY *et al.*

(Supreme Court, General Term, Fifth Department. October, 1889.)

1. MORTGAGES—FORECLOSURE—EVIDENCE.

In foreclosure proceedings, the report of a referee as to the amount due on two mortgages stated that sundry payments were made, but that it was not proven in every instance what were the amounts or dates, nor to which of the bonds secured by the mortgages they were applied, but that there was unpaid only \$500. Certain amounts were indorsed on the bonds as paid, and no proof was made by defendants of the payment of any particular sums not indorsed, nor of any facts or circumstances on which a finding could be based. A town assessor testified that one of the mortgagees, who had since died, stated, when examined for assessment, that his mortgage was paid to \$500, or thereabouts, and an affidavit, made by him for the same purpose, stated that he had but one mortgage, on which there was due about \$500. There was other evidence, consisting of admissions of defendants, indicating that much more was due and unpaid. *Held*, that the finding would be set aside, and a new reference ordered.

2. SAME—PAYMENT—EVIDENCE.

The evidence of the declarations of the mortgagee to the tax assessors was competent on the question of payment.

Appeal from judgment on report of referee.

Action by Betsy Whitman, as administratrix of George H. Whitman, deceased, against Matthew F. Foley and Bridget Dean, to foreclose a mortgage. Plaintiff appeals from the findings of the referee.

Argued before BARKER, P. J., and DWIGHT and MACOMBER, JJ.

Frank S. Coburn, for appellant. *W. E. Hughitt*, for respondents.

BARKER, P. J. After allowing the payments admitted to have been made, which are indorsed on the bonds secured by the mortgages, there remained unpaid, principal and interest, the sum of \$5,675. The referee found that there was unpaid on both of the bonds, on the 19th day of August, 1885, the aggregate sum of \$500, and no more. He also found that there was subsequently paid on and towards that sum \$300, leaving unpaid, at the date of his report, \$242.42. One of the mortgages was originally given to Mr. Whitman; the other was given to Jane Calvert, as mortgagee, which she sold and delivered to the deceased in the year 1875. The appellant earnestly contends that the finding of the learned referee as to the amount remaining unpaid on the mortgages is unsupported by the evidence, and insists that the only credit the evidence justified the referee in allowing, in addition to those indorsed on the bonds, is the sum of \$300, which the evidence tended to prove had been made and never indorsed. The amount involved in this controversy is so large that we have examined the evidence with the greatest care and attention. The result of our study of the same is that we are unable to agree with the learned referee in his deduction of fact from the evidence and circumstances of the case. We are fully convinced that justice to those whom the plaintiff represents as the administratrix of the estate of Mr. Whitman demands that a new trial should be ordered. We need not, in announcing our decision, state with much detail the features of the case, nor the character of the proof upon which the referee must have relied in support of his report. The obligor and mortgagor in both of the bonds and mortgages was John D. Foley, who had, a long time before the trial, and in the life-time of the decedent, conveyed all his interest in the premises, and been released from all personal obligations on the bonds, so that the only security remaining to the owner of the mortgages was the land. The present owners of the premises are the defendants Matthew F. Foley and Bridget Dean, both of whom answered the complaint, the former having acquired his interest in the lands as early as in 1876. John D. Foley, the mortgagor, also put in an answer, and pleaded in bar of a judgment against him for any deficiency which might arise on the sale a release on the bond executed by the decedent. On the trial the release was established, and judgment rendered in his favor, and a reference ordered to ascertain the amount due and unpaid on the securities. Each defendant denied that the sum claimed to be unpaid by the plaintiff, as stated in the complaint, was unpaid, and set up a particular payment of \$200, and alleged the payment of other sums, stating they were unable to give the amount of such payments, or to whom the same were made. On these pleadings the cause was tried. No proof was made by the defendants of the payment of any particular sum not indorsed on the bonds, nor of any facts or circumstances upon which a finding could be predicated of the amount, time, or place of any particular payment. The referee, in his report, states "that sundry payments were made upon said bonds by said John B. Foley and others, but it was not proven before me in every instance what were the amounts or dates of said several payments, nor upon which of said bonds the same were applied; but such payments were to such an amount that on the 9th day of August there was due upon both of said bonds and mortgages to said George A. Whitman, or upon which-

ever one the same was then unpaid, the sum of \$500, and no more." From the evidence no account could be stated showing the sums paid, except those which were indorsed upon the securities, and the further sum of \$300 found to be paid since August, 1885. It is evident that the referee, in finding the sum unpaid, must have relied upon the evidence of declarations made by Mr. Whitman to the town assessors in the years 1883 and 1885, when he was examined by them for the purpose of determining the amount of personal property for which he should be assessed. This evidence was entirely competent as bearing upon the question of payment, and was properly received and considered by the referee. The question before the assessors was, what amount of personal property should be assessed to Mr. Whitman? Not how much was unpaid on the Foley mortgages, although that might have been a proper subject of inquiry in determining the matter under consideration before the assessors. The burden of proof was on the defendants, and all payments credited to them must be supported by proof, and not allowed on mere guess or conjecture. When a party seeks to establish a fact by the admission of his adversary, the language used by him ought to be reproduced by the witnesses who heard his statements, so that the court may determine whether the fact in dispute was conceded to exist, giving the words used their usual and customary meaning. It is a dangerous species of evidence, and should always be scrutinized and received with caution. The witnesses, the two assessors, were unable to narrate the conversation they had with the decedent, and stated that they could not do so with any degree of accuracy by giving the language used when he referred to the amount unpaid on the Foley mortgages. The examination before the assessors was partly in writing signed by the decedent, and the remainder was an oral statement made during a conversation carried on between them. No court would be justified in holding that the written statements made in the years 1883 and 1885, standing alone, contain an admission that the sum of \$500 only was unpaid on the Foley mortgages on the day the last statement was made and verified. Both of the assessors stated, in substance, that they do not recollect that the Foley mortgages were mentioned in the examination of 1883. In speaking of the examination in 1883, one of the assessors, Mr. Miller, said he could not give the conversation that took place between Mr. Whitman and the assessors in that year; that he could give some of it, but could not give it word for word,—very little of it, probably. Minutes were kept of statements made by him. Mr. Norman, the other assessor, stated that he conducted the examination of Mr. Whitman in the year 1885. He said, on that occasion, \$500 was all we could put him down for, and I asked him if the Foley boys had paid their mortgage off to \$500. He answered, "Yes." He said they had paid the interest and principal to \$500, or thereabouts. And in the same examination Mr. Whitman told him he never owned but one mortgage against the Foleys. These statements, when taken together, relate to only one of the mortgages in suit, and in the affidavit made the same day reference is only made to one mortgage. The entire affidavit is as follows: "George A. Whitman, sworn, says that he has but one mortgage at the present time, upon which there is now due him about \$500. [Signed] GEORGE A. WHITMAN." There is other evidence in the case bearing on the question of the amount due, consisting of the admissions of the defendants, who are now the owners of the fee, indicating that the sum claimed to be due by the plaintiff was due and unpaid at the time this action was commenced. Upon the whole case we are fully convinced that the judgment should be reversed, for the reason that the facts found by the referee are not supported by the evidence. Judgment reversed, and new trial granted before another referee, with costs of this appeal to the appellants to abide the final award of costs. All concur.

In re HAYDEN'S ESTATE.

(Supreme Court, General Term, Fifth Department. October 19, 1889.)

1. WILLS—CONSTRUCTION—RIGHTS OF LEGATEES.

Testator bequeathed to his wife, during her life, \$40,000, "including the proceeds of any and all insurance policies on my life payable to her or otherwise." He directed the sum to be invested, and the income paid to her. After giving her the homestead and certain personalty, he proceeded: "The foregoing bequests and devises * * * are in lieu of dower, but if the use and income thereof shall be insufficient for her reasonable support, * * * my executors shall pay any deficiency from any other property." Later, the will directed that the executors hold in reserve at least \$10,000 during the life of the wife, and pay her such part as might be needed for her comfortable support, and that the residue of the income be paid to the residuary legatees. The will then proceeds: "I direct that the principal of such fund in reserve shall, after the death of my wife," become a part of the residuary legacy. He then gave "all the rest, residue, and remainder of my property in three equal shares," etc. The wife was made one of the executors. Testator had three policies of life insurance, amounting to \$10,000, payable to his wife, and another, of \$5,000, payable to his executors. *Held*, that the "fund in reserve" was the additional \$10,000, and not the \$40,000, and that the widow, by electing to stand by the will, did not relinquish her right to the \$10,000 insurance money, as being money bequeathed by the testator, which was not his own.

2. EXECUTORS—ACCOUNTING—COMPENSATION.

The will authorized the executors, in their discretion, to continue a certain business of the testator, which one of the executors had been carrying on for him at a stated salary. His co-executors agreed to pay him at the same rate for continuing the business. *Held*, that it was in the line of his duty as executor, and he should be allowed no more than the statutory commission for the services.

3. SAME.

Code Civil Proc. N. Y. § 2736, providing that, where the personal estate of a decedent amounts to \$100,000 or more above his debts, each executor, if there are not more than three, is entitled to full compensation allowed to a sole executor, does not authorize such commission to executors who resign their trust, and are succeeded by an administrator; nor is one of three such executors entitled, on the ground that he did all the work, to a triple commission on sums actually received and disbursed.

Appeal from surrogate's court, Monroe county.

Proceedings for the final accounting of the executors of Charles J. Hayden, deceased.

Argued before BARKER, P. J., and DWIGHT and MACOMBER, JJ.

George F. Yeoman, for appellants. *Marsenus H. Briggs*, for respondents.

BARKER, P. J. This proceeding comes before this court upon cross-appeals from a decree of the surrogate's court of Monroe county, adjusting and settling the accounts of Charles A. Hayden and Ella L. Williams, as resigning executors of the last will and testament of Charles J. Hayden, deceased. The appeal of the administrator J. P. Varnum is for the purpose of reviewing the question of the right of Esther Hayden to retain upwards of \$2,000 paid her upon policies of insurance upon the life of the testator, who was her husband. Charles J. Hayden died April 9, 1888, leaving an estate of upwards of \$250,000 in value. By the second clause of his will he made the following provisions for his wife, to-wit: "*Second.* I give, bequeath, and devise to my beloved wife, Esther Hayden, for and during the time of her natural life, the sum of forty thousand dollars, (\$40,000,) including the proceeds of any and all insurance policies on my life payable to her or otherwise. * * * I direct that said sum of forty thousand dollars be invested by my executors in good bonds and mortgages on real estate in accordance with the savings banks laws, or invested in accordance with the laws governing trustees or the approval of the surrogate; and that the income shall be paid to my wife semi-annually by my executors during her life." In the same clause the testator gives his wife the homestead, household furniture, and makes some other directions not material to consider here, and ends that clause of his will

by directing that "the foregoing bequests and devises to my wife, for and during her natural life, are in lieu of dower; but if the use and income thereof shall be insufficient for her reasonable support and comfort in her station of life, I direct that my executors shall pay any deficiency from any other property." Later in the will the testator by a sixth clause directed his executors to invest "in all respects, as directed by the foregoing bequests, to my wife for life, and to hold, in addition to such bequests and devises to her, and in reserve, at least the sum of ten thousand dollars (\$10,000) during her life, and to pay the income thereof semi-annually, as follows: Such proportion, if any, as may be needed for additional income to provide a comfortable and proper support for her in her station of life," as directed in the second section of his will, and the residue of such income, if any, in equal shares among "my three residuary legatees and devisees, namely, my son Charles, my daughter Ella, and my daughter Maud. I direct the principal of such fund in reserve shall, after the death of my wife, and all payment of all my debts, and the expenses of settling my estate, and all claims hereby created, fall into and become a part of the property hereinafter bequeathed and given to my said three remaining legatees."

The testator's will contains a clause disposing of the residue of his estate, —one-third to his son Charles A. Hayden; one-third to his daughter Ella Williams for life, with a remainder over to her children; and one-third to his granddaughter Maud Bush for life, with the remainder to her children. Some time prior to the death of the testator he had taken out insurance policies upon his life, represented by four different policies, amounting in the aggregate to \$15,000, three of which policies, amounting to \$10,000, were payable to Esther Hayden, the wife of the deceased, and the other to his executors, administrators, or assigns. It is contended by the administrator with the will annexed that the proceeds of the policies of insurance, which were by the terms thereof made payable to Esther Hayden, the wife, and which she had received from the insurance companies issuing the policies, should be paid over by her to the administrator with the will annexed, upon the theory that the will makes the \$10,000 insurance moneys a part of the estate of the testator, and that the provisions which the testator made for his wife were given and accepted by her in lieu of any rights she might have in the moneys in question, and that, by electing to stand by the will, she thereby relinquished any right to the insurance moneys in question. The equitable doctrine of election is invoked against her. It is contended by the administrator with the will annexed that, by the express terms of the will, the \$10,000 in question is made a part of the testator's estate by the provisions of the sixth clause of the will, which has been previously quoted. It is argued that the language of that clause saying, "I direct the principal of such fund, in reserve, shall, after the death of my wife, and the payment of all my debts, and the expenses of settling my estate, and all claims hereby created, fall into and become part of the property hereinafter bequeathed and given to my said residuary legatees," applies to the \$40,000 in the second clause of the will. We are of the opinion, however, that the "fund in reserve," in regard to which the direction is made, is the additional \$10,000 over and above the \$40,000 previously mentioned in the will, and by said sixth clause directed to be set aside as a "fund in reserve." This, we are confident, is the natural and proper construction of the clause, and this construction is supported by the residuary clause, "I give, bequeath, and devise all the rest, residue, and remainder of my property in three equal shares." The residuary clause only disposes of what belonged to the testator himself, and cannot be held to make any disposition of what was his wife's. *In re Fraser*, 92 N. Y. 250.

The insurance moneys in question belonged to Mrs. Hayden. They were absolute property, and she is entitled to retain and control the same, unless, by electing to take under the will, she becomes equitably bound to pay them

over to the testator's estate; for it is conceded that she has chosen to abide by the will. The administrator insists that by the will the testator has attempted to dispose of property not his own, and at the same time given a benefit to the person to whom the property belongs; and that she must make good the testator's attempted disposition, and be required to relinquish either her own property or the devise under the will, within the rule laid down in *Leonard v. Steele*, 4 Barb. 21; *Havens v. Sackett*, 15 N. Y. 365. It seems well settled, however, in order to deprive a devisee or legatee of property rightfully his own, and to raise a case of election under a will, a clear and decisive intention of the testator must be manifested by the will itself to dispose unconditionally of that which did not belong to him. *Havens v. Sackett*, 15 N. Y. 365; *Mills v. Mills*, 28 Barb. 459; *Sheldon v. Bliss*, 8 N. Y. 85; 2 Redf. Wills, p. 352, par. 21, subds. 13-16. Can there be found in the will under consideration any such clear intention? We think not. The surrogate happily expressed our own views when he said: "The second clause of the will indicates his intention that the insurance moneys shall form a part of the sum of forty thousand dollars to be invested for her benefit during her life, and also expresses his wishes as to the form of investment, but nothing more; and it is to be observed in this connection that the widow is one of the executors who is directed to make the investment of them; and that his direction as to the mode of investment did not, therefore, necessarily contemplate her parting with the control and custody of the fund, or the securities with which it might be put." At the very most, the testator's will but gave to the person already entitled to its enjoyment the income of certain moneys without expressly making disposition of the principal sum upon her death. Under such circumstances this court is of the opinion that the surrogate rightfully refused to direct Esther Hayden to pay over the insurance moneys to the administrator with the will annexed, especially when the testator expressly declared that the provisions made in the second clause of his will were simply in lieu of dower, and not in consideration of her relinquishing her property right to the insurance moneys.

It is contended that the surrogate erred in the disallowing a charge of \$2,083.33, made by the executor Charles A. Hayden for salary in conducting the furniture business of the testator from his death to the date of the executor's retirement from his trust. By the will of the testator, his executors were authorized in their discretion to continue for a year the business of the manufacture and sale of furniture in which the testator was engaged at the time of his death. It appears that Charles A. Hayden was familiar with the business, and at the time of his father's death was largely conducting the same, under an arrangement with his father by which he was to receive a salary of \$5,000 a year for his services, and that after his father's death his co-executors agreed to pay him at the same rate for continuing the business for the benefit of the estate. The charge made by him was upon that basis for the time he continued to manage the business. If the persons making the agreement for this compensation were the only persons interested in the estate, they doubtless would not be heard to question the propriety of the charge; but the objection to it is made by infants, who were not parties to the agreement, and upon their objection the charge was disallowed. An executor cannot receive from an estate any greater compensation for his services than the statutory commission, however meritorious or extraordinary his services may be. *Collier v. Munn*, 41 N. Y. 143; *Clinch v. Eckford*, 8 Paige, 412; *Morgan v. Hannas*, 13 Abb. Pr. (N. S.) 361; *Betts v. Betts*, 4 Abb. N. C. 485. It is, however, claimed that within the rule laid down in *Lent v. Howard*, 89 N. Y. 169, the executors should receive extra compensation. In that case, however, the services rendered were not in the line of the executor's duty, while here the will expressly authorized a continuance of the business by the executors, and it was, in fact, continued by them as such, and, in exercising

their discretion to continue the business for the benefit of the estate, the executors were but doing a duty they owed their trust, and the parties interested in it. While the rule in this case, and in other special cases, may work a hardship, nevertheless it is on the whole a salutary and wise provision, and the surrogate committed no error in enforcing it in this case.

The surrogate's decree in adjusting the commission of the executors denied commissions to Mrs. Hayden and to Mrs. Williams, and allowed one-half commission to the executor Charles A. Hayden upon the personal estate, namely, \$155,973.33, being the amount of the inventory and the income thereon. It is insisted on behalf of the counsel for the executrix Mrs. Hayden that she is entitled, by virtue of the provisions of section 2736 of the Code of Civil Procedure, to whole commissions upon \$155,973.33; and, on the other hand, it is contended by the counsel for the administrator that the executors, having resigned their trust before the final execution of their duties imposed on them by the will, are entitled to no commission upon the *corpus* of the estate. This contention we think is the law. The rule is laid down in *Re Jones*, 4 Sandf. Ch. 615, followed and approved by this court in *Re Allen*, 29 Hun, 7. It is difficult to see how the executors in this case can legally claim any commissions on the body of the estate. It appears here that the executors voluntarily resigned their trust, and an administrator with the will annexed was appointed in their place. The one-half commission given by statute for receiving is to be allowed only on the accounting when the trust fund is finally paid over and the trust discharged, and, if for any reason the trustee does not perform the duty, his right to the commission is not complete. As said in *Re Allen*, 29 Hun, 9. "If he [*i. e.*, the resigning trustee] is allowed commissions on the *corpus* of the estate, a precedent will be set which will authorize his successor to make the like claim, under like circumstances, and the process may be repeated without limit, so that the estate may be depleted by taking from it a full commission on the capital [which exceeds \$100,000 in value] whenever one of the trustees is permitted to resign for his convenience." To the same general effect is the case of *In re Baker*, 35 Hun, 272. We think, therefore, that the surrogate erred in allowing the executor Charles A. Hayden one-half commission on the uninventoried value of the personal estate, and the increase thereon. It appears that there was received and paid out in the payment of debts and legacies \$12,577.26, and that there was received and paid out in the management and conduct of the business, \$58,844.36. As to the first of the sums the will was fully executed, and full commissions should be allowed. *In re Allen*, 29 Hun, 10.

As to the second amount, (namely, \$58,844.36,) received and disbursed in the management of the business, more difficulty exists. While it is apparent that the money was received and paid out in the execution of the provisions of the will, and pursuant to the authority given by it, it nevertheless does not appear that from the business any profit or any advantage resulted to the estate. The buying and selling, incident to the conduct of a manufacture or other business, is, at best, a species of reinvestment of the trust funds. If commissions were to be allowed each time a stock in trade were purchased or sold, it is quite probable, as well as possible, for a case to arise where the executor's commissions would largely consume the body of the estate. Especially, where the stock in trade is rapidly turned over, and no great profit is realized from the transactions. It is quite manifest that the claim for commissions on the \$58,844.36 was properly disallowed.

It has been further argued that inasmuch as the personal estate of the testator exceeded the sum of \$100,000 in value under the provisions of section 2736 of the Code of Civil Procedure, the executor Charles A. Hayden is entitled to three full commissions, he having done all the labor in managing the estate. Inasmuch as we have already held that the executors, having resigned before executing, are not entitled to commissions on the body of the estate,

the only question remaining is whether three full commissions are to be allowed on the \$12,577.26 received and paid out in the payment of debts and legacies, or whether the commission allowed on that sum shall be confined to one full commission to the executor handling that sum. Section 2786 of the Code provides for commissions where the trust has been fully administered. It evidently has no application to a case where the trust is not executed, and the executors resigned before their duties are finished. In such a case we think no executor has the right to claim either for himself or for his associate executor the three commissions allowed by the section, and, where one full commission is allowed on \$12,577.26, he is receiving all the law can give. The decree appealed from should be modified by disallowing half commissions on the item of \$155,973.88, and by allowing one full commission upon \$12,577.26 to the executor Charles A. Hayden, and as so modified the decree is affirmed, without costs to either party of this appeal. All concur.

KINSELLA v. CITY OF AUBURN.

(*Supreme Court, General Term, Fifth Department. October 19, 1889.*)

1. MUNICIPAL CORPORATIONS—SEWER ASSESSMENTS—LOCAL IMPROVEMENTS.

A resolution of the city council of Auburn for the construction of a sewer is a proceeding authorizing a local improvement, the expense thereof being assessed on the property benefited, and not a public one, within Laws N. Y. 1879, c. 53, § 85, as amended by Laws 1885, c. 255, § 5, providing that no resolution authorizing any public improvement shall have any effect unless approved by the mayor within four days after its passage, or, failing of his approval, is repassed by the concurrent vote of eight aldermen.

2. SAME—AWARDING CONTRACT—FAILURE OF LOWEST BIDDER.

After bids for constructing a sewer were opened, and the council had passed a resolution awarding the contract to the lowest bidder, who failed to enter into contract, it was not necessary to advertise again, as the council might, at its next meeting, rescind the former resolution, and award the contract to the next lowest bidder; Laws N. Y. 1879, c. 53, § 111, providing that, the next meeting after proposals are made, they shall be presented to the common council, and be opened and considered. "The common council may reject any or all of the proposals, if they shall deem it for the interest of the city. If either of said proposals is deemed favorable to the city, and the bond accompanying the same is acceptable, the common council may direct the mayor and city clerk to contract with the party whose proposal is accepted."

3. SAME—EXCESSIVE ASSESSMENT.

Where the proposals for bids referred to other materials, but not to lumber, a provision in the contract allowing for lumber without consent of the council is unauthorized, and the assessment for its payment is in that particular excessive.

4. SAME—INTEREST ON COST OF WORK.

An assessment for interest for one year on the cost of the improvement was not erroneous, it being authorized by Laws N. Y. 1885, c. 255, § 27.

5. SAME—CORRECTION OF ASSESSMENT.

Where the amount of an erroneous assessment for local improvements can be ascertained, the entire assessment is not thereby invalidated, but the court may, in the exercise of its equitable power, correct the error.

Appeal from special term, Cayuga county.

Action by Thomas F. Kinsella against the city of Auburn to vacate an assessment to pay the expense of constructing a sewer. The complaint was dismissed at the trial, and plaintiff appeals.

Argued before BARKER, P. J., and DWIGHT and MACOMBER, JJ.

L. A. Pterce, for appellant. John W. O'Brien, for respondent.

BARKER, P. J. The action was brought to vacate an assessment which was apparently a lien upon the plaintiff's premises in the city of Auburn. It was levied pursuant to proceedings taken to pay the expense of constructing a sewer in Van Anden street. The regularity of the proceedings up to and including the adoption by the common council of the resolution authorizing the construction of the sewer is not questioned; but it is contended that,

to render the resolution effectual, its approval by the mayor, or its readoption by the common council, was required by the statute, which provides that no resolution authorizing any public improvement shall have any effect unless approved by the mayor in writing within four days from the time of its passage; or in case it is not so approved, or is disapproved by him, the common council may at its next regular meeting repass the same by the concurrent vote of the eight aldermen. Laws 1879, c. 53, § 35, as amended by Laws 1885, c. 255, § 5. It was not so approved or repassed. The term "public improvement" is not defined by the statute; and, while the purpose of the work in question is public, it comes within what is designated as a "local improvement," which is a term also used in the same statute, and applied to work, the expense of which is assessed upon the property benefited by it. The distinction between public and local improvements may be so construed as to embrace within the former those which are charged upon all the taxable property within the municipality, while the fund to pay the expense of the latter is raised by means of local assessments upon the property supposed to be benefited by them. This, we think, is the meaning of those terms, respectively, as used in the defendant's charter. Dill. Mun. Corp. § 596. It follows that the approval of the resolution by the mayor, or its repassage by the common council, was not essential to render it effectual.

The city clerk proceeded to advertise for sealed proposals as directed, and afterwards report was made to the common council that three proposals were received,—one by Sullivan, one by Sisson & Ocobock, and another by Dillon; and the committee to whom the matter was referred reported that Sullivan was the lowest bidder, and recommended that his proposal be accepted. The report was adopted, and the mayor and the city clerk were directed to reduce to writing and to execute the contract in behalf of the defendant. This, for some undisclosed reason, does not appear to have been done; and, at a subsequent meeting of the common council, resolutions were passed rescinding the one by which the contract was let to Sullivan, and directing the mayor and city clerk to enter into a contract with Sisson & Ocobock upon their proposal before mentioned. The contract was made with them, and they proceeded with the work. It is now argued that the contract was made without authority, because—*First*, the acceptance of the proposal of Sullivan operated to produce a contract with him, and the power of the common council upon the notice given for proposal was then exhausted; and, *second*, that they could not lawfully enter into a contract with another without proceeding *de novo* to advertise for proposals. The statute upon the subject provides that, at the next meeting after proposals are made, they shall be presented to the common council, and be opened and considered; that "the common council may reject any or all of the proposals, if they shall deem it for the interest of the city. If either of said proposals is deemed favorable to the city, and the bond accompanying the same is acceptable, the common council may direct the mayor and city clerk to contract with the party whose proposal is accepted." Laws 1879, c. 53, § 111. The statute does not in terms require the common council, at such first meeting, to complete its action and determination upon the subject of the proposals, and they evidently could at that meeting lawfully consider any action then taken in that respect. By the final acceptance of one of the proposals, all there was for that body to do upon that subject was performed. The matter was then with the mayor and clerk to consummate it by entering into a contract with the successful bidder. This, within the contemplation of the statute, was essential to the completion of an agreement with him to do the work. It, for some cause, had not been done when the common council were in session upwards of three weeks after. It was then within its power (unless some right had been vested which would be prejudiced) to reconsider the resolution of the previous meeting; and, that being done, the proposals were made for their consideration. This was the situa-

tion which enabled it to accept the proposal of the parties with whom the contract was finally made. It may be assumed, nothing appearing to the contrary, that the common council acted upon knowledge or information of facts, so far as related to Sullivan, which permitted them to take the action which was taken by way of reconsidering the resolution of acceptance of his proposal; and whether or not the action of the common council in accepting the proposal of the other parties with whom the contract was made was abusive of its powers or discretion in that respect is not a question here for consideration.

The specifications upon which the proposals were made required that the sewer be made of brick; and they provided that if, in excavating the bottom, they found it soft from the presence of quicksand or muck, or from any other cause, so as not to furnish a good foundation, wood inverts, reaching on each side one-third of the way to the top of the sewer if of tile, and one-half if of brick, should be laid in the bottom. The proposal of Sisson & Ocobock was to construct the sewer in accordance with the specifications, and furnish all labor and materials, at the price named. It made no reference to any lumber. The direction of the common council was to enter into a contract with them, according to the plans and specifications, at the price bid by those parties. The contract as made provided for payment to them of \$14 per thousand feet for lumber regularly used for bottom and foundations in the construction of the sewers. In the bill rendered by the contractors, and allowed, the amount of which went into the assessment, was included \$72.25 for lumber, and \$70.60 for making and laying inverts in quicksand, neither of which was mentioned in the proposal. It does not appear that the common council consented to the insertion of the lumber provision in the contract; and the trial court found that the contract was never reported to or before that body. The power of the mayor and city clerk was only to pursue the direction of the common council in making the contract in which the lumber provision was inserted without authority. As, by the proposal, the contractor proposed to furnish all the labor and materials, the item for lumber, and for making and laying the inverts, in the bill rendered, were not legitimately embraced in the amount assessed; but that did not have the effect to invalidate the entire assessment. The proceedings were within the statute, and regular. The assessment, by reason of including those items, was merely excessive, and the excess is easily and accurately ascertained, and correction may be made by reduction of the amount which was assessed against the plaintiff's lots. This, we think, clearly within the equitable power of the court in this action. *In re Asylum*, 69 N. Y. 353; *In re Railroad Co.*, 102 N. Y. 301, 6 N. E. Rep. 590; *In re Auchmuty*, 90 N. Y. 685. The amount of the excess in the plaintiff's assessment is small, but he is nevertheless entitled to the abatement which the proper reduction will produce. The sewer was not made entirely of brick. Twenty rods of it was constructed of tile. This is argued as an objection to the validity of the assessment. No circumstances appear as to the cause of this departure from the terms of the contract, nor does it appear whether this work is better or less expensive than brick. The specifications, which were practically part of the contract, provided that the work should be done under the direction of the city surveyor, to whom was reserved the right to modify and amend them in such matters of detail as in his judgment should be advantageous to the work, and for the best interests of the city. It may be assumed that, for some cause which in his judgment rendered the modification desirable, this portion of the work was constructed pursuant to the direction or with the approval of the surveyor. It will not be presumed that he acted otherwise than in good faith, (Laws 1885, c. 255, § 34,) or that the plaintiff was prejudiced by this change, (*In re Merriam*, 84 N. Y. 596; *In re Society*, 70 N. Y. 476; *In re Mead*, 74 N. Y. 216; *In re Insurance Co.*, 89 N. Y. 530.)

In the assessment was included the interest, at the rate of 4 per cent., for one year, upon the amount of the expense of the work. This, it is claimed, was error, because the statute provided that the common council should, to pay the expense of the work, borrow money payable in two installments,—six months and a year,—and issue bonds accordingly; but it will be observed that the statute also directs that the interest upon the amount until the second installment becomes due shall be added to the cost for the purposes of the assessment. Laws 1885, c. 255, § 27. There is an apparent reason for this provision of the statute, and for a construction of it which supports the action of the common council in that respect, in the fact that the expiration of the time which may follow payment by the city before the proceedings had to perfect the assessment, and collected, may result in reimbursement. Sections 28, 30, 31. A party may take the benefit of a discount by early payment. Section 31. The statute seems to have been observed upon the question of interest.

The contention that the assessment "was inequitable, unjust, and oppressive," and therefore void, is upon the assumption that other property than that covered by the assessment should have been embraced within it. No evidence appears in the record which required the conclusion of the trial court that the assessors failed to perform their duty in that respect, in making the assessment; nor upon the evidence or facts found can it be here determined that any omitted property should have been included with that assessed for the expense of constructing the sewer. The compensation of the inspector was a proper charge to go into the assessment. Section 27; *In re Merriam*, 84 N. Y. 596; *In re Lowden*, 89 N. Y. 548. The amount included for such compensation was \$218. That was done pursuant to the resolution of the common council that such was its amount. The trial court found that it in fact amounted to only \$206. The error produced an excess of \$12 in the assessment, which, added to the \$142.05 for lumber and putting in the inverts before mentioned, makes \$154.85, in excess of the amount for which the local assessment should have been made. The cases cited by the plaintiff's counsel do not support his proposition that the court cannot direct the reduction of the assessment on his property. It, of course, cannot be done unless the excess clearly appears in such manner as to permit it. In *Hassan v. Rochester*, 67 N. Y. 528, property which should have been assessed was omitted; and such was the situation in *Re Public School*, 75 N. Y. 324.* In the latter case, why it could not be done was given by the court in the remark: "There was no fixed sum or criterion for the court to act upon. The court would occupy the position of the assessors, and the assessment would be according to its judgment, instead of the judgment of the assessors." A court of equity has the power, and will exercise it, to correct mistakes, when it clearly appears that it may be done without prejudice, and thus protect and preserve the rights of the parties concerned. It follows that the judgment should be modified by striking out so much as dismisses the plaintiff's complaint, with costs; and also to restrain the defendant from collecting so much of the assessment as is excessive, as is decided in this opinion, without costs to either of this appeal. All concur.

HEALEY *et al.* v. TERRY.

(City Court of New York, General Term. October 31, 1889.)

APPEAL—RECORD.

On settlement of the case on appeal, it is error for the trial judge to arbitrarily strike from appellants' exhibit any words which form a part of it.

Appeal from special term.

Action by William W. Healey and others against Kate M. Terry. Plaintiffs appeal from an order striking certain words out of the case.

Argued before MCADAM, C. J., and HOLME, J.

C. J. Hardy, for appellants. J. Fromme, for respondent.

PER CURIAM. We are satisfied that the words stricken out were part of plaintiffs' Exhibit 3, and cannot be detached therefrom. Where the facts are disputed, the certification of the trial judge as to what occurred is conclusive, (*Green v. Shute, ante*, 69;) but where the facts are undisputed, or are indisputable, the trial judge cannot arbitrarily strike out evidence regarded by the appellant as material to his appeal, (*Rubber Co. v. Rothery*, 112 N. Y. 592, 20 N. E. Rep. 546.) The words stricken out formed part of plaintiffs' Exhibit No. 3, and the appellants had the right to have them printed as part and parcel thereof. It follows that the order striking them from the case must be reversed, with costs.

GAMMOND v. BOWERY SAV. BANK.

(City Court of New York, General Term. October 31, 1889.)

BANKS AND BANKING—DEPOSITS—GIFTS.

Where money is deposited in a bank, and the depositor receives from the bank a deposit book containing a rule requiring depositors to draw money by written order or power of attorney, this condition of the contract of deposit does not impair the rights of the depositor as a creditor of the bank, and his donee may draw the money without a written order or power of attorney signed by the depositor.

Appeal from special term.

Action by Sarah B. Gammond against the Bowery Savings Bank to recover money deposited by Michael Galligan, who made an absolute gift of it, accompanied with his bank-book, to plaintiff, and subsequently died. The book contained the following among other regulations: "Drafts may be made personally, or by the order in writing of the depositor, or by letters of attorney duly authenticated." The defense was that no legal demand could be made for the money except by compliance with this rule. The trial judge ordered judgment for the amount of the deposit, and interest, and defendant appeals.

Argued before MCADAM, C. J., and HOLME, J.

Carlisle Norwood, for appellant. Cromwell G. Macy, for respondent.

PER CURIAM. The reasons assigned by the trial judge in his opinion sufficiently warrant the direction made. As he says: "The alleged contract of deposit does not limit nor impair the absolute right of the depositor as a creditor of the defendant;" and that "it refers only to the proof upon which the depositor may require a payment to himself, or to another at his request." It did not prevent the creditor from passing the demand by general or specific assignment, by gift or bequest, or by operation of law, such as bankruptcy proceedings, or the appointment of a receiver, in the life-time of the creditor, or by the appointment of an administrator, or qualification of an executor, after death. In either of these cases the fund would pass to and be assets in the hands of the assignee, donee, beneficiary, or legal representative, on whom the title devolved, (see *Penfield v. Thayer*, 2 E. D. Smith, 305,) without a written order or power of attorney signed by the depositor and duly authenti-

cated, according to the rules of the bank. For these reasons the plaintiff acquired good title to the fund, and the judgment rendered awarding it to her must be affirmed, with costs.

FARMER *et al.* v. MEDICO-LEGAL JOURNAL ASS'N *et al.*

(City Court of New York, General Term. November 4, 1889.)

CONTRACT—MUTUAL ASSENT—COMPROMISE.

Where the holders of a note agree with the indorser to accept a certain sum in full of their claim against it, and it appears that the intention of the holders was to release the indorser, but to reserve the right to collect the balance of the note from the maker, while the indorser intended to compromise its liability, and repossess itself of the note, there is no contract between the parties, and payment of the sum agreed on is not an accord and satisfaction as to either indorser or maker.

Appeal from trial term.

Action by Aaron D. Farmer and others against the Medico-Legal Journal Association and the Railway & General Printing Company on a promissory note. The court directed judgment for plaintiffs, and defendants appeal.

Argued before MCADAM, C. J., and HOLME, J.

Clark Bell and *Roger Foster*, for appellants. *Thornton, Earl & Ktendl*, for respondents.

PER CURIAM. The action is on a promissory note made by the Medico-Legal Journal Association to the order of the Railway & General Printing Company, and by it indorsed and delivered to the plaintiff. It is dated November 5, 1887, and fell due March 8, 1888. Prior to the maturity of the note, to-wit, in the early part of February, 1888, the Railway & General Printing Company found itself embarrassed, and the plaintiffs agreed to accept from it 50 cents on the dollar in settlement of their claim against the Railway & Printing Company. The latter company was willing to settle on this basis, and, after the present action was commenced, sent an indorsed note according to the terms of the compromise. The plaintiffs' attorneys accepted the note, and \$15 taxable costs, and returned a consent discontinuing the action against the Railway & Printing Company. The latter declined to accept the discontinuance unless it embraced the Medico-Legal Journal Association (the maker of the note in suit) as well. This the plaintiffs declined to do, claiming that the proposed compromise was merely to release the Railway & Printing Company from its liability, but was not to discharge the Medico-Legal Journal Association. The costs were thereupon returned, and the action proceeded to trial, both defendants pleading the alleged compromise in defense as an accord and satisfaction.

We hold that what occurred falls short of an executed accord and satisfaction. The Railway & Printing Company evidently intended to compromise its liability for 50 cents on the dollar, and to repossess itself of the note in suit at the same time. The plaintiffs evidently intended to release the Railway & Printing Company from liability as indorser for 50 cents on the dollar; reserving its right to collect the balance from the Medico-Legal Journal Association, the maker of the note. When it was ascertained that the parties had not united in the same understanding, the compromise was abandoned, and the parties were restored to their former position. A misunderstanding such as occurred here does not make a contract. Indeed, the elementary books lay it down as a legal axiom that there is no contract unless the parties thereto assent to the same thing, and in the same sense, and that a proposition becomes a contract only when it is met by an acceptance which corresponds with it entirely and adequately. An indorser on a note may lawfully effect a discharge from liability by the consent of the creditor without at all impairing the remedies of the latter against the principal debtor,—the maker,—or he may arrange that the creditor shall enforce the obligation as against the maker

for any sum due by the latter, returning the overplus after paying the creditor's demand against the indorser; the creditor being, in respect to the amount due to himself, an owner, and, in respect to the overplus, a trustee of an express trust for the benefit of the indorser; or the latter may agree with the creditor that the sum paid to the latter for the indorser's discharge shall operate as a payment *pro tanto*, as none of these arrangements work any prejudice to the principal debtor, in respect to whom the indorser is a mere surety, and as between whom the surety is entitled to full payment of the obligation. As it is evident, the minds of the contracting parties did not meet; there was no valid, executed accord and satisfaction of the note in suit; and the judgment directed by the trial judge must be affirmed, with costs.

WOARMS *et al.* v. BAUER.

(City Court of New York, General Term. October 31, 1889.)

PARTNERSHIP—ACTIONS—PARTIES—EXECUTORS OF DECEASED PARTNER.

The members of a firm agreed, in their articles of copartnership, that, if a certain partner should die before the expiration of the stipulated term of partnership, his interest should survive to his personal representatives, by whom, with the other partners, the business should be continued. The partner in question, by his will, directed his executors to carry out the partnership agreement. *Held*, that defendant, in an action for a firm debt, could not object that the deceased partner's executors were improperly joined as plaintiffs.

Appeal from trial term.

Action by Albert L. Woarms and others against Moritz Bauer. The complaint alleged that between the 15th day of August, 1888, and the 15th day of October, 1888, David S. Hess, Charles T. Parks, Louis J. Lesser, and Albert L. Woarms were copartners doing business in the city of New York under the firm name and style of D. S. Hess & Co., and as such copartners, during the period aforesaid, performed work, labor, and services for, and furnished materials to, the defendant, at his special instance and request, in decorating the interior of his dwelling-house. That the reasonable value of such interior decorations was \$566.33. That thereafter, and before the commencement of this action, the aforesaid Charles T. Parks retired from said firm, and assigned all his right, title, and interest in and to the aforesaid claim to David S. Hess, Louis J. Lesser, and Albert L. Woarms, continuing to do business as copartners under the firm name and style of D. S. Hess & Co. That, by virtue of the articles of copartnership between the persons last named, it was mutually agreed between them that, in the event of the demise of the aforesaid David S. Hess before the expiration of the stipulated term of partnership, his interest as a partner in said firm of D. S. Hess & Co. should survive and accrue to and be continued by his personal representatives, and said business should be continued by said Louis J. Lesser and Albert L. Woarms and the said representatives of said David S. Hess as copartners; and that thereafter, before the expiration of said stipulated term of partnership, and before the commencement of this action, said David S. Hess died, leaving a will, by which Albert L. Woarms, Martin S. Fechheimer, and Sarah Hess—above named as plaintiffs herein—were appointed executors thereof, and were directed to carry out the provisions of the copartnership articles aforesaid of the firm of D. S. Hess & Co. That on the 11th day of March, 1889, said will was duly proved and admitted to probate in the office of the surrogate of the county of New York, and letters testamentary thereupon were thereafter duly issued and granted by the surrogate of said county to the above-named Albert L. Woarms, Martin S. Fechheimer, and Sarah Hess as executors; and that they thereupon duly qualified as such executors, and entered upon the discharge of the duties of their said office, and carried out the aforesaid provisions of the copartnership articles of the firm of D. S. Hess

& Co., as directed by the will. The defendants interposed a denial, which was waived at the trial, and they relied upon the objection reserved by the answer that there was a misjoinder of parties plaintiff, in this: that the action ought to have been brought by the surviving members of the old firm, without joining the executors of the deceased member thereof. The action was submitted to the trial justice on the pleadings, (conceding the allegations of the complaint to be true,) to the end that the plea of misjoinder might be determined as the only issue in the case. The trial judge directed judgment in favor of the plaintiffs, and the defendant appeals.

Argued before MCADAM, C. J., and EHRLICH and HOLME, JJ.

Donohue, Newcombe & Cardozo, for appellant. *M. A. Lesser*, for respondents.

PER CURIAM. We are aware of the rule that the surviving partners succeed primarily to all the rights and interests of the partnership; that they have entire control of all the partnership property, and the sole right to collect the partnership debts, to the exclusion of the personal representatives of the deceased member. The complaint, however, alleges reasons why that rule is inapplicable. The copartnership articles provided that if, during their continuance, David S. Hess died, his interest in the firm should accrue to and be continued by his personal representatives; that he did die during the continuance of the copartnership; and that his personal representatives, *i. e.*, his executors, pursuant to the provisions of said articles and of his will, agreed to and did continue the partnership business. Such a partnership arrangement does not violate the statute in regard to the use of firm names, (Laws 1886, c. 262;) nor is it illegal, so far as the defendant, a mere debtor of the firm, is concerned. The parties in interest admit and assert the validity of the arrangement by which the surviving partners and executors are made joint owners of the claim in suit, and no one interested in the estate of the deceased partner seems to object to it. The defendant has no power to question its validity in defense to an action for a debt in which the surviving partners are before the court, sustaining it. How far the estate of the deceased partner might have repudiated it (*Stewart v. Robinson*, 22 N. E. Rep. 160) need not be inquired into now. It follows that the judgment must be affirmed, with costs. All concur.

BERRIEN v. SOUTHACK.

(City Court of New York, General Term. October 31, 1889.)

1. STATUTE OF FRAUDS—CONTRACT NOT TO BE PERFORMED WITHIN A YEAR.

In March, 1887, plaintiff made an oral contract to work for defendant from May 1, 1887, to May 1, 1888. In October, 1887, defendant became displeased with plaintiff because of a mistake made by him, and said that he would let him (plaintiff) go. Afterwards defendant agreed to let the matter remain in abeyance, and finally "called it off." Plaintiff then went on with his duties as before. Nothing was said at this time as to term of service, duties, salary, etc., all of which were governed by the contract made in March, 1887. *Held*, that no new contract was made in October, 1887, so as to take the case out of the statute of frauds as a contract not to be performed within a year.

2. SAME—PLEADING.

Where defendant denies that he made the contract sued on, he may prove that there was no contract in writing, as required by the statute of frauds.

Appeal from trial term.

Action by William M. Berrien against Frederick Southack for the wrongful discharge of plaintiff from defendant's service. Judgment was entered on a verdict for plaintiff, and defendant appeals.

Argued before MCADAM, C. J., and EHRLICH and HOLME, JJ.

Billings & Cardozo, for appellant. *Mitchell & Mitchell*, for respondent.

MCADAM, C. J. The action is by an employe to recover damages for a wrongful discharge. The contract, which was made, according to the complaint, in March, 1887, was to continue from May 1, 1887, till May 1, 1888. The plaintiff was discharged February 14, 1888, and recovered a verdict for salary, by way of damages, from that date until May 1, 1888. As the contract declared on was an oral one, which, by its terms, was not to be performed within one year from the time of the making thereof, it was void under the statute of frauds. 3 Rev. St. (6th Ed.) p. 142, § 2, subd. 1; *Little v. Wilson*, 4 E. D. Smith, 422; *Nones v. Homer*, 2 Hilt. 116; *Levison v. Stiz*, 10 Daly, 229; *Oddy v. James*, 48 N. Y. 685; *Wanamaker v. Rhomer*, 23 Wkly. Dig. 60. The plaintiff, evidently feeling the force of this objection, undertook at the trial to show a new contract of hiring not alleged in his complaint, and made in October, 1887. It appears that the defendant had become displeased with the plaintiff in reference to a mistake he had made in a lease, and had said he would let the plaintiff go. After some conversation concerning the error, the plaintiff said he was sorry the mistake had occurred, and the defendant agreed to allow the matter to remain in abeyance. The defendant finally "called the matter off," to use the language of the plaintiff, and he went on with his duties as before until he was discharged, February 14, 1888. It is evident from what occurred that no discharge of the plaintiff in October actually took place, although it was strongly threatened and intended by the defendant. The plaintiff did not leave the defendant's service in October, and never suspended the performance of any of his duties under the original contract for a single instant. The so-called new contract did not specify a term of service, a rate of salary, mode of payment, nor did it define the duties of the employe. All these were governed by the oral contract made in March, 1887. It is evident, therefore, that the minds of the parties never united in the conclusion that a discharge was effected in October, and a new employment then consummated. Calling the threatened discharge "off," and treating things accordingly, rendered the making of a new agreement unnecessary. In order to constitute a new agreement in a case like the present, sufficient to take it out of the operation of the statute of frauds, it must clearly appear that it was the mutual understanding of the parties that the old contract was given up, or put to an end, and that a new one was accepted in its stead. Such an understanding was not arrived at in this instance, either by the words employed by the parties, their acts, or by any logical implication to be drawn from them. A mere threat to discharge, not acted upon by either party, does not terminate a contract of employment. Recanting and recalling the threat, and allowing things to proceed as before, do not make a new engagement. A gun is not discharged simply because the holder threatens to discharge it. If the charge is fired, and the agent charged thrown out by the explosion, there has been an effectual discharge and separation; not otherwise. The plaintiff was not sent away by the defendant in October. There was no explosion, no discharge, no separation; nothing but an empty threat, unexecuted and withdrawn. There was no appreciable time in October when he was not in the defendant's employ, subject to his orders and under his pay; all by force of the oral contract made in March, 1887. So much for the contract portion of the case.

Next, as to the right of the defendant to invoke the protection of the statute of frauds under his answer, pleading a general denial, without referring to the statute. The plaintiff urges that the objection that the statute is applicable has been waived by the defendant because it is not pleaded in his answer; and cites *Porter v. Wormser*, 94 N. Y. 431, to sustain his contention. In that case (on page 450) Judge ANDREWS, says: "The general rule is that the defense of the statute of frauds must be pleaded, except where the complaint on its face discloses a case within the statute. It cannot be doubted that if the defendants had brought an action to recover a balance claimed to

be due on the contract for the purchase of the bonds, without disclosing whether the contract was oral or written, the plaintiff would have been bound to plead the statute, to avail himself of its protection." The language of the court certainly sustains the claim made by the plaintiff's counsel; but, in considering its application, it must be limited to the circumstances of the case in which it was employed. The action was by bill in equity to open and review an account of transactions in the purchase and sale of stock and government bonds. The complaint, in substance, alleged the existence of a contract for the purchase of the bonds, and sought to avoid the loss charged thereon, "on the ground of fraud in the inception of the contract." The allegations of the complaint implied the existence of a legal contract, and did not impeach it as void under the statute; and the court properly held that "the plaintiff, having become an actor, and brought an action to impeach the account on grounds which implied the existence of a formal contract, is not in a position to question the validity of the contract under the statute;" citing *Cozine v. Graham*, 2 Paige, 177; *Vaupell v. Woodward*, 2 Sandf. Ch. 143; 2 Story, Eq. Jur. § 755. An examination of these authorities show the ground upon which the decision in *Porter v. Wormser*, *supra*, was made.

Judge Story (2 Story, Eq. Jur. § 755) says: "Courts of equity will enforce a specific performance of a contract within the statute, not in writing, where it is fully set forth in the bill, and is confessed by the answer of the defendant." The reason for this is that, the agreement being admitted, the case is taken out of the mischief intended to be guarded against by the statute, to-wit, fraud and perjury. *Vaupell v. Woodward*, 2 Sandf. Ch. 143, was decided upon the authority of *Cozine v. Graham*, 2 Paige, 177, in which the chancellor said: "The rule of pleading on this subject is well settled in the courts of law, and I do not see why the principle of that rule is not equally applicable to this court. It is there held that the statute did not alter the form of pleading; that, if an agreement or contract is stated in the declaration to have been made, it is not necessary to allege that it was in writing, as that will be presumed until the contrary appears. If the agreement is denied, the plaintiff must produce legal evidence of its existence, which can only be done by producing a written agreement, duly executed according to the provisions of the statute. If the agreement is admitted by the pleadings, no evidence to prove its existence is necessary; and the court never inquires whether it was or was not in writing." Hence it is that a complaint need not allege that a contract which would be void unless reduced to writing, and signed, was in fact in writing. *Marston v. Sweet*, 66 N. Y. 206; *Livingston v. Smith*, 14 How. Pr. 490; *Stern v. Drinker*, 2 E. D. Smith, 401; *Amburger v. Marvin*, 4 E. D. Smith, 393; *Washburn v. Franklin*, 7 Abb. Pr. 8, 28 Barb. 27. If the defendant, by not denying, admits the existence of the contract declared upon, he admits its legality, unless he specially pleads the statute of frauds, to-wit, that it was not in writing, and therefore void. But, where the defendant (as in this case) denies that he ever made such a contract as is alleged in the complaint, he need not plead the statute; and unless the plaintiff proves a contract valid in law he cannot recover. *Spear v. Hart*, 3 Rob. (N. Y.) 420; *Goelet v. Corodrey*, 1 Duer, 132; *Champlin v. Parish*, 11 Paige, 405; *Harris v. Knickerbacker*, 5 Wend. 638; *Haight v. Child*, 34 Barb. 186; *Duffy v. O'Donovan*, 46 N. Y. 223. A defendant who denies that he ever made the contract alleged is certainly not bound to plead the contradictory defense that it was not in writing. If he never made the contract, it follows that it could neither be oral nor written; in short, it never had existence in any form whatever. If, in attempting to prove the contract alleged, the plaintiff fails to prove that it was made in a form sufficient to bind the defendant, how can he consistently ask a court of justice to hold the defendant liable on it, or complain if the court does not? Of course, if the defendant, by his written answer, admits the contract, legal evidence of it is furnished by the very admis-

sion, and no proof whatever is required on the subject. It is therefore clear that the court in *Porter v. Wormser*, *supra*, did not intend to establish any new rule of pleading, but simply applied existing rules to the peculiar circumstances of the case then under consideration. It follows that, as the contract sued upon was void by the statute, the plaintiff could not, in the face of the denial contained in the defendant's answer, recover, in the absence of an agreement in writing subscribed by the defendant. The contract being void, the defendant had the right to discharge the plaintiff at any time, without cause, upon paying him for the services actually performed; and this he did before suit brought. He can be required to do no more. The judgment appealed from must therefore be reversed, and a new trial granted, with costs to the appellant, to abide the event. All concur.

In re SMITH'S ESTATE, (two cases.)

(Surrogate's Court, New York County. September 20, 1889.)

TRUSTS—REMOVAL OF TRUSTEE.

Where a trustee fails to charge herself with rents received, and evinces such carelessness as proves her an unsafe guardian of others' property, and her testimony discloses an intention, persisted in until discovery, to conceal from the interested parties her reception of, and intention to appropriate, such rents, she will be removed as trustee, and it need not be found that she is dishonest or improvident.

Applications by Mrs. Drinker and others, and Hanford Smith and others, to remove the trustee of the estate of Hanford Smith, deceased.

Dilloway, Davenport & Leeds, for Mrs. Drinker and others. *Dill, Chambers & Seymour*, for Hanford Smith and others. *Ovide Dupre*, for trustee.

APPLICATION OF MRS. DRINKER AND OTHERS.

RANSOM, S. The evidence which is now before the court shows that the learned referee has found that the respondent collected before the death of the testator the sum of \$1,068, and afterwards the further sum of \$465, and that she failed to charge herself in her account with any part of these sums, and that she was charged with the same by a decree of this court, entered upon the report of a referee holding her liable for it. The learned referee herein, however, decides that her failure to charge herself with the moneys collected was not the result of dishonesty or bad faith, and concludes, as matter of law, that she was not guilty of any misconduct for which she could be removed. This conclusion of law seems to be deduced solely from the finding of fact as to the absence of dishonesty and bad faith in omitting to charge herself with the collections stated. It is apparent that the learned referee has not considered whether the acts or omissions in question, although done, or omitted to be done, in good faith, and with no dishonest purpose, might not involve such an improper application or administration of the funds of the trust, or such an improvident management thereof, or such other misconduct in the execution of the trust, as would justify the removal of the trustee. That the utmost good faith and honesty would not, in a multiplicity of instances readily suggested as coming within the cases mentioned, save a trustee from removal from his office, is manifest. The statute plainly recognizes this. Section 2817, subd. 2, Code Civil Proc; *Estate of Stanton*, 2 N. Y. Supp. 342; *Morgan v. Morgan*, 3 Dem. Sur. 616.

I have very carefully examined and considered the evidence which has been adduced before the learned referee, and am unable to reach any other conclusion than that which follows. The testimony of the respondent given upon the previous reference, and which has been admitted in evidence, discloses, to my mind, an intention on her part, existing at and previously to the time of the filing of her account, and afterwards persisted in until discovery made

impossible its further continuance, to conceal from the parties interested the fact of her reception of the rents collected, and to convert the same to her use. This conduct I deem such dishonesty as would warrant her removal. Aside from this, and assuming that she had no knowledge of the amount of the rents she received in the month of May previously to her father's death, which I do not believe, she should at once, upon the death of her father, (which occurred on the 11th day of May,) or at least as soon thereafter as she had received her letters, have informed herself of their amount, and the disbursements made from them; as she knew, I am satisfied from the evidence, that any balance remaining constituted assets of the estate, for which she was accountable as executrix. Her testimony with regard to the rents received from Wolfe since the death of the testator, and her attempted explanation of her omission to charge herself with them, evidence such a degree of carelessness and inattention as prove her to be an unsafe guardian of the property of others. Her conduct with respect to the rents collected, before as well as after her father's death, is such as to satisfy me that she has not shown that fidelity which the law exacts from a person in her position; but, on the contrary, she has so improvidently and faithlessly managed the property committed to her charge as to render her an unfit person for the due execution of her trust. Section 2817, subd. 3, Code Civil Proc., and cases above cited. It is hardly necessary to add that the fact that the trustee satisfied the decree which charged her with the rents in question—a decree which could have been enforced by proceedings for contempt—does not relieve her from liability to removal. *In re Wiggins*, 29 Hun, 271. I have thus reached a conclusion opposed to that arrived at by the learned referee, and am therefore constrained to overrule his report, and decide that the respondent should be removed from her office as trustee.

APPLICATION OF HANFORD SMITH AND OTHERS.

RANSOM, S. The evidence warrants the findings contained in the report of the referee, and also the disposition which he made of the requests to find of the petitioner Hanford Smith. The provisions of the Code, as well as the cases cited below, show that it is not necessary to find that the respondent was dishonest, although it is not entirely beyond doubt that she was not. Nor is it necessary to find that she was improvident, in the general sense of that term, to justify her removal; but the grounds specified in the referee's report are sufficient, and compel the court to decree her removal. Code Civil Proc. § 2817, subd. 2; *Estate of Stanton*, 2 N. Y. Supp. 342; *Morgan v. Morgan*, 3 Dem. Sur. 616. The case of *Emerson v. Bowers*, 14 N. Y. 449, referred to by the respondent's attorney upon the argument, has no application, as the facts relied upon for the removal of the trustee in the present proceeding were not then grounds for removal, and, of course, were not considered. The Code of Civil Procedure has since made them such grounds. See section of Code above cited.

In re HILL'S ESTATE.

(Surrogate's Court, New York County. June 12, 1889.)

EXECUTORS AND ADMINISTRATORS—ACCOUNTING—FAILURE TO DEFEND ACTION.

Where a claim of an administrator against his decedent's estate is assigned, and referred as a disputed claim, and the administrator fails to make the apparent defense of the statute of limitations, and all the testimony in support of the claim is incompetent, though not objected to by the administrator, the judgment allowing such claim will be set aside upon exceptions to the referee's report on a settlement of the administrator's accounts, and all claims for costs and expenses in connection therewith will be disallowed.

Motion to confirm report of referee.

Hastings & Southworth, for administrators. *George Wilcox*, for contestant.

RANSOM, S. Motion to confirm report of referee, and to overrule exceptions filed thereto, on the judicial settlement of the accounts of the administrators. The exceptions relate to three items allowed by the referee: (1) Two hundred and fifty dollars paid for legal services; (2) \$120.75 paid for costs and disbursements in a suit against the administrators; (3) claim originally owned by one of the administrators, but subsequently assigned to his daughter. For 30 years prior to her decease, the decedent lived with the administrators, who are husband and wife; the latter being the sister of the deceased. Subsequent to her decease one of the administrators (the husband) presented a claim to himself and his wife, as administrators, and subsequently assigned the same to his daughter. The matter was referred as a disputed claim, under the statute, and the judgment rendered in favor of the plaintiff. This judgment exceeds in a considerable sum the entire value of the estate. The contestant claims that it was obtained collusively, and is void, and that the claim, being that of the administrator, could not be referred, but must be proved before the surrogate on the accounting. The only testimony taken before the referee was that of the plaintiff, and her father and mother, the administrators. It appears from the testimony given by the assignee of this claim, the daughter of the administrator, that she was unaware of the fact of assignment, paid no consideration therefor, and knew nothing whatever with reference thereto. It is clear, therefore, that the assignment was merely colorable.

The apparent defense of the statute of limitations was not interposed to the claim, or any part thereof, and all the material testimony that would in any way be relied upon to sustain the claim was susceptible to objection under section 829, Code Civil Proc. Had the former defense been interposed, I am of opinion that certainly the greater part of the claim would have been rejected; and, if the testimony is considered as though the latter objection had been insisted upon, the court would find nothing upon which to base a judgment in favor of the claimant. Reading the testimony taken upon the reference of the claim, and comparing the same with that taken on the accounting herein, I am forced to conclude that the judgment was obtained in such a manner that its authority will not be recognized in this proceeding. "It has become an established rule, settled in the administration of justice, that, where a judgment has been fraudulently obtained, it may either be set aside by an action brought for that object, or the judgment itself may be defeated by a defense to any legal proceeding taken upon its authority." *Richardson v. Trimble*, 38 Hun, 410, and cases cited. It is not necessary to bring an action to avoid the record. *Mandeville v. Reynolds*, 68 N. Y. 528. See, also, *Ward v. Town of Southfield*, 102 N. Y. 287, 6 N. E. Rep. 660. In *Richardson v. Trimble*, *supra*, the term "fraud" is defined by Justice DANIELS, writing the opinion of the general term, as follows: "Fraud, 'in the sense of a court of equity, properly includes all acts, omissions, and concealments which involve a breach of legal or equitable duty, trust, or confidence justly reposed, and are injurious to another, or by which an undue and unconscientious advantage is taken of another.' 1 Story, Eq. Jur. (5th Ed.) § 187."

The facts I have briefly recited are established by the evidence, and constitute a valid defense to so much of this proceeding as is based upon the authority of the judgment. The failure of the administrators to interpose the available legal defenses was such a neglect of duty as to charge them with the damage occasioned to the estate by such failure. An executor or administrator is bound to set up the bar of the statute of limitations, and will not be allowed in his accounting any sum paid upon a debt which at the time of its payment by him was barred by the statute. *Butler v. Johnson*, 111 N.

Y. 204, 18 N. E. Rep. 643. The other items which are the subject of exception were for legal services and costs in connection with the reference of the alleged disputed claim of the administrator. I think they should stand or fall with the determination of the main exception. Exceptions to the referee's report sustained.

In re FREY'S WILL.

(Surrogate's Court, New York County. September 6, 1889.)

1. WILLS—PROBATE—EVIDENCE.

Where a will is on its face properly executed and attested, and one of the subscribing witnesses, whose memory of other circumstances connected therewith is defective, states that she was not asked to sign the will, and the other subscribing witness, who also drew the will, and a third person who was present at its execution, testify positively to the contrary, and there is nothing to show fraud, the will should be admitted to probate.

2. SAME—VALIDITY—REFERENCE TO LETTER.

Where a testator bequeaths one-fourth of his residuary estate to his executor for purposes to be made known by a letter written by the testator, said letter to form a part of the will, and the letter cannot be found, the will is valid except as to the one-fourth, as to which testator is intestate.

Application for the probate of the will of Joseph B. Frey, deceased.
George W. Carr, for proponent. *Edward B. Crowell*, for contestant.

RANSOM, S. The instrument, though without date, appears by the testimony to have been executed on the 17th day of April, 1882, the date of a letter referred to in the body of the paper. The subscribing witnesses were Charles N. Hilliard, the attorney who drew the will and superintended its execution, and Mrs. Clemence Dodge. During the seven years that succeed the event, the memory of Mrs. Dodge as to the occurrence had become nearly obliterated, unless her testimony was given in a disingenuous spirit, which, from a careful reading of it, seems not improbable. When the attention of Mr. Hilliard was first called to the subject after the testator's decease, he said that his recollection was vague as to the circumstances attending the transaction, but, on reflection, he was able to recall the facts. If his testimony is to be credited, the requirements of the statute were substantially complied with. His statements in that regard are corroborated by the proponent, Mr. Clirehugh, whose wife was a sister of the decedent, and is a legatee named in the will. The decedent's widow, by her attorney, contested the probate of the paper, alleging that it was not the decedent's free and unconstrained act, and that it was not executed in conformity to the statute. Mr. Hilliard states that, two days before the paper was executed, Mr. Clirehugh gave him some headings of the proposed will, of which he took memoranda. On the day on which it was drawn, he proceeded to an apartment in the residence of the decedent, whom he had never until then seen, and the provisions of the instrument were discussed by the decedent and Clirehugh, and he then drew the will. After its completion, Mrs. Dodge, who was in the apartment of Mrs. Frey, and who was to remain with her during the night because the decedent was to leave for Washington, was asked by him to come into the room where the instrument had been prepared, he stating that she was wanted to witness a paper for the disposition of his patents, and that he did not say that it was his will. In this statement she is confirmed by the testimony of the contestant. She, however, did not accompany Mrs. Dodge into the other room. When there, Mrs. Dodge states that no one asked her to sign her name as a witness to a will. Her memory is singularly perverse in respect to nearly all the circumstances attending the execution, and the greater part of her testimony is a succession of answers, "I cannot remember," to the questions propounded in respect to the successive acts to constitute the valid execution of the will. Mr. Hilliard, in 1882, had been admitted to the bar for three years,

and he states that during that period he had drawn six wills. He further testifies that on this occasion, before proceeding to the decedent's residence to draw the paper, he took the precaution to look at the statute in respect to its requirements. At the foot of the instrument is an attestation clause in his handwriting; and both Hilliard and Clirehugh say it was read at the time of the execution in the presence of both witnesses.

It is incredible that a lawyer of any experience in superintending the execution of wills, unless he was a party to a fraud, should have written the recitals contained in the clause, and then signed them, if the events therein stated had not taken place; and as he testifies that his feelings are not cordial towards the proponent, Clirehugh, because he had refused to pay him for his services in connection with the matter, I certainly see no reason to believe that he would vary his statements from the truth. Nor does the fact that Clirehugh and Hilliard do not agree in respect to some of the important details of an interview cause me to doubt that the will was properly executed. Under a well-settled principle of law, if, by reason of the lapse of time, witnesses are not able to recall the circumstances connected with the execution of a testamentary instrument to which they have affixed their signatures, the existence of an attestation clause reciting the facts requisite for a due execution, and to which the witnesses have affixed their signatures, comes in aid of probate; and in this case, as its statements are re-enforced by the positive recollections of Mr. Hilliard and Mr. Clirehugh, I am satisfied that the will was properly executed.

The contestant calls in question the construction and legal effect of the disposition of the personal estate of the decedent upon a further ground. By the will the decedent bequeaths to his wife one-third of the profits accruing from certain royalties on patents, and one-third of the proceeds of the sale and manufacture of a certain other patent to be issued to him, and gives the residue of his estate to be divided into four equal parts,—one to his mother; another to his sister Mrs. Clirehugh; another to his brother August William; and the fourth part “unto my executor, to be devoted by him to and for a certain purpose made known unto said executor by a certain letter written by me to my said executor, and bearing date April 17, 1882; the said letter to form a part of this, my will.” No such letter was found after the decedent's death. Mr. Hilliard states that he was informed by the decedent and by Clirehugh, at the time of drafting the will, that the letter was then in existence. In this respect, the recollection of Mr. Clirehugh is different. If it had been written at the time, and was properly identified, its directions would be followed as a part of the instrument; but as it was not found, and I hold that the paper propounded was properly proven as the decedent's will, the non-production of the letter cannot invalidate the provisions for the disposition of three of the four parts of the residuary estate, and that the fourth part must go to the parties in interest, under the statute of distributions.

In re KEECH'S ESTATE.

(Surrogate's Court, New York County. June 20, 1889.)

LEGACY TAX—EXEMPTIONS—ALMSHOUSE.

A charitable institution which requires, as a condition of entrance thereto, the payment of an admission fee, and the making of a will by the applicant in its favor, is not an almshouse, within the definition of a “pure charity,” so as to exempt a bequest to it from the legacy tax.

Motion to confirm the report of the appraiser of the estate of Charlotte G. S. Keech, deceased.

R. E. Selmes, for comptroller. *D. S. Olmstead*, for executors. *Dixon, Williams & Ashley*, for Baptist Home Society.

RANSOM, S. The appraiser has reported as subject to taxation a legacy to the "Baptist Home Society," to which report objection is made on the ground that the society is an almshouse, and as such exempt from taxation. Counsel for the society relies upon the case of *Association v. Mayor, etc.*, 104 N. Y. 581, 12 N. E. Rep. 279, as authority directly in point. In that case the court held an almshouse to be "a house appropriated to the poor," and it might be a private corporation. It thus defines the meaning of an almshouse as relating to the case before the court: "It is appropriated wholly for the poor who are colored orphans, and where they are to have a place of refuge, and to be boarded, clothed, and suitably educated, etc., gratuitously." A little further on: "The plaintiff is performing a work of pure charity, and is taking upon its own shoulders a portion of the burden that would otherwise fall upon the public." Article 13 of the constitution of the society prescribed certain rules for admission, chief among which is the payment of an entrance fee of \$100. This fee may be remitted, under peculiar circumstances, by the trustees, and no fee is charged where an applicant is nominated by a patron, who becomes such by the payment of \$1,000, which payment gives the patron the right to have one person at a time continuously maintained by the society during the life-time of the patron. Affidavits have been submitted showing that the fee has been remitted in some cases by the trustees, but very rarely. Section 6 of article 5 of the by-laws, after providing that the committee on applications shall inquire into the character, etc., of the applicants, and inform them of the requirements of the same, says: "This committee shall visit accepted applicants, and obtain their signature to a contract accepting the terms of admission, and to a will transferring to the home, for the consideration of one dollar, all the property of which they are or may be possessed." The difference between the two cases is striking. In *Association v. Mayor, etc.*, *supra*, it was a pure charity, where the orphans were boarded, clothed, and educated gratuitously. No charge was made for admission, and they were at no expense whatever. Well might the court hold that that institution was an almshouse, taking some of the burden off the public. In the case at bar an admission fee is charged the applicant, or has been paid in bulk by a patron, or, in a few isolated cases, the applicant is admitted free. Each applicant, however, who is accepted, must make a will giving to the home all the property he has or may have. The Baptist Home Society, while no doubt a grand charity, is limited in its scope, and cannot fairly claim to be an almshouse, under the definition of a "pure charity," where everything is provided gratuitously. The society, not being an almshouse, does not come within the exemption as laid down in *Catlin v. St. Paul's Church*, 20 N. E. Rep. 864, and is therefore subject to the tax. An order should be handed up confirming the report of the appraiser, and assessing and fixing the tax.

In re LAWRENCE'S ESTATE.

(Surrogate's Court, New York County. September 28, 1899.)

1. TRUSTS—SALE OF TRUST PROPERTY—PROFITS.

Where the interest of a trust fund is payable as income to a life beneficiary, and the securities in which the fund has been invested are sold at a profit, it is error to credit the profit to the income account, as it is a gain to the principal, to which it should be added, to go eventually to the one entitled to receive the *corpus*.

2. SAME—ACCOUNTING OF TRUSTEE—INTEREST.

Where a payment by the testamentary trustee has been directed by a decree, it is error to charge him compound interest on the sum due.

On settlement of the accounts of the trustee of the estate of William Lawrence, deceased.

Alexander & Green and *Frederick R. Coudert*, for the trustee. *Hoffman Miller*, for William E. Lawrence. *Albert Bach* and *Walter L. McCorkle*, for

Isaac Lawrence and Sarah L. Moser. *Rufus L. Scott*, for Ann E. S. Holywell.

RANSOM, S. I have examined this case carefully, and such matters as have been presented in a shape to enable me to consider them I have disposed of. The others, however, are left in such a condition, owing to the confused manner in which they are submitted, that I am obliged to defer their determination. The report of the referee consists of opinions and findings, facts and evidence, so commingled and run together as to make it extremely difficult, if not impossible, to ascertain definitely the grounds upon which he bases his conclusions, or to test their accuracy or correctness; and he has made contradictory findings of fact, no doubt by inadvertence. The report must be sent back for the purpose of having the referee state his conclusions of fact and law separately, and entirely dissociated from his opinion.

The amount of \$462.63, respecting which the contestant, William E. Lawrence, filed his fourth objection, was not included in the trustee's accounts, and very properly so. The amount was adjudged to be paid to the objectant by the decree made upon the former accounting, and was an adjudication and a determination enforceable in the usual way in which any other money decree or judgment could be enforced. Sections 2553-2555, Code Civil Proc.; Laws 1837, c. 460, §§ 63, 64, as amended by chapter 104, Laws 1844; *People v. Marshall*, 7 Abb. N. C. 380. Obviously, simple, and not compound, interest could be charged on the amount of the recovery. What defenses might be successfully interposed to the attempted collection of its amount could be set up when the attempt to enforce it is made in a proper proceeding. If any claim were made herein by the contestant that payments to him which the trustee seeks to charge against funds, or for which he is now accounting, were not so paid, but paid on account of the moneys directed to be paid by the decree, it would, of course, be necessary to take into consideration such moneys in ascertaining the fact, and determining the extent of the interest of the contestant in the moneys now being accounted for. In no aspect of the case, however, can compound interest be awarded on the amount directed to be paid by the decree, or annual rests be taken in computing the interest. The account prepared by the referee will, he having allowed interest with annual rests to be charged on such amount, have to be readjusted.

The eleventh finding of the referee, respecting the profits upon the sale of the United States securities forming part of the trust fund, to whose income Isaac Lawrence is entitled, is plainly wrong. This profit is credited to income account, and allowed as income to the life beneficiary. It should have been added to the principal of the trust fund, and go as a part thereof to the party or parties eventually entitled to receive the *corpus*. The referee has found that the decree in the previous accounting is binding upon the other parties, but not upon Isaac Lawrence, as he was not cited to attend such accounting, and was not otherwise before the court in such proceeding. The proof of service of citation shows that he was served with the citation. It was, notwithstanding this, competent to show such was not the fact. *Ferguson v. Crauford*, 70 N. Y. 253. I do not decide whether the evidence was or was not sufficient to justify his finding in this regard. Nothing is now determined by me save the questions involved in the fourth objection of William E. Lawrence, and the eleventh finding of the referee, hereinbefore considered. I refer to the finding for the purpose of stating that, while the referee has made this finding, he has not indicated with sufficient explicitness the particular matters affected by it.

I am unable to ascertain definitely from the exceptions filed by the trustee whether any exception is intended to be interposed to the disposition which the referee has made of so much of his report as deals with the mortgage for \$1,000 made by William E. Lawrence to the accounting party. The latter's

thirty-sixth exception, which attempts to raise questions respecting the disposition made by the referee of items of the account, is too general and indefinite. It seems to have been made for the purpose of enlisting the ingenuity of the court in a career of exploration and discovery which it is the duty of the counsel to wholly undertake himself. This exception is therefore not available. When the referees shall have returned to the court his report with the proper findings, the counsel will be expected to submit anew such exceptions as they may wish to file, as I shall consider those already filed, except to the extent that they relate to the questions which I have herein disposed of, as not before me for consideration. The purpose of this is to prevent confusion, and to have the issues presented to the court for decision plainly and precisely defined and indicated.

In re COMSTOCK'S ESTATE.

(Surrogate's Court, New York County. August 3, 1889.)

WILLS—CAPACITY TO MAKE.

Where the mental capacity of the testator is the question in the contest of a will, and the testimony of subscribing witnesses and others, apparently disinterested, who had opportunities for observing the condition of testator's mind, show that at the time of making her will she was rational, and it appears that the disposition made of the property was the natural result of her surroundings, and in accordance with her intentions previously and repeatedly announced, the will must be admitted to probate.

Application for admission to probate of a paper purporting to be the will of Marie Louise Comstock, deceased. Testator's next of kin contested its validity on the ground of mental incapacity of the maker.

George Carleton Comstock, for proponent. *A. J. A. Callaghan*, for contestants. *Strong & Cadwalader*, for St. Mary's Free Hospital. *Edward Jacobs*, for Sarah S. Reed. *Arnoux, Ritch & Woodford*, for Laura Barbaria, legatee.

RANSOM, S. The last few minutes of the argument have been devoted to a subject which has very little to do with the question to be decided in this proceeding. The comment of counsel on both sides upon this last subject is justified by the evidence as it is said to exist. I think it unfortunate, not for this case, but because of the tenderness which we all feel towards women and children, that there should have been any extended remarks upon this evidence, although the evidence was material and proper, and the witness testified, when she found that she must, by direction of the court, briefly and honestly; and, if it be true that she sinned, in the language of the Saviour of mankind, let those without sin cast a stone. It was not introduced in this case for the purpose of discrediting her testimony, as I understood it, at all. It was not referred to in argument for the purpose of discrediting her testimony, but only to make the point, which was a perfectly legitimate one, that that was probably the reason that Miss Comstock excluded her from the will in which she had theretofore included her; and Mr. Cockran has met the suggestion by a very pertinent inquiry, and I might agree with him if it were necessary for me to decide anything about it.

Now, in regard to the papers propounded as the last will of Miss Comstock, there is no difficulty in my mind about a proper disposition of the question. If we were without instruction which has come down to us for ages, I might say, upon this precise proposition, I might find it more difficult to dispose of the question since I have heard the very plausible argument of the contestant's counsel. But in the light of precedents which he referred to, which have been indorsed and are indorsed in every decision made by every court in this country, on the doctrine of those old cases, carried down to the present time, there cannot be any reasonable doubt in the mind of the surrogate, and it

seems to me in the mind of any person who has listened to this evidence, but that Miss Comstock, at the time she executed these papers, had capacity to execute a will. Whether the capacity was great or small is not the inquiry. Whether the capacity then was as it had been for some years previous is not the inquiry. Evidence of what the capacity was previously and subsequently is admissible as throwing light upon the question of her mental strength at the time she executed the paper. And so the door has been opened very widely, and all objections by the proponent's counsel have been overruled, that the contestant might give all the evidence that exists, so that the surrogate should have a perfect understanding from that evidence of this lady's condition of mind, not only at the time she executed the paper, but at a prior and at a subsequent time. The statute which controls us we are all very familiar with; and the rules and decisions under the statute, and even a higher and a better reason, if we needed to look for it, which may be said to be ingrained in the common sense of a man, require us to look to the subscribing witnesses to a testamentary paper as the most trustworthy source of information in regard to the then condition of the testator, and whether or not the act was free and voluntary and unrestrained. In this proceeding the usual objections were filed. I do not think that the fact that an objection is spread upon a paper charging undue influence, and then abandoned, is to be regarded with any surprise. The objections filed are in the nature of a pleading, and they are for the purpose of presenting, as lawyers understand, the issue, and all the issues that may be inquired into. And in this case Mr. Cockran has done what honest lawyers always do upon the investigation of the facts of the case. He has frankly stated to the court that the only issue under the evidence is one of mental capacity, and has abandoned the charge of undue influence; so that it is unnecessary for me to consider specially that the papers were procured by anybody's improper influence. If it were, of course I agree at once with Mr. Cockran's frank statement that there is no evidence here that there was any influence practiced upon Miss Comstock to procure this will. And I may say that I cannot see that there is any evidence from which it would be fair to infer, or even to suspect, that any influence—improper influence—had been exercised. Proper influence, we understand, is legal. A friend or a relative has a right to persuade a testator to leave a benefaction to him; but there is no evidence even of that. Again, in the whole course of the proceeding, it appears that the wills are precisely in accordance with previously expressed testamentary intentions. There is no doubt about that. Miss Comstock had said to persons who testified—and their testimony must be regarded with full credit, and the fact is established that she had said—that it was her intention to dispose of her property as she has disposed of it. And it does not seem to me unnatural that she should have so disposed of it, considering her surroundings and the way she accumulated her fortune. It seems to me it was perfectly natural that she should prefer to bestow upon her intimate friends, and those who had been with her in the accumulation of this fortune, the benefits of its enjoyment, rather than that it should go to collateral relatives, who were second or third cousins, who were not even her intimate acquaintances. The testimony of Mr. Docharty and other witnesses introduced by the contestant justifies the very careful inquiry by the kin of this lady into the *factum* of this will, and how it was procured; and the contest is one which should have been commenced, and should have been as carefully and as capably prosecuted, as it has been. The result, to my mind, is as I have already intimated. I had occasion, in a case some time ago, to examine the law very carefully, and it occurred to me that I might refer to some of those cases; but I think it unnecessary. The law-books are full of precedents upon this question, which is whether Miss Comstock, at the time she executed these papers, had capacity to make a will, and whether the surrogate is satisfied, from all the evidence, beyond any reasonable doubt, that that is so; and I am satisfied

that she had such capacity. I might spend some time in referring to some items of evidence, letters of the decedent, and express my views, if they would be at all material, upon the suggestion that these letters evidence failing intellect, and that they are contradictory of each other. For the sake of the case, I am quite willing to concede that all that is true; but that does not establish such mental incapacity as should reject a testamentary paper. A great many witnesses were called by the proponent, and their testimony has had great influence upon me; notably Capt. Samuels, Mr. Brackett, and others, who had abundant opportunity to see this lady about the time these papers were executed, before that time, and subsequent to that time. They certainly appeared to be—and I have no doubt they are—disinterested witnesses; and they are unanimous in their testimony, in spite of the skillful cross-examination that they were subject to in their statement, that in any view, after a description of this lady's conduct and speech, that she seemed to them rational down to some considerable period of time after the execution of this codicil. Therefore I say that the papers must be admitted to probate.

PACH v. GILBERT.

(Superior Court of Buffalo, Trial Term. September, 1889.)

ATTACHMENT—VACATION—LIEN—REVERSAL OF ORDER.

Where the lien on goods seized under an attachment is lost by their delivery to defendant under an order vacating the attachment, it is restored by the reversal of such order.

Action by Moritz Pach against Frank T. Gilbert, as sheriff, for failure to levy an execution. Judgment was entered on a verdict for plaintiff, and defendant moves for a new trial upon the minutes.

O. O. Cottle, for plaintiff. *Charles B. Wheeler*, for defendant.

HATCH, J. *Prima facie*, where a sheriff fails to return an execution within the required time, he is liable for the amount of the debt; but he may show, in mitigation of damages, that defendant therein had no property on which the execution could be levied. *Ledyard v. Jones*, 7 N. Y. 550. It satisfactorily appears that at the time the execution was issued, and to the commencement of the action, the defendant therein had no property out of which it could be made. The claim, however, by plaintiff is that under and by virtue of the attachment issued in the action a lien was obtained upon sufficient property to satisfy the execution, which lien has not been lost. In answer to this, defendant insists that no lien can be secured by virtue of an attachment unless there be an actual manual custody of the goods attached under it; and that in the present case, the judge having vacated the attachment, and the sheriff having released the levy and surrendered the goods, the lien of the attachment was gone until there should be another manual seizure under it, which in this case never did, and could not, take place, for the reason that the title to the goods had passed from the defendant, leaving nothing upon which the officer could lay hold. It may be conceded that no lien by virtue of an attachment can be secured unless there be a manual seizure. In the present case there was such seizure, and the lien of the attachment in the first instance was perfect. If lost at all, it was lost by an erroneous order of the court in vacating it. If, then, the contention of counsel for defendant be correct, an error of the court results in defeating a vigilant creditor of his rights, even though he succeeds in establishing such error, and is left, through no fault of his own, to see the property upon which he once had a legal lien appropriated by a more dilatory creditor of no higher standing. While it is true, as claimed, that there is a distinction between executions and attachments, the former becoming a lien upon delivery to the sheriff, and the latter only by an actual seizure of the property, yet I see no reason, and find no law, for

continuing such distinction after there has once been a valid seizure. Then each is equally a lien; and if the law, as has been held in the case hereafter cited, will restore the lien of a judgment and execution erroneously vacated by an order of a court, when such order is itself reversed, I see no reason why it will not restore in like manner the lien of an attachment erroneously vacated. I therefore think that the reasoning and principle decided in *King v. Harris*, 30 Barb. 477, affirmed in 34 N. Y. 330, apply to this case, and are conclusive of it. The case of *Anthony v. Wood*, 96 N. Y. 180, is not in conflict with this conclusion, for the reason that in that case there was at no time a valid levy of the attachment, because there was never any manual custody of the property. Here there was an actual seizure of the goods. There is presented no question of superior intervening rights. The judgments upon which the executions were issued were all for pre-existing debts; and within the decision of *King v. Harris, supra*, no equity exists in their favor. The same is true as to creditors represented by the assignee. *Ray v. Birdseye*, 5 Denio, 619; *Slade v. Van Vechten*, 11 Paige, 21. It follows, therefore, that the sheriff should have made the execution. The motion for a new trial is denied, and judgment ordered for plaintiff on verdict, with costs.

CRONIN v. O'REILEY.

(Superior Court of Buffalo, Special Term. October, 1889.)

ATTORNEY AND CLIENT—DISQUALIFICATION—SUBSTITUTION.

Under Code Civil Proc. N. Y. § 61, prohibiting the clerk of a court from practicing as attorney or counselor therein; and section 65, providing that, if an attorney becomes disabled to act at any time before judgment, no further proceedings shall be taken against the party for whom he appeared until after 80 days' notice to appoint another attorney,—the service of papers by the surviving partner of a firm of attorneys, after the other has been appointed clerk of the court, is authorized and regular without a formal substitution for the latter, who remains the attorney of record, where he has ceased to take any part in the proceedings, and had, with the consent of the client, turned over the action, and all the papers therein, to the survivor.

Motion to vacate an order.

Action by Patrick Cronin against Dennis F. O'Reiley. Plaintiff moves to vacate an order removing the receiver appointed in the action, granted upon motion of defendant.

Norris Morey, for plaintiff. *George Wadsworth*, for defendant.

HATCH, J. This action is brought for the dissolution of a partnership heretofore existing between the parties to it, and for the appointment of a receiver. The action was commenced in 1885. The firm of Green, McMillan & Gluck appeared therein as attorneys for the defendant. In February, 1886, the law firm of Shire & Van Peyma was duly substituted as attorneys for defendant in place of said first-named firm. They have ever since remained, and are now, the attorneys of record. On the 1st day of October, 1886, Moses Shire, the senior member of the last-named firm, was duly appointed clerk of this court, and immediately entered upon the duties of said office, which he has ever since continued to perform. On the 29th day of December, 1888, motion papers were served herein on behalf of the defendant, subscribed by H. B. Van Peyma, as attorney for the motion, asking that the receiver appointed in the action be removed. The plaintiff's attorneys duly appeared, and opposed said motion, and the same was heard, without objection, upon the merits. On the 21st day of January, 1889, the judge rendered a decision granting said motion, and on the 28th day of March, 1889, an order in conformity therewith was duly entered in the office of the clerk of this court. Motion is now made to vacate and set aside said order upon the ground that Shire, being still the attorney of record, is by statute disqualified from practicing in this court, and

that, while he so remains such attorney, the court is without power to entertain proceedings in the action.

Section 61, Code Civil Proc., provides that the clerk of a court shall not practice as an attorney or counselor in that court; and counsel for plaintiff very properly insists that there is manifest impropriety in such a relation. Very cogent reasons exist why a clerk should not practice in the court of which he forms a part. It falls within the reason and principle which disqualifies a judge from participating in a cause in which he is interested. If the fact, therefore, be that the clerk occupies such relation, then this motion should be granted. It, however, appears by the opposing affidavits, read upon this motion, and no attempt is made, either by proof or assertion, to dispute it, that Mr. Shire, from the assumption of the duties of clerk, has taken no part in the conduct of this suit; but at that time, by and with the consent of the defendant, he turned said action, and all papers therein, over to H. B. Van Peyma as attorney, and thereupon said Van Peyma associated with him Mr. George Wadsworth as counsel, and all proceedings therein have since been conducted by said last-named persons. Said Shire supposed that an order substituting said Van Peyma as attorney for defendant had been entered. The question thus presented is, does the fact that Shire still remains the attorney of record render void any proceedings had therein, even though in fact he took no part therein?

By section 65, Code, it is provided that if the attorney dies, is removed or suspended, or otherwise becomes disabled to act, at any time before judgment, no further proceedings shall be taken against the party for whom he appeared until after 30 days' notice shall be given to appoint another attorney. Section 61, Id., does not render permanent the disqualification of the attorney in the present case, but only for the period that he continues in office, and during such period he is prohibited or disabled from practicing. By section 65 he is placed in the category and upon the same footing as if he were dead; for the disability here, so long as it lasts, is quite as effective in preventing practice in this court as death. Shire being thus disqualified, Van Peyma alone was the only person having any standing to represent the defendant. It was held in *Saxton v. Dodge*, 46 How. Pr. 467-477, that service of notice of trial upon the surviving partner of a firm of attorneys was regular. I see no reason why the converse of the rule is not equally sound, nor why it is not equally applicable to any case of disability created by law. I am therefore constrained to hold that the service of the motion papers by Van Peyma was authorized and regular without a formal substitution. But, if it be conceded that the service of the motion papers by Van Peyma alone was irregular, the plaintiff, by appearing and arguing the motion upon the merits, and awaiting a decision of the motion, without objection, cannot now be heard to urge that the court should not have heard or decided it. If any irregularity existed, it has been waived. *In re Cooper*, 93 N. Y. 507; *Howard v. Saxton*, 1 Denio, 440; *In re Hathaway*, 71 N. Y. 238; *White v. Coulter*, 59 N. Y. 629. If, however, it appeared that Shire had participated to any extent, however slight, in the proceedings now sought to be set aside, it would be the duty of the court to interfere, and vacate the order, notwithstanding that no objection was interposed; but, where it so clearly appears that it has in no manner interfered or been connected with the proceeding, there exists no ground for interference. The motion is therefore denied, with costs.

O'CONNELL v. MADDEN et al.

(Superior Court of Buffalo, Special Term. October, 1899.)

1. FRAUDULENT CONVEYANCES—INSOLVENT DEBTOR—VOLUNTARY DEED.

Where an insolvent debtor, whose debts are all of the same class, conveys all his property to third persons, who immediately convey it to his wife, such conveyances, being without consideration, are in fraud of his creditors, and void.

2. SAME—MORTGAGE BY GRANTEE.

In such a case, mortgages executed by the insolvent's wife to certain of his creditors, after his death, do not give preferences to the mortgagees as against other creditors; the estate upon the insolvent's death becoming assets in the hands of his administratrix for the benefit of all his creditors.

Action by Bridget O'Connell, as administratrix of John Madden, deceased, against Ruth C. Madden, to set aside certain conveyances as in fraud of creditors. It appeared that plaintiff's intestate, being insolvent, and indebted to Mary Madden, Maggie Ford, and plaintiff, had conveyed his real estate to Charles Cooper, who, about three days afterwards, conveyed it to Ruth C. Madden, the intestate's wife. Both of these deeds were without consideration. Rodney Daniels became the assignee of Mary Madden's claim, and on his death his executrix was made a party defendant.

White & Simons, for plaintiff. *A. W. Hickman*, for defendants Ruth C. Madden and Maggie Ford. *Rogers, Locke & Milburn*, for defendants Mary Madden and Ann E. Daniels.

HATCH, J. The deeds of conveyance which vested title in Ruth C. Madden were each without consideration. John Madden was, at the time, unable to pay his debts in full. His only property was the house and lot conveyed; so that at the time of the conveyance, as well as the date of his death, he was insolvent. The rule of law under such circumstances is that failure of consideration and insolvency, coupled together, furnish controlling circumstances for finding fraudulent intent. *Erickson v. Quinn*, 47 N. Y. 410; *Wheel Co. v. Fielding*, 101 N. Y. 504-508, 5 N. E. Rep. 431; *Cole v. Tyler*, 65 N. Y. 73; *Potts v. Hart*, 99 N. Y. 168, 1 N. E. Rep. 605. The law gives no preference to a vigilant creditor in the estate of a deceased debtor. It simply impounds his property for the benefit of all his creditors. *Lichtenberg v. Herdtfelder*, 103 N. Y. 302-306, 8 N. E. Rep. 526. In this case, deceased, at the time of the conveyance, was insolvent. The debts existing were more than the value of all the property he then or subsequently owned. The conveyance was without consideration. This, coupled with the fact that the debts were all of the same class, the obligation to pay being the same, morally and legally, furnishes evidence sufficiently satisfactory upon which to base a finding that the deeds from Madden to Cooper and wife, and by them to Ruth C. Madden, were in law fraudulent and void as hindering, delaying, and defrauding creditors. Being so void, the estate became an asset in the hands of his administratrix for the payment of his debts, and it became and was her duty to pursue the estate in the hands of the fraudulent grantees, to the end that it might be applied to liquidate his indebtedness. *Lichtenberg v. Herdtfelder*, *supra*.

The direction, assuming it to have been made, by John Madden to pay Mary Madden's debt, created no trust in her favor to have her debts first paid. It may be assumed that if Ruth C. Madden obtained title to the property by virtue of an agreement to pay the debt of Mary Madden, so that she became personally liable for its amount, that it would furnish sufficient consideration to uphold the conveyance. Such is the contention of Mr. Locke. It must fail, however, for the reason that it finds no basis in fact. Ruth C. Madden nowhere so testified. On the contrary, her claim is that she owned one-half of the property, and was consequently entitled to it upon John Madden's death; while Mary Madden says that, just previous to John's death, he stated to Ruth, in her presence, "for her to pay me all the money he ever owed me, and the interest. He didn't say where she was to get it. * * * She [Ruth] asked how much it was. * * * He told her \$1,800. Question. What did she say? Answer. Some friends came in, and she didn't say any more." She further testified that she did not know of the conveyance to Ruth until after John's death. This evidence fails to establish the agreement contended for, and there is none other adding to its strength. It cannot therefore be

said that the payment of Mary's debt formed, or was intended to form, any consideration for the execution of the deed; nor did Ruth C. Madden at any time assume to enter into any agreement by which she charged herself personally with the payment of the debt as a condition upon which she accepted the conveyance. John Madden's object, so far as expressed, was that he desired Ruth to have the benefit of it upon his decease, in preference to his heirs. There was no intimation made at the time of the conveyance as to the condition or rights of the other creditors; so that in no aspect did Ruth become in any manner chargeable with the payment of their debts. Such being the *status* of the property, and the conveyance which vested title in Ruth C. Madden being void, it became part of the estate of John Madden, and, as such, liable for his debts.

As already seen, no vigilance will inure to secure a preference in a deceased person's estate; and the debts all being of the same class, they each stand upon the same footing. As a consequence of this, the mortgages executed by Ruth C. Madden to Rodney W. Daniels and Maggie Ford, as well as the assignment by Daniels to Mary Madden, do not avail to secure a preference in their favor as against the plaintiff or other creditors, but they must be canceled and discharged as liens upon the property, and each creditor paid in full, if the property be sufficient, or *pro rata*, as the case may be; the portion subject to the creditors' lien being the proceeds of the property subject to the lien of the prior existing mortgage, and the dower of the widow. The conveyances are also sought to be upheld upon the doctrine of a resulting trust in favor of the grantee, Ruth C. Madden. This contention finds support, if at all, in the testimony of the witness Cooper as to the declaration of John Madden, made just prior to the conveyance, that he wanted to make provision for Ruth. She owned half interest in this property down below when this deed was made out of the house and lot; and he wanted she should have the property while she lived, and no one else have it until she got through with it. He said they had no heirs, and she was the one that ought to have it. Assuming this testimony competent for the purpose of this case, it falls short of establishing as a clear fact that any portion of what was called the "property down below" went to furnish, in whole or in part, the purchase price of the property affected by the present action; nor is this position aided by the testimony of Ruth, as, at the most, it was a mere supposition upon her part. The title to the property on Seneca street was held jointly by Madden and his wife. They each, therefore, became seised of the entirety. *Bertles v. Nunan*, 92 N. Y. 152. When this property was sold, assuming its proceeds went to purchase the present property, it nowhere appears that there was then any understanding or claim made by Ruth C. Madden that she had or claimed any interest in the property affected by this action. The fact that title was taken by the husband alone rebuts such presumption, and, in addition, it was so taken with knowledge on her part. Her legal title was thus wiped out and gone; nor was it kept alive by virtue of any agreement, nor was any equitable interest claimed. From this we are quite able to say her legal title has not survived, and the claim is not now available to defeat the creditors of John Madden. *Niver v. Crane*, 98 N. Y. 40. But, if we treat one-half as paid by the wife, no trust resulted in her favor, as the statute provides that where the compensation is paid by one person, and the title is taken in the name of another, no trust results in favor of the person paying the money. 4 Rev. St. (8th Ed.) § 51, c. 1, pt. 2, p. 2437. See *Niver v. Crane*, *supra*. The exceptions in the statute are not applicable here. It thus appearing that the deed was taken in the name of John Madden upon payment by him of a portion of the purchase money, and that such title was so taken with the knowledge and consent of Ruth C. Madden, no trust resulted in her favor, even though some portion of the purchase money at the time legally belonged to her. *Hurst v. Harper*, 14 Hun, 280.

It is not overlooked that there may be established an implied or resulting trust, recognized at common law notwithstanding the statute; but careful examination of the cases cited fails to convince my mind that they are applicable to the facts developed here, for the reason that the evidence is insufficient to show any equitable interest in Ruth C. Madden at the date of the conveyance beyond her dower interest. If these views are correct, it follows that the plaintiff should have judgment setting aside the conveyances from John Madden to Cooper, and from Cooper to Ruth C. Madden; also a judgment setting aside and canceling the three mortgages, viz., that to Rodney W. Daniels, assigned by him to Mary Madden, the one now held by Ann E. Daniels as executors, etc., and the mortgage to Maggie Ford; also a decree adjudging that the said property be sold under the direction of the court, and out of the proceeds thereof there be first paid the prior mortgage, and the widow's right of dower, and that the balance be applied in payment of the just debts of John Madden in full, if there be sufficient for that purpose, and, if not, then *pro rata* equally upon each. Costs of this action to be paid out of the property.

AVERY v. NEW YORK CENT. & H. R. R. CO.

(*Superior Court of Buffalo, Special Term. October 9, 1889.*)

1. EASEMENTS—OBSTRUCTION—ACTIONS—PARTIES—LESSEES.

Where the enjoyment of an easement appurtenant to property is obstructed, the lessee of the property may sue for damages, he being the real party in interest, in whose name actions are required to be brought by Code Civil Proc. § 449.

2. SAME—NUISANCE.

The lessee of property to which an easement is appurtenant may sue for damages for the obstruction thereof, it being a nuisance.

Action by John G. Avery against the New York Central & Hudson River Railroad Company. There was a verdict for plaintiff at the trial term, and defendant moves for a new trial. For previous litigation between the same parties, see 2 N. Y. Supp. 101, 109.

White & Simons, for plaintiff. *James F. Gluck*, for defendant.

HATCH, J. The court of appeals, in an action in equity between these parties, has heretofore held that in and by certain conveyances which define the rights of these parties, and of plaintiff's lessor, there shall be kept an opening through a fence separating their respective lands, "of a size reasonable, proper, and fit, which shall be opposite to the hotel, and adjacent to the premises conveyed by the deeds, and large enough for the convenient access of passengers and their baggage to and from the said strip; which opening must at no time be closed against such passengers and their baggage, and which access must be subject to all proper regulations of police and railroad discipline of persons on the said premises." *Avery v. Railroad Co.*, 106 N. Y. 142, 12 N. E. Rep. 619. This court has heretofore adopted and applied the rule thus laid down. *Same v. Same*, 2 N. Y. Supp. 101. The court of appeals further held and decided that the aforementioned provision in the deeds "was intended to be an agreement or covenant between the parties running with the land," and that it constituted "an easement reserved for the benefit and in favor of the grantors, being owners of the remaining hotel property, and as appurtenant to it, and fairly necessary for its full and proper enjoyment. It therefore runs with the hotel property, and in favor of its owner or lessee, the latter of whom has such an interest in its existence as courts will recognize and protect." This would seem to be decisive of the right of the plaintiff to maintain this action. But the defendant insists that since the period embraced within that action the plaintiff has surrendered the lease he then held, and taken another at a time when the defendant had invaded the rights secured by the deeds; that this act of the defendant was a breach

of the covenant, in consequence of which it ceased to be a covenant real, running with the land, but became a mere chose in action, for which alone the right of action vested in the lessor and owner, and not in the lessee. The cases cited by the learned counsel for defendant in support of his claim are *Beddoe's Ex'r v. Wadsworth*, 21 Wend. 120; *Greenby v. Wilcocks*, 2 Johns. 1; *Hamilton v. Wilson*, 4 Johns. 72; and some others to which it is not necessary to refer, as they do not add to the weight of those cited. These were all actions for breach of covenant of seisin, quiet enjoyment, and against incumbrances, and decide the doctrine with not exact agreement, but sufficient to sustain the point contended for, that the breach occurs the moment of the execution and delivery of the deed, and is no longer a covenant running with the land, but becomes a mere chose in action, incapable of assignment, with the right of action vesting in the grantee alone, and passing to his personal representatives. The reason assigned is that, the covenant being broken, there remained no land to which it can attach, but only a personal right. As expressed in *Greenby v. Wilcocks*, *supra*: "The covenants, it is true, are such as run with the land; but here the *substratum* fails, for there was no land whereof the defendant was seised, and, of consequence, none that he could alien." *Id.* 4. And in *Hamilton v. Wilson*, 4 Johns. 72: "The covenant here was not connected with the estate, because, as no estate passed by the deed to the ancestor, none descended to his heirs."

It is to be noticed that all the cases were for breaches of covenant, where the whole title had failed, and where the person in at the breach is ousted by title paramount. The damages are thus fixed and certain, and partake of the character of personalty. So a distinction was made between covenants going to the title and those which go to the enjoyment, (*Norman v. Wells*, 17 Wend. 160,) for the reason that the latter could not be at once estimated, but depended upon their operation. They are all without application here, for the reason that the lessor of the plaintiff has never been evicted of his title. So far as his title is concerned, it is as perfect now as it has been at any preceding time. He now has, and has always had, as perfect a right to lease, sell, or assign as any other owner of real property, and to vest in tenant, purchaser, or assignee as perfect a title as he himself possesses. The ancestor of plaintiff's lessor did not get title or right to enforce this covenant or easement by virtue of any covenant running from defendant or its grantor, but it is a right reserved by the ancestor of plaintiff's lessor in his own deed. There could be no more failure of this covenant to run with the land by wrongful act of the defendant than there could by the wrongful act of any other person. It is an agreement which sticks fast to the land, and accompanies the land wherever it goes, or into whosoever hands it comes. It may be invaded, but it cannot be broken or done away with, except by owner of the fee. To say otherwise would be to allow the defendant to take advantage of its own wrong. The defendant has wrongfully invaded the rights reserved in the deeds. It now says to the owner: "You can neither lease, sell, nor assign these premises until my invasion be repelled, else the lessor, purchaser, or assignee gets no title, and can maintain no action for damages; and, as to yourself, you can have once for all a right of action for damages, which, when paid, deprives you of all right forever in this land." It is not believed that valuable rights in real property, secured by deed under seal, can be destroyed thus easily and summarily, or that real property can be thus diminished in value or title thereto transferred in this manner; but, if we assume that the doctrine is in all respects applicable to this case, it is sufficient, in answer, to say that such doctrine, however correct it may have been, is no longer the law in this state. By the old Code, (section 111,) and by the present Code of Procedure, (section 449,) actions are now to be brought in the name of the real party in interest, and all choses in action are now assignable, vesting good title in the assignee, who may maintain an action thereon,

except those that from their nature are unassignable, or those that are expressly forbidden by law. *Boyd v. Belmont*, 58 How. Pr. 513. But the latter class do not embrace damages arising from breaches of covenants in deeds which pass to intermediate grantees and assignees, vesting the cause of action in the party in interest. *Andrews v. Appel*, 22 Hun, 429, where the court says: "The objection, existing at common law, that a covenant or chose in action was not assignable, has been obviated by our modern legislation." Id. 433; *Ernst v. Parsons*, 54 How. Pr. 163. As before remarked, in the equitable action between these parties the court held this covenant to constitute an easement running with the land, and enforceable as such in the possession of owner or lessee. In doing this, the court but affirmed what was before familiar doctrine. *Trustees v. Lynch*, 70 N. Y. 440. This was a case where there were mutual covenants limiting the use of lands of the covenantees to certain purposes. The defendant was the grantee of one of the covenantees who had violated the covenant. It was held to be such a covenant as could be enforced, even though it did not run with the land, and that an interference with the right creating it could be enforced by appropriate remedies, either at law or in equity, and that this right exists for the benefit of the owners of the land at the time being, who are the proper parties to bring the action. It is unnecessary to carry the rule, for present purposes, so far as it was there carried; for here is a reservation contained in a deed, it creates a right of way, is an appurtenant right to this hotel of much value, and, within the principle of the decision last cited, its integrity may be protected by appropriate legal remedies by the person at the time being in possession, and entitled to its use and enjoyment. The lease under which defendant held, vested him with the right to enjoy the hotel property, and the whole thereof, carrying with it all appurtenant rights, embracing the right to a free and uninterrupted use of the said easements. Possessing such right, he was the party in interest, and could protect it by legal remedy to remove any obstruction, or seek redress in damages for the wrongful act. *Taylor v. Railway Co.*, 50 Super. Ct. 311-316. The contention, therefore, that plaintiff has not legal capacity to sue cannot be upheld.

There is, however, another ground upon which this action may be maintained. The complaint alleges the right of way as an appurtenant right to the hotel of much value; then alleges its obstruction by the defendant, and that the latter is without right, constituting a trespass in the nature of a nuisance, from which the plaintiff suffers damage. The court of appeals have held that an unlawful obstruction of an easement is a continuing nuisance, for which, as one of the remedies, the person damnified may bring successive suits to recover his damages. *Uline v. Railroad Co.*, 101 N. Y. 98, 4 N. E. Rep. 536; *Pond v. Railroad Co.*, 112 N. Y. 186, 19 N. E. Rep. 487. The evidence here tended to show an obstruction by defendant of the easement, and also damages arising from the unlawful management and operation of its road adjoining the hotel, alleged also to be a nuisance. Under these authorities and the evidence, I think the action can be maintained by plaintiff independent of the relation of the parties with respect to the covenants. The case of *Taylor v. Railway Co.*, *supra*, is not in conflict with these views. There the lessee took the new lease with full knowledge of the existence of the railroad and its operation; that it was a permanent structure; and consequently the rental paid was presumed of fair value, having in contemplation the existence and operation of the road. Here the structure was not permanent, and there was, at the time of the new lease, a judgment restraining defendant from a continuance of the obstructions, and directing its removal, of which plaintiff had notice,—was a party thereto. It is fair to presume, therefore, that plaintiff took the new lease in contemplation of the compliance by defendant with the judgment, which would give him the full enjoyment of the appurtenant right. The court charged the jury that the defendant had no right to

erect a fence in that portion of the alley running from Exchange street south to the 20-foot strip. An exception was taken. It is now urged that this was error, as it did not appear, that plaintiff or his lessor had title to or right in the alley. It has been already determined that the ancestor of plaintiff's lessor dedicated for public use a strip of land, 30 feet wide, running from the easterly end of the hotel, on Michigan street, westerly 240 feet, and thence, at right angles, northerly, 100 feet, to Exchange street. This has always been designated as an alley. It never became a public street, as there was no acceptance by the public authorities. Subsequently, the heirs of said ancestor assumed to and did convey to defendant 20 feet of so much of said strip as lies south of the hotel, being 240 feet in length. This left the title to the remaining portion of the land, which includes the whole of that portion running south from Exchange street to the 20-foot strip, in plaintiff's lessor, and it has never passed therefrom. All this is abundantly established by the deeds, map, and judgments introduced in evidence upon this trial. It further appears by the testimony that the Exchange-Street alley has always been used as an appurtenant to said hotel structure in furnishing access to and from the same for travelers, to bring in supplies, and remove garbage. This, being established, gave to the plaintiff as free and unincumbered a right to the use of the alley as to any other portion of the hotel premises; and, when the defendant erected its fence therein, it did so without shadow or color of authority. Such act interfered with plaintiff's use of the alley; and to the extent that he suffered damage he was entitled to recover. I therefore think the charge was right.

It is further claimed that the evidence is insufficient to show that damage was sustained by the plaintiff by reason of the obstruction of the easement, assuming it was obstructed, for the reason that the patronage to the hotel passed over the 10-foot space next to the hotel, instead of over the 20-foot strip, and that the former was at no time obstructed during the period embraced in this action. This point was urged and considered by this court at general term in *Avery v. Railroad Co.*, 2 N. Y. Supp. 101, and decided adversely to the defendant. The facts as to use are substantially the same in this case. I see no reason for changing my views as therein expressed, and upon this point concurred in by the court.

It is further urged that the verdict for damages in this case is excessive. This point was also urged in the case last cited, and the question fully considered. The evidence here presented upon the question of damages is very much the same as there, and I reached the conclusion then that they were not excessive. The damages claimed here embrace a period of one year seven months and two days; and, in addition, there was brought in another element of damage, set up as a second and a different cause of action, not present in the case referred to, viz., proof of damage to the property of plaintiff by reason of the unlawful use of the tracks immediately adjacent to the hotel. There has not been in the court entire harmony upon this question; but for the reasons assigned in the case last cited, and on account of the additional cause of action, from which the jury were authorized to find additional damages, I am unable to say that the verdict of the jury is unwarranted, or that the damages are excessive. The court was asked to charge "that even if the jury believe that the defendant has not used this twenty-foot strip in a lawful manner, and that the plaintiff has sustained some pecuniary loss, there being no evidence to show its extent, or from which they can verify what that extent is, or from what source it arises, their verdict must be for nominal damages;" to which the court answered: "Yes, I so charge." The jury had already been charged fully upon this question, and it had been left for them to say whether the use of the road by defendant had been unlawful, and, if so, had the plaintiff suffered damage therefrom, which, if they found he had, they were to assess the amount thereof. The request is seemingly inconsistent with this charge,

and must have been made under a misapprehension. The jury have, however, rendered a verdict taking into account this element, and in accordance with the original charge. Having adopted the correct rule, effect will be given to the verdict. 2 Thomp. Trials, § 2061, p. 1478; *Wells v. Zallee*, 59 Mo. 509. There are no other questions save such as have been heretofore disposed of. The motion for a new trial is denied, with costs.

MCGUIRE v. TRUSTEES OF ST. PATRICK'S CATHEDRAL.¹

(*Supreme Court, General Term, First Department. November 7, 1889.*)

1. CEMETERIES—RIGHT OF BURIAL—EQUITY—JURISDICTION.

Where the right of burial in a certain cemetery is a mere license, it confers no such property rights as are enforceable in equity.

2. SAME—SPECIFIC PERFORMANCE.

In the absence of further testimony on the subject, no such agreement for the grant of an easement as is enforceable in equity can be implied from the following receipt: "Received from John McGuire ten dollars, being the amount of purchase money of a grave, two feet by eight, in Calvary Cemetery, with privilege to erect a headstone thereon. [Signed] D. BRENNAN, Supt. of Office of Calvary Cemetery. Grave 9, plot F, section 8, range 56,"—the payment of the consideration, and the burial of the purchaser's wife in such grave not being a part performance of such an agreement. DANIELS, J., dissenting.

3. RELIGIOUS SOCIETIES—MEMBERSHIP—JURISDICTION OF CIVIL COURTS.

A person purchasing the right of burial in ground consecrated for the exclusive purpose of the burial of persons who die in communion with the Roman Catholic Church submits the question as to his dying in communion therewith to the exclusive jurisdiction of the authorities of such church, whose judgment thereon, it being a spiritual matter, cannot be questioned in the civil courts. DANIELS, J., dissenting.

Appeal from special term, New York county.

Action by Philip McGuire, administrator of John McGuire, for an injunction against the trustees of St. Patrick's Cathedral.

Argued before VAN BRUNT, P. J., and BARRETT and DANIELS, JJ.
John H. Post, for appellant. George Bliss, for respondents.

BARRETT, J. I am unable to concur in the conclusion arrived at by Mr. Justice DANIELS in this case. The learned judge ignores the views which were expressed by this court in *People v. Trustees, (Coppers Case)*, 21 Hun, 184. In that case, a receipt similar to the present, but more favorable to the holder's contention, was fully considered, and its inadequacy to confer a legal and enforceable right pointed out. The question there was whether a *mandamus* would lie. Incidentally, we held that it was "even doubtful whether equity would decree a specific performance." Upon that question a definite opinion was reserved. It was enough for the denial of the *mandamus* that the right, if any existed, was an equitable one, and such as could not be enforced at law. We endeavored to show that there was absolutely no legal right, and that an equitable right was extremely doubtful. This latter question is now before us for a decided and definite opinion. To its accurate solution a clear statement of the precise facts is essential. Let us, for the moment, assume that burial has been arbitrarily refused. Thus, it is said, McGuire has been denied his "property rights." What, then, are these property rights? They rest exclusively upon the receipt given *in extenso*, in Mr. Justice DANIELS's opinion. There is not a particle of evidence in the case of any parol agreement, except such as may be implied from the possession of that paper. What took place between the parties when Mr. John McGuire paid the \$10 specified in the receipt to Mr. D. Brennan, the "superintendent of the office of Calvary Cemetery," we know not. What their bargain was is entirely un-

¹ Affirming 3 N. Y. Supp. 781.

disclosed. Whether it was a bargain for the burial of one person, or of two or more persons, for the burial of McGuire himself, of his family, of both, or of Catholics outside of his family, are all mere matters of conjecture. What we know is that, as the result of some undisclosed parol agreement, Brennan gave McGuire a receipt for \$10, specifying that such sum was the "amount of purchase money of a grave," the location of which is indicated by some words and figures which appear beneath Mr. Brennan's signature. I have said that the receipt in the *Coppers Case* was more favorable than this to the holder's contention; for there it read, "amount of purchase money of a plot of ground, eight feet by eight feet." That receipt was also more complete and specific, in that it particularized and numbered the graves for which the plot of ground should be utilized. I quote the form of this enumeration: "4 graves, 5, 6, 7, 8." Here we have nothing of the kind. There is proof in the case that the located grave would hold four bodies, and perhaps even more; but who shall say that the parties contemplated packing the earth (two feet by eight) in such an extremely economical fashion? Is it to be implied from a receipt for the purchase money of a grave,—that receipt standing alone, and without a *scintilla* of evidence tending to pluralize the expression? I cannot think it. Now, upon these facts, what in law were Mr. McGuire's precise property rights? Were they such as can be specifically enforced by his administrator in a court of equity? That is the real question. Now, in the first place, it is very clear that the right of burial is either an easement or a license. If an easement, it is an interest in the land; if a license, it is not. In the former case, the right is permanent; in the latter, it is personal and revocable. There are some subtle suggestions in the old cases with regard to irrevocable licenses founded upon good consideration. It seems to me, however, that, when we talk of an irrevocable license founded upon a good consideration, we simply run into the domain of easements. However that may be, it is not claimed that McGuire here acquired an easement; nor, indeed, could such a claim be defended, for the simple and sufficient reason that there was no grant. The learned counsel for the plaintiff rests his claim upon the purchase of a license or privilege which he contends was irrevocable, and enforceable by bill for specific performance. If, however, McGuire acquired no interest in the land, as is fully conceded in the appellant's second point, and as is unquestionably the law, it is difficult to see what basis there can be for a decree that the land be perpetually burdened.

If the plaintiff proceeds as the successor of a mere license, he is met by the principle of revocation, and also by the rule that courts of equity will not specifically enforce such privileges. Mr. Pomeroy, in his work on Specific Performance, (section 132,) says that in certain states a parol license to enter upon and occupy land of the licensor, and to do acts thereon, "if partly executed by the licensee, so that injury which is technically called 'irreparable' would be caused by its revocation, will be specifically enforced. * * * This rule is undoubtedly opposed to the common-law doctrine concerning licenses as it prevails in England and in most of the American states." In a note to this section it is said that the proposition stated in the text is most strongly maintained by decisions of the Pennsylvania courts. These Pennsylvania cases (notably *Rerick v. Kern*, 14 Serg. & R. 267) were considered by DUER, J., in *Jamieson v. Millemann*, 3 Duer, 255. That learned judge said: "It cannot, however, be denied that the supreme court of Pennsylvania * * * has held that a parol license may, in special cases, have the full operation of a grant; but the decisions in Pennsylvania stand alone, and will be found, upon examination, to proceed upon a doctrine which is peculiar to the courts of that state. * * * As evidence of the law that we are bound to administer," these decisions "have no authority whatever." Judge DUER also points out the distinction between an executed license, the effect of which is merely to suspend the enjoyment of an easement, (as in *Winter v.*

Brookwell, 8 East, 308,) and a license warranting acts to be done by the licensee upon the lands of the licensor. In the former case the doctrine is nothing more than that, by a parol license without a deed, the enjoyment of an easement may be waived or extinguished. This doctrine of *Winter v. Brookwell* (and also of *Moore v. Rawson*, 3 Barn. & C. 332, and *Liggins v. Inge*, 7 Bing. 682) is said to be wholly inapplicable when "the effect of holding the license to be irrevocable would be to give to the licensee a permanent interest or easement in these lands of the licensor;" and the learned judge adds that this "has been determined in numerous cases in the English courts, in those of our sister states, and emphatically in our own." See the cases cited by Judge DUEK in support of this latter statement, page 260, to which I add *Wolfe v. Frost*, 4 Sandf. Ch. 73. As Chief Justice SAVAGE said in *Mumford v. Whitney*, 15 Wend. 393, "to decide that a right to a permanent occupation of the plaintiff's land may be acquired by parol, and by calling the agreement a 'license,' would be in effect to repeal the statute." It follows that as plaintiff has no grant, and consequently no easement, and as his license is revocable, and cannot be specifically enforced, he has no property rights whatever which will authorize a court of equity to grant him the extraordinary remedy of a mandatory decree.

The question remains whether a case has been made out for a specific performance of a parol agreement for the grant of an easement. In *Wiseman v. Lucksinger*, 84 N. Y. 38, this question was considered upon facts somewhat analogous to those now before us. The court first discussed the claim of license, holding that "a right of drainage through the lands of another is an easement, requiring for its enjoyment an interest in such lands, which cannot be conferred by parol license. It can only be granted by 'deed or conveyance in writing.'" The head-note disposes of the question of consideration in these words: "A mere license to drain is not made irrevocable by the fact that a valuable consideration was paid therefor." In answer to the remaining contention, namely, that courts of equity would give effect to parol agreements for the grant of easements when founded upon a valuable consideration, DANFORTH, J., observed that "the contract which equity will regard as equivalent to the grant required at common law or by the statute must be a complete and sufficient contract, founded not only on a valuable consideration, but its terms defined by satisfactory proof, and accompanied by acts of part performance unequivocally referable to the supposed agreement;" and again: "There are, no doubt, many cases in which courts recognize an equitable right to an easement without a deed; but there will be found in them either an express agreement for an easement, or an acquiescence or consent by conduct which has led to the erecting of permanent works, or valuable and lasting improvements, or some other fact which would make the assertion of a legal title operate as a fraud upon the persons setting up the equitable right." The doctrine of this case was reaffirmed in *Cronkhite v. Cronkhite*, 94 N. Y. 323. MILLER, J., repeated the language of DANFORTH, J., which I have quoted, and he referred to the facts of the former case in these words: "In the case of *Wiseman v. Lucksinger*, the plaintiff had paid a sum of money for permission to drain his lot upon the land of the defendant, and took a receipt for the same, and he used and enjoyed the privilege for twenty-five years, when the defendant revoked the permission. In an action to enforce the right of the plaintiff, it was held that * * * the right to drain was an easement which could not be conferred by parol license, but could be granted only by deed or conveyance in writing, and that an oral contract, which equity will regard as equivalent to the grant required at common law or by statute, must, as already stated, be a complete and sufficient contract in all its parts." These cases were referred to with approval, and cited in support of like propositions, in *Duryee v. Mayor*, 96 N. Y. 484, and *Fargis v. Walton*, 107 N. Y. 403, 14 N. E. Rep. 303. It is apparent from the state-

ment of facts with which I have prefaced these legal considerations that the present case, treated even as a bill for the specific performance of a parol agreement for the grant of an easement, falls far short of what is required by the principles enunciated in these authorities. In all of the cases there was at least some oral testimony in support of the parol agreement. It was not left entirely to the implications deducible from a mere receipt for money. Thus, in *Wiseman v. Luckstinger*, *ubi supra*, the plaintiff testified to the parol agreement, (page 43,) and the defendant denies the receipt of the alleged consideration. The plaintiff also proved the loss of a receipt, said to have been given to him by the defendant, which one of the witnesses testified was in the following form: "Received of Joseph Wiseman \$7 for the right to drain through my premises,"—a receipt singularly analogous to the present. The plaintiff's contention there was that a valid contract must be implied from these words; that the defendant thereby agreed, for the expressed consideration, to cede to the plaintiff the right to drain through his lands; and that equity would enforce the agreement. But the court denied the completeness of the contract to be implied from this receipt, even when read in the light of the oral testimony behind and supporting it, and denied relief because the agreement was not entirely clear in all its parts. The court also denied relief because there had been no part performance within the rules laid down in courts of equity. Referring to the latter head, DANFORTH, J., observed that the receipt contains "a mere license or permission to drain, and no agreement to convey an easement; nor is the license coupled with any interest in the land. It was therefore revocable, and its revocation did not operate as a fraud upon the plaintiff. His expenditures were trifling, and, for aught that appears, have been more than repaid in the use already had by the plaintiff of the privilege given to him." The conclusion of the court upon this branch of the case was that "the agreement, however, to be implied from the receipt was undoubtedly good as a license, giving to the plaintiff immunity while acting under its privilege, but no vested right entitling him to its use or enjoyment against the will of the grantor."

The case of *Cronkhite v. Cronkhite* is also very much in point. There the parol agreement was for the laying down of pipes to carry water from a spring on the licensor's lands—*First*, to the licensor's buildings; and, *second*, to buildings on the licensee's lands. The referee found as a fact, on the oral testimony, "that it was agreed that Henry C. Cronkhite [the licensee] should bear one-half the expense, and perform half the labor, of procuring and laying down the logs and pipes, etc.; and that, in consideration of such expenditure and labor, he should have a right to take water from said spring through logs and pipes in perpetuity." Upon this, MILLER, J., observed that "the testimony upon the trial established a parol contract between John C. Cronkhite [the licensor] and Henry C. Cronkhite, whereby Henry C. was to take and use the water; and there was proof that both parties acted in accordance with that agreement. Money was expended by Henry C., pipes were laid down and improvements made in connection with the use of the water, but there was no specific agreement as to the size of the pipes, the amount of water to be carried through them, how far below the surface they were to be laid," etc. It was accordingly held that the agreement could not be enforced. "Disagreements," said Judge MILLER, "might also arise as to how and when and where the pipes should be laid and repaired, and as to the manner in which the spring should be protected; and thus it would be difficult for a court of equity to determine the precise character of the agreement. The evidence given upon the trial was too vague and uncertain to establish a valid agreement in perpetuity such as the law recognizes. The statute requires an agreement of this character to be in writing, expressing a consideration; and to establish it otherwise, by adverse possession, the proof should be entirely clear as to the nature and specific character of the agreement, so

that it can be eventually carried out and enforced." In *Kincaid's Appeal*, 66 Pa. St. 411, an instrument of far greater weight and importance than the present receipt was spoken of as a "very loose paper." The court there refers to the instrument as follows: "The certificate set out in the bill states that the subscriber, in consideration of \$10 paid by him, is entitled to 'two burying lots in the burying ground of said church,' 'to have and to hold the said lots for the use and purpose, and subject to the conditions and regulations, mentioned in the deed of trust to the trustees of said church.' * * * We cannot consider this certificate as evidence of a grant to the lot-holders of any interest or title in the soil. * * * Taking it for a grant, it is only for the life of the lot-holder, and at the very time it would be needed for his own interment his title would cease. Without accompanying conditions and regulations, it is a very loose paper." In *Dwenger v. Geary*, 113 Ind. 106, 14 N. E. Rep. 903, where the *Coppers Case* is commented upon, quoted from, and approved, the receipt seems to have been in substantially the same form as the present. The court found that John Geary had never received any conveyance. "The only instrument executed," said the court, "was a receipt for money. This, and nothing more, does he [Geary] hold in the form of a written evidence of title. It is clear, therefore, that he is a mere licensee. This license conveys no interest in the land. It does no more than confer a privilege." In that case the supreme court of Indiana was not considering the possibility of specifically enforcing such a privilege. The question was whether an injunction should be granted to the authorities of the church restraining the receipt-holder from attempting to exercise the privilege implied by its terms; and such injunction was granted. And in Maryland (*Partridge v. First Independent Church*, 39 Md. 631) it was held that a certificate with words of grant to the party, "his heirs and assigns, forever," conveyed "no estate or title, nor a grant of an easement, because the instrument was not under seal and recorded, so as to be effective to convey such interest."

It seems useless to multiply authorities upon this point, for the present case is not as strong in its equity as the weakest of those already cited. In the absence of any parol testimony, and standing upon the naked possession of the receipt, how is it possible here for a court of equity to decree specific performance of a supposed contract for the grant of an easement? We are asked to imply all the terms of a complete and specific agreement from the words in the receipt, "amount of purchase money of a grave, two feet by eight, in Calvary cemetery;" the two feet by eight being located beneath the superintendent's signature as "grave 9, plot F, section 8, range 56." The amount of purchase money of a grave. Was the contract completely fulfilled when a "grave" was opened for Mrs. McGuire, and her body permitted to rest there? Can it be said that even that question is entirely free from doubt? Or was the contract personal to McGuire, and did it terminate, as suggested in *Kincaid's Case*, *ubi supra*, upon his death? If the agreement to be implied from the receipt passed to McGuire's administrator, what actual right thus passed? If this receipt implies a property right to burden the soil with as many bodies as can be decently placed in the located two feet by eight, can this administrator renew his demand from time to time? If so, can he place there, for a consideration paid to him as the representative of McGuire's estate, the bodies of strangers in blood to the family, provided they are Catholics? Could McGuire himself have done that under this receipt? And in this process of burdening the soil with numerous bodies, in or out of the family, how deep might McGuire have dug, and how deep may this administrator now dig? The mere outlining of these questions clearly indicates that the receipt, to again quote the language used in *Kincaid's Appeal*, "without accompanying conditions and regulations, is a very loose paper." We look in vain throughout this case for any such accompanying conditions or regulations. Even the cemetery rules, 'so far

as they were read in evidence and appear in the printed case, shed no light upon the obscurity involved in the language used in this receipt; nor do they indicate, directly or indirectly, the precise terms or the specific conditions of the agreement. Nor does the undertaker's testimony, as to the usage of the cemetery, establish any definite rule, either as to the allowable depth of the grave, or as to the number of bodies which the receipt-holder is permitted to place there, or as to the character or personality of the occupants. The entire testimony on that head was as follows: "I have been in the undertaking business about fourteen years, and during that time have made a great many interments in Calvary Cemetery, and am familiar with its regulations. In the old ground graves are usually dug eight feet deep, and in the new ground now they are dug nine feet deep. The grave described in plaintiff's Exhibit A is in the old cemetery. It is usual to bury more than one body in a grave. *Question.* How many bodies can be safely and properly buried in this grave? *Answer.* Four bodies, and sometimes more. I have got three in mine, and there is room for two more. I have known numerous cases in which two or three bodies have been buried in one grave in Calvary Cemetery. I can name my own case,—my sister and father and mother, and room for two more." The case on this head is thus clearly within the principles laid down in *Wiseman v. Luckstinger* and *Cronkhite v. Cronkhite*, above cited. It is also within the rule as to part performance. The act of permitting Mrs. McGuire's body to burden the soil was in no proper sense an act of part performance. It was simply a partial enjoyment of the privilege. It was an act of burden on the part of the licensor; of enjoyment on the part of the licensee. McGuire never expended a penny upon the grave. The trustees were guilty of no such conduct as to lead McGuire—to quote again Judge DANFORTH's words in *Wiseman v. Luckstinger*—"to erect permanent works, or valuable and lasting improvements." Nor was there any other fact which would make the revocation of the license, or the refusal to fulfill the implied obligation,—whatever it may have been,—a fraud upon McGuire or his legal representatives. It does not appear that McGuire ever placed even a headstone upon his wife's grave. The part performance, therefore, (or the complete performance, as the receipt may be viewed,) was wholly on the side of the licensor; and, as we pointed out in the *Coppers Case*, the payment of the consideration did not operate as such part performance. *People v. Trustees, (Coppers Case,)* 194, citing Story, Eq. Jur. § 760; *Rhodes v. Rhodes*, 3 Sandf. Ch. 284. See, also, on the point under consideration, the cases already cited of *Wiseman v. Luckstinger* and *Cronkhite v. Cronkhite*.

I have thus considered this case precisely as though the rights of property claimed by the plaintiff had come from a secular cemetery. The weakness of the plaintiff's equity is still more strikingly apparent. The record contains an express admission by the plaintiff of the allegation in the answer that the cemetery lands in question were set apart and consecrated, with appropriate religious ceremonies, by the ministry of a priest or priests of the Roman Catholic Church, for the exclusive purpose of the burial of the remains of persons who may die in communion with that church. McGuire was a Catholic. As such, he entered the denominational domain; as such, he obtained the receipt in question from the denominational cemetery office. What transpired at the time he so obtained that receipt is, as we have already seen, entirely unknown. What may safely be affirmed, however, is that he sought burial privilege in a denominational cemetery thus consecrated to the exclusive purpose of the burial of those dying in communion with the church. That denominational rule must certainly be implied (as part of the agreement) from the receipt, and the surroundings under which it was sought and obtained. It is as though the receipt had read: Received from John McGuire \$10, being amount of purchase money of a grave, two feet by eight, in the ground of Calvary Cemetery, which has been consecrated for the exclusive purpose of the burial of the re-

mains of persons who may die in communion with the Roman Catholic Church. That is the parol agreement,—the only one which can possibly be implied. The plaintiff, too, recognized this, for he averred in his complaint that McGuire died in the Catholic faith and in communion with the church. And it was only when, upon the trial, the difficulty of proving affirmatively the latter assertion weighed upon him, that he struck it from his complaint, and claimed that it was superfluous.

Now, who is to determine whether McGuire died in that communion? Mr. Justice DANIELS admits that it is the hierarchy, but he thinks that the chosen judges of the church must proceed according to the principles of the common law; that they can only act upon evidence, (as applicable to church law;) that the accused is entitled to a hearing; and that if those "first principles" which govern in the ordinary administration of justice are ignored, the authorities of the church exceed their jurisdiction when they decree that the holder of the receipt died out of communion with the church. With great respect and diffidence, I venture to differ with the conclusion. In my judgment, McGuire contracted for the exclusive jurisdiction of the church with regard to the question of communion. Spiritual questions are solely for the determination of the church authorities. Over their action in the domain of church discipline or excision the civil courts exercise no revisory power. *Shannon v. Frost*, 3 B. Mon. 253. There the court said: "We cannot decide who ought to be members of the church, nor whether the excommunicated have been justly or unjustly, regularly or irregularly, cut off from the body of the church. We must take the fact of expulsion as conclusive proof that the persons expelled are not now members of the repudiating church; for, whether right or wrong, the act of excommunication must, as to the fact of membership, be law to this court." The same doctrine was maintained by the supreme court of Pennsylvania in *German Reformed Church v. Seibert*, 3 Pa. St. 291; and the additional suggestion was there made that under no circumstances would the civil courts interfere until the wronged party had exhausted his remedy within the church by appeal to its highest tribunal. This doctrine is peculiarly applicable to the present case, where it is conceded that an appeal to Rome lay from the decision of the ordinary of this diocese forbidding the burial of McGuire, and that no such appeal has been taken. The language of the Pennsylvania court is exceedingly apt, and I quote the most material part of it: "If, therefore, the relator is injured by the decree of the consistory, his remedy is by appeal to a higher ecclesiastical court, which no doubt (and it is indecorous to suppose otherwise) will afford him redress by reversing whatever may have been done by the inferior court inconsistent with the canons of the church. That the power of the classis and synod is advisory only matters not, as we cannot suppose their decision will be disregarded; and, if it should be, it will then be time enough to seek redress from the civil authorities. The decisions of ecclesiastical courts, like every other judicial tribunal, are final; as they are the best judges of what constitutes an offense against the word of God and the discipline of the church. Any other than those courts must be incompetent judges of matters of faith, discipline, and doctrine." To the same effect, in substance, are the decisions in *Dieffendorf v. Reformed Calvinist Church*, 20 Johns. 12; *Robertson v. Bullions*, 9 Barb. 64, affirmed, 11 N. Y. 243; *People v. German, etc., Church*, 53 N. Y. 103; and *Dwenger v. Geary, supra*. In the latter case the court said that "no power save that of the church can rightfully declare who is a Catholic. The question is purely one of church government and discipline, and must be determined by the proper ecclesiastical authorities." And again: "Under the discipline and doctrines of the church, as enforced by the functionaries invested with the power and duty of deciding questions of doctrine and discipline, James Geary was not a Catholic, and this decision is final and conclusive." On the same principle, the decision that McGuire, although a Catholic, did

not die in communion with the church, was final and conclusive until reversed,—reversed not by the civil courts, for they have no jurisdiction under a constitutional system which, happily, separates church and state, but by the highest authorities of the church itself. To attempt to exercise jurisdiction to such matters upon the plea of want of jurisdiction in the church authorities of first instance would be the entering wedge whereby the symmetry of our governmental system with regard to church and state might readily be destroyed. And, after all, what do we question, when looking into the ordinary's jurisdiction, but his procedure? Shall we go further, and decide that he has no jurisdiction, within his sphere, to decree that a Roman Catholic died out of communion with the church, because the testimony upon which he acted was unsupported by an oath? Must he also notify the next of kin, or the executor or administrator, of a proposed hearing, produce his witnesses in their presence, permit them to cross-examine, and then to produce their own witnesses? Is he without jurisdiction if he deny them counsel? And all this while the dead body is waiting his decision. Where does the right to question the jurisdiction begin, and where does it end?

It seems to me that the ordinary's jurisdiction in spiritual matters cannot be questioned by the civil courts at all. He may act upon the best light he can obtain, however informal the source; and we cannot review his judgment, however out of touch with common-law principles may have been his means of ascertainment. If the ordinary acts capriciously or arbitrarily, there is an appeal to Rome. If the appellant is there again defeated, it will be time enough to inquire whether he has or has not contracted for the possibility of such injustice; and whether, even then, the facts, and the laws applicable thereto, would warrant a court of equity in entering the spiritual domain to redress a mixed temporal and spiritual wrong. For we cannot overlook the fact which pervades this entire controversy that it is not the mere right to be buried in two feet by eight of ordinary earth which the plaintiff seeks to enforce, but plainly the right to be so buried in consecrated earth. It is thus the spiritual right which, in substance, he asks us to enforce; that is the agreement, so to speak, for consecration predicated upon communion. The rest is but a temporal incident. The world is all before this plaintiff to secure for his testator mere burial. The secular cemeteries, with their regular and binding deeds, were open to McGuire, and are yet open to his representative. But that is not what is required or desired. What the plaintiff insists upon is the burial of McGuire in the same consecrated earth where the body of his wife now rests. That, however, is something which the civil courts are powerless to compel, under such a contract or understanding as that which here forms the basis of the plaintiff's rights and of this action. The *Guibord Case*, (*Brown v. Cure of Montreal*, L. R. 6 P. C. 157.), from which the learned counsel for the appellant quotes so fully, has no conceivable applicability here. That case proceeded upon rules referable to a system in which church and state are blended. Under that system a British subject is entitled to burial in his parish church-yard without regard to contractual locality, and the question of his right to such burial is essentially for the civil courts, in the exercise of their *quasi* ecclesiastical jurisdiction. The privy council, in opening the discussion, declared that the question to be decided was "the right of Guibord to interment in the ordinary way in the cemetery of his parish. * * * It may be observed that the cure and marguilliers are only proprietors of the parochial cemetery in the sense in which a parson in England is the owner of the freehold of the church-yard; that is to say, subject to the right of the parishioner to be buried therein." In that case the church authorities offered to permit Guibord's burial in that part of the cemetery which was unconsecrated. But the court determined that he was entitled to be buried in the consecrated part, and even queried whether they might not command the church to so bury him with its ordinary and appropriate re-

ligious rites and service. "The payment of dimes to the clergy of the Roman Catholic Church," said the court, "by its lay members, and the ratifiability of the latter to the maintenance of parochial cemeteries, are secured by law and statutes. These rights of the church must beget corresponding obligations, and it is obvious that this state of things may give rise to questions between the laity and clergy which can only be determined by the municipal courts." Even the observation made by Lord PHILLIMORE, that "if this church were to be regarded merely as a private and voluntary religious society, resting only upon a consensual basis, courts of justice are still bound, when due complaint is made that a member of the society has been injured as to his rights in any matter of a mixed spiritual and temporal character, to inquire into the laws or rules of the tribunal or authority which has inflicted the alleged injury," must be taken as applicable to the parish church-yard system; that is, to the parish church-yard or cemetery of any private and voluntary religious society in the kingdom, resting only on a consensual basis. The general right of a British subject, a member of such society, to burial in its parish church-yard or cemetery, is thus held to be a matter for consideration and adjudication by the courts construing the laws or rules of such consensual society. Throughout the case there is not a suggestion of contractual relation, nor of a right to burial in any particular plot. It was simply a judicial review, authorized by the law of England, of the action of the Roman Catholic Church in Canada: and thereupon the privy council examined the laws of the church, and held that its authorities had erred. We have no such system of jurisprudence here. In this, I must be permitted to say, we are fortunate, for, while human nature is what it is, there must always be more or less of religious faction, with its intensity of bitterness, in every theological establishment, however well disciplined and authoritative. And I can conceive of nothing more surely tending to weaken respect for judicial authority than the bringing of such factional controversies before the ordinary tribunals of our country, and making the people's judges final arbiters thereof.

In conclusion, I must say a word with regard to the present record. I have been somewhat embarrassed by the peculiar character of the findings made by the learned judge at special term. They seem to me to be inconsistent and contradictory in some important particulars, and they can only be reconciled by treating the eleventh, thirteenth, and fourteenth findings of fact as really conclusions of law erroneously deduced from the accurate findings of fact numbered second, third, and fourth. These latter findings are supported by the uncontradicted testimony, while the subsequent findings to which I have referred, as well as the first and second conclusions of law, are implications not borne out by such testimony. But as, upon the pleadings and proofs,—the latter undisputed,—and the findings of fact really applicable to such proofs, the third legal conclusion (namely, that the complaint be dismissed) was fully justified, the judgment appealed should be affirmed, with costs.

VAN BRUNT, P. J. I concur in the conclusions arrived at by Mr. Justice BARRETT. I think that he has conclusively shown that whatever contract the facts proven establish, if any, is of so vague and indefinite a character that it cannot be specifically enforced by any court. I think that he has further shown that all that the deceased received was a license which was revocable. No grant or irrevocable right or easement was ever given him, and could not be, by the paper he received, without in effect repealing the provisions of the statute in respect to conveyances of interest in land. If it were possible to hold that there was a valid contract for burial only, and not for any interest in land, there seems to be another ground which is fatal to the plaintiff's claim. There is no evidence but that, if the deceased's rights of property have been invaded, his estate can be entirely indemnified through an action at law for damages. If it is urged that damages cannot indemnify

for the deprivation of burial in this consecrated ground, then the court is called upon to decree that a church shall administer to one who claims to be of its communion its religious offices, and the court is called upon to determine whether the person is or is not in full communion with the church. I think that it will hardly be claimed that a court could rightfully direct a church to administer a sacrament to a person who claimed to be entitled thereto, but whom the church authorities had declared not so to be; and yet, in the case at bar, this is substantially what the court is called upon to do. It is asked to compel the burial of this man in a particular location, apparently because it is consecrated ground, because, if it is not burial in consecrated ground which is asked for, but simply burial, then sepulture in a non-denominational cemetery would attain the object, and damages would compensate for all invasion to property rights. Under our form of government, we do not think that courts can be called upon to compel churches to administer religious rights to persons claiming to be its members, or perform an act in any way impressed with that character. The judgment appealed from should be affirmed, with costs.

DANIELS, J., (*dissenting*.) The action has been brought to secure the interment of the remains of John McGuire, deceased, in Calvary Cemetery, Queens county, in the state of New York. The cemetery was acquired and controlled by the defendants under an act of the legislature conferring that power upon the trustees of St. Patrick's Cathedral. The intestate died on the 19th of February, 1888, and an application was made for his interment in the cemetery, which was refused by the trustees, under the direction of the clerical authorities of the Catholic Church. In his life-time, the intestate, for the sum of money mentioned in it, received the following receipt and agreement:

"No. 726. CALVARY CEMETERY, NEW YORK, November 22, 1870.

"266 Mulberry street.

"Received from John McGuire ten dollars, being the amount of purchase money of a grave, two feet by eight, in Calvary Cemetery, with privilege to erect a head-stone thereon.

"D. BRENNAN, Supt. of Office of Calvary Cemetery.

"Grave 9, plot F, section 8, range 56."

And prior to his own decease the grave mentioned in the instrument was actually located, and the remains of his wife were interred therein. The grave, as it was located, was sufficient in capacity for the interment of more than two dead bodies; and the object of the action, as well as of the application to the authorities controlling the cemetery, was to secure the interment of the remains of the intestate in the same grave; and by the language of the instrument, and the location of the grave, his representative was entitled to insist upon that right, if the intestate had observed the laws and discipline of the church under whose authority the property was acquired and controlled. The instrument as it was issued, and under which the grave was located, created a privilege or license to this effect, without conveying a title to the land. *Kincaid's Appeal*, 66 Pa. St. 411; *Page v. Symonds*, 63 N. H. 17; *People v. Trustees*, 21 Hun, 184. And the administrator was empowered to secure this interment if the intestate had complied with the laws of the church controlling the cemetery up to the time of his decease. 2 Bl. Comm. 508; *Williams v. Williams*, L. R. 20 Ch. Div. 659. And that was the view which was adopted and followed in the decision made at the special term; for it was there held by the court that the plaintiff, as the personal representative of the deceased, was vested with whatever right existed to enforce the contract to be implied from or contained in this instrument. The action, accordingly; did not fail because of any infirmity in the right of the plaintiff, as the personal representative, to maintain it, if that could be done legally upon the facts made to appear by the evidence.

Upon the trial of the action, accepted compilations of the laws of the church were proved and read in evidence, and these laws or regulations defined and declared the causes for which the interment of a deceased person might be forbidden in the consecrated cemetery and grounds of the church; and so far as they existed, and were applicable to this subject, they are required to be observed in the determination of the controversy which has arisen concerning the right of the deceased to burial in this cemetery. By these laws or regulations it was necessary that the deceased should have been during his life a member of the Catholic Church. If he were not such a member, then his personal representative could claim no right to the interment of his remains in these grounds. *Dwenger v. Geary*, 113 Ind. 106, 14 N. E. Rep. 903. But the right to the interment of these remains was not denied for want of any compliance on the part of the deceased with this regulation or requirement. Neither could it have been; for it was stated positively by the daughter of the deceased, who was sworn as a witness upon the trial of the action, that her father was a member of the Catholic Church in his life-time, and she was no further interrogated as to the correctness of this statement made by her. It appears to have been accepted as truthful, and it was assumed during the progress of the trial that he was a member of this church. And the complaint, as it is contained in the case, asserts that to have been the fact; for no more was stricken out on the application of the plaintiff than the statement that he died in full communion with the church, leaving the complaint, as it now forms a part of the case, with the allegation that he did die in the faith of the Roman Catholic Church. And it was not for want of any additional evidence as to this fact that the interment of the remains in the cemetery was denied by the authorities of the church or by the trial court. But that denial appears to have proceeded upon the conclusion adopted by the court that it properly belonged, under the usages and discipline of the church, to the decision of the ordinary of the bishop of New York to determine whether the deceased was entitled to be buried in this cemetery; and the ordinary having made a decision adversely to this right, upon evidence sufficient to give him jurisdiction to act, the remains were not entitled to burial in the consecrated ground of the cemetery.

It is undoubtedly the law that the courts will not review conclusions or decisions of the ecclesiastical authorities of the church relating to mere matters of faith, practice, or discipline. *Dutch Church v. Bradford*, 8 Cow. 457; *People v. German, etc., Church*, 53 N. Y. 103; *Shannon v. Frost*, 3 B. Mon. 253; and *German, etc., Church v. Com.*, 3 Pa. St. 282, 291. But this exclusive authority vested in the church is not applicable to the disposition or determination of rights or interests in property, or those derived from contracts lawfully entered into. As much as that was stated in *Bouldin v. Alexander*, 15 Wall. 181. And it necessarily follows from the nature of the transactions through which rights or interests in property, by virtue of contracts, may be created, that they are to be governed by the secular law, as they are distinguishable from ecclesiastical subjects, and may only be divested, impaired, or forfeited by reason of some act or circumstance upon which the right or contract has been made dependent, or for the violation of rules or regulations which by the sanction and intention of the parties have been made applicable thereto. Rights of this description are recognized and protected by the general law of the state, and that has carefully defined the manner in and the causes for which they may be lost or forfeited; and under that law, if the deceased, as a matter of fact, had violated or failed to observe any of the laws or regulations of the church applicable to and controlling this contract, then the plaintiff could not claim or insist upon his interment in this cemetery. But neither one of these rules or regulations vested the clerical authorities of the church with jurisdiction to determine this right of interment in such a manner as to conclude the party entitled to insist upon the observance of this

agreement. No hearing whatever has been provided for or took place before the vicar general, by whose order the interment of the remains in these grounds was forbidden; but he acted solely upon information which he had received from no directly responsible source, in reaching the conclusion that the deceased had forfeited his right to this burial. This was done, according to his own testimony, upon mere information,—not a safe subject to be relied upon in any case for the determination of rights of property or contract,—and the determination was made without any notice to, consultation with, or hearing of any person entitled to represent the deceased, or to controvert the correctness of the information received by this clerical official; and under these circumstances the law will not permit a determination arrived at in this manner to forfeit the right which the deceased may have secured through this instrument to burial in the consecrated cemetery of the church. The legal principle, on the contrary, has been declared to be that “there is nothing which our law denounces more explicitly than an adjudication of the rights of a party without offering him an opportunity of being heard in his defense.” *People v. Soper*, 7. N. Y. 428, 481, and *Loubat v. Le Roy*, 40 Hun, 546, follows and enforces this principle.

The determination which in fact was made in this manner proceeded upon information that the deceased had died at the Academy of Music at a meeting addressed by Dr. McGlynn, who had been excommunicated from membership in the Catholic Church, and that he was in reality a confederate and abettor of this deposed priest. The vicar general had been informed that McGlynn had abused and denounced the pope, and it was considered a scandal for any good Catholic to be present at his meetings. His own testimony is that he did not know the deceased, but that he had “heard that he had been applauding Dr. McGlynn in abusing the pope a few minutes before his death.” Upon his cross-examination he testified that it was a public fact that the deceased had died there. Thereupon the following questions were put to and answered by the witness: “*Answer.* I was not there. I did not see him die. *Question.* You say it came up from the trustees. By what means? *A.* The undertaker called upon them. *Q.* How do you know? *A.* The clerk told me. *Q.* His name? *A.* Mr. Brennan. *Q.* Where did he tell you so? *A.* Oh, I can’t remember the exact spot. *Q.* When did he tell you so? *A.* Either the day after his death or the following day. *Q.* What was said? *A.* Simply the fact that he died at the Academy of Music. *Q.* And on that you issued the order forbidding the burial? *A.* I did, sir.” These reports, with the exception of that as to the fact of the deceased dying at the Academy of Music, were of a loose and unreliable character, and could not legally have been the subject of binding action by the vicar general. They were in no sense so authentic as to warrant or justify the conclusion that the deceased approved of the actions or expressions of McGlynn, or applauded any remarks or imputation made by him at the meeting, in this manner referred to, or at any other, and afforded no grounds of jurisdiction upon which he could legally or properly act in declaring the right of the deceased, under this contract, to have been forfeited by any misconduct on his part. The evidence was not of such a nature as to be acted upon, and therefore afforded no jurisdiction over the subject-matter; and the want of jurisdiction, or the power to act, may be questioned in the courts by legal proceedings whenever the legality of the action taken shall be brought in controversy. *Ferguson v. Crawford*, 70 N. Y. 253, 257; *Cagwin v. Town of Hancock*, 84 N. Y. 532, 541; *Craig v. Town of Andes*, 93 N. Y. 405. And to afford jurisdiction by way of support for a *quasi* judicial determination, it must proceed upon at least colorable evidence of the fact. But here no such, or indeed any, evidence was supplied; and this, as well as the circumstances that the consideration given to the subject was wholly without notice or an opportunity to be heard by any person interested in protecting the right of the deceased against these aspersions, ren-

dered the determination which was made inoperative for the want of authority over it. But beyond this, according to the laws and regulations of the church, which have been made a part of the evidence in the case, the deceased could not be deprived of the right to burial in this cemetery by a simple determination that it had been forfeited or lost by him; for the laws of the church have made this disability to depend entirely, where the deceased shall have been a member of the Catholic Church, upon some act, misconduct, or omission of the deceased. These laws and regulations have in no manner provided that the right to burial in the cemetery, under an instrument of this description, can be taken away merely by the *dictum* or decision of a member of the church hierarchy; but the right to such burial by these laws has been declared to be lost or forfeited only by reason of actual misconduct on the part of the person in whose behalf it may in this manner be claimed. It is a penalty imposed for misconduct, either by means of affirmative acts, or delinquent omissions to act, on the part of the deceased. Among the causes for which burial in consecrated ground may be refused are the fact that the deceased died a public sinner, or that he failed to perform some affirmative duty forming a part of his obligations as a member of the church, or had committed some act of scandalous misconduct. The law of the church in these and other matters attaches the loss or forfeiture to the act itself, or to the delinquency of the party, and not to a mere *dictum* or determination of any member of the clerical authority of the church. And to bring this case within these laws it was necessary, therefore, that the deceased should be shown, as a matter of fact, by way of defense to the action, to have violated or become chargeable with some act of misconduct prohibited by them; thereby forfeiting, under their authority, his right to burial in the consecrated ground of the church. But no such proof in any form has been included in or made a part of this case.

The evidence concerning the conduct of the deceased was obtained from witnesses either related to or knowing him well, and seeing him at meetings of the Anti-Poverty Society, and of the parishioners of the church of which McGlynn had previously been the pastor; but no witness testifies to the fact that he was present on any occasion when McGlynn addressed the people who were assembled, or that he in any manner had applauded or approved of his conduct, or sentiments, or the principles which he endeavored to maintain; and upon the occasion when he was at the Academy of Music, the proof is positive, from at least two witnesses, whose evidence is not contradicted, that he died half an hour before the proceedings of the meeting had commenced, and before Dr. McGlynn made his appearance. All that was shown against him was that he was present at the meetings already referred to, but not when Dr. McGlynn was either officiating, or making any remarks or allusions whatsoever. There was no evidence that upon any occasion he had either misconducted himself, or neglected any of his duties or obligations as a member of the Roman Catholic Church. And that was the view which was adopted by the judge presiding at the trial; for by his fifteenth finding he found the facts to be "that the said John McGuire did not at any time after the said 22d day of November, 1870, violate any of the rules or regulations for the management of the said cemetery, and interments therein, theretofore made by the defendants, nor any laws of the Roman Catholic Church theretofore made respecting the burial of the bodies of its deceased members." And in this state of the evidence, as it cannot be affirmed that he had violated any rule or regulation of the Catholic faith, it follows that he did not forfeit his right to burial in this cemetery.

If, upon a mere mistaken view of the facts produced by unfounded reports, which was all that was before the vicar general, this right of burial may be forfeited, then no security can certainly exist for the protection of any person acquiring and paying for this privilege of burial; for even the most correct

religious deportment may be sacrificed by the malignant and untruthful reports of persons misrepresenting the acts, conduct, or sentiments of deceased persons. Instead of the right being maintained, as the law requires it to be, as one of a proprietary character, it may then be overthrown or forfeited, after the decease of the party securing it, without any available means of avoiding the result. No Catholic, whatever his standing may be, will be entirely removed from this danger, if upon mere reports, turning out, as they have in this instance, to be untruthful and unfounded, he can be deprived of burial in the consecrated ground of his church by the action of one of its officials, induced by reliance upon these reports. The only safety which exists is that already indicated in reliance upon and maintaining the laws of the church itself, which require, not rumors or information, but that actual misconduct, or the omission to observe specific obligations, shall be proven to have taken place before a contract or instrument of the description of that, for a good consideration, delivered to the deceased, shall be forfeited or avoided. That proof is wholly wanting in this case, and the judgment should be reversed, and a new trial ordered, with costs to the plaintiff to abide the event.

BRIGGS v. LANGFORD.

(*Supreme Court, General Term, Fifth Department. October 19, 1889.*)

ESTOPPEL—REPRESENTATIONS—MORTGAGES.

Where plaintiff was induced to buy land in part by the advice of defendant, and his representation that it was free from incumbrances, such defendant, having purchased a mortgage executed by the former owner of the land, is estopped to deny that the same is unincumbered, though he supposed it to be so when he made such representations to plaintiff.

Appeal from judgment on report of referee.

Action by Alba Briggs against John Langford to restrain the present defendant and one Austin Heath—the latter now deceased—from foreclosing the mortgage mentioned in the complaint, upon the ground that the same had no validity, and was without consideration, and was null and void; and upon the further ground that, at the same time the plaintiff purchased the mortgaged premises, the defendant fraudulently concealed the existence of such mortgage from him. Plaintiff appeals from a judgment entered in Chautauqua county on the report of a referee.

Argued before BARKER, P. J., and DWIGHT and MACOMBER, JJ.

Henderson & Wentworth, for appellant. *B. A. Barlow and L. Morris*, for respondent.

MACOMBER, J. On the 12th day of August, 1875, one Anson R. Day and his wife executed and acknowledged a mortgage upon the lands now owned by the plaintiff, consisting of 11 acres, in the town of Ellory, Chautauqua county, to one Austin Heath, mortgagee, conditioned for the payment of the sum of \$1,540, with annual interest; the principal sum to become due in two years from the 2d day of August, 1875. No bond or other obligation to pay such moneys so purporting to be secured by the mortgage, or any part thereof, was executed by the mortgagors, or either of them. This mortgage was recorded in the proper clerk's office on the 26th of October, 1875. The case discloses no facts showing what the actual consideration of the mortgage was, or that it was given for any value whatever, except as the same may be derived from presumptions of law. On the 24th day of November, 1879, Heath assigned the mortgage to the defendant, John Langford, which assignment was properly recorded. This assignment was so made and the mortgage delivered to the defendant, Langford, upon his agreeing to pay to Heath the full sum purporting to be secured thereby, upon which no part, either principal or interest, had been paid, by paying him a part thereof in money at the time of the

assignment, by paying another part as he needed it, and by crediting and applying the remainder of such purchase price upon the debt owing to said Langford by the said Heath. Anson R. Day and the defendant were brothers-in-law, as were also the deceased defendant, Heath, and Langford, as well as the said Day and Heath. The premises in question were conveyed by Day and wife to the plaintiff on the 17th day of August, 1876, which deed was properly recorded. This deed contained a covenant that the premises were free and clear from all incumbrance.

The principal question litigated is whether or not the defendant is estopped to deny that the plaintiff has an unincumbered title of these premises. All of the parties interested seem to have been present at the negotiations, including the defendant. The plaintiff objected to closing up the transaction, and receiving the deed, and paying the purchase price of the lands, until he had obtained a search of the title of the property. Thereupon a search was produced by Mr. Day, showing an unincumbered title down to the time he purchased the premises; and he asserted, as well as did the other members of his family then present, that there was no incumbrance upon the same, as he had had no occasion to execute any such incumbrance. During this interview the defendant, Langford, said to the plaintiff that he (Langford) thought it was not necessary to wait about signing the papers and finishing up the bargain until the search was brought down to that time, for he thought the premises were clear and free from all incumbrances. Such is the finding of the referee. The referee further finds that Langford believed that the premises were free and clear from incumbrances at that time. Up to the time of the assignment of the mortgage to the defendant, Mr. Heath had made no attempt to foreclose the same, or to assert any right thereto as against the plaintiff. Day and Heath are both dead, and both died insolvent. At the request of the plaintiff's counsel, the referee has found that the plaintiff was induced to make the payments for the purchase price of the lands by the representations made to him, "and by the conduct of said Anson R. Day and wife and of said defendant." We are not unaware that the respondent's counsel claimed before the court, at a time after the appellant's counsel had gone therefrom, that this special finding was a mistake, and that the appellant's counsel did not insist upon its retention, and had promised to strike the same from the case. Evidently there is some misunderstanding existing between the respective counsel, and some misapprehension on their part of the facts existing. As it appears to me, this special finding, instead of being contrary to the testimony in the case and to the report of the referee, is a proper and just corollary adduced from them. In the eleventh finding, as contained in the report, it is found "that at the time of the purchase of the said mortgage by the said Langford, as aforesaid, the said Langford well knew that the said premises were purchased by the plaintiff upon the belief and with the understanding that the same were free and clear from all incumbrance." It is further found by the report that Langford was not a purchaser of the mortgage in good faith, but took the same chargeable with notice of any and all defenses existing thereto; that the said purchase was not in the usual course of business; and that the assignment was made by Heath to Langford because and for the reason that they believed that the said mortgage could be more easily enforced by the said Langford than by the said Heath. The learned referee, in his opinion, asserts that the rule is well settled that proof in this class of actions must go the extent of a practical demonstration before relief can be afforded to the injured party. Applying this rule, he says he is not able to find that the mortgage was without consideration, and is not able to give the plaintiff the relief demanded. We know of no such rule of evidence in existence in this state. If there have been intimations of a rule requiring more than a preponderance of the evidence in the case to support a judgment, the same have been disapproved in the decision of the court of appeals in the

case of *People v. Briggs*, 20 N. E. Rep. 820, where it is held that, even in an action to recover a penalty, a mere preponderance of the evidence is all that the rule requires to enable the people to recover in a civil action. The referee has found that the assertion made by the defendant was a mere expression of opinion on his part that the premises were, in fact, free and clear from incumbrance, and that he is not bound by the same. This seems to be confounding his responsibility to answer affirmatively for false representations, and his inability, under the doctrine of estoppel, now to assert the contrary of what contributed, in part at least, to induce the plaintiff to purchase the premises in reliance upon the false assertion that the same were free from incumbrance. Supposing Mr. Heath had stood by while owning this mortgage, and had by word and action and advice induced the plaintiff to purchase the lands in reliance upon the false assertion that the same were free and clear from incumbrance, it could not certainly be claimed by him afterwards that the mortgage which he then held, and the existence of which he did not disclose, could be enforced in his behalf. The right of his transferee can be no greater than his own. Under the proofs and finding, he is not a purchaser in good faith, but, on the contrary, he is a purchaser with knowledge that the owner of the lands, at the time of the purchase, induced in part by the advice of the defendant, believed them to be unincumbered, and, acting upon such belief, had paid full value for the same. Under these circumstances, we think that the defendant is estopped to deny that the lands are unincumbered, for the reason that he contributed in part in inducing the plaintiff to purchase the same, relying upon the assertion that they were free from incumbrance. The judgment should be reversed, and new trial granted before another referee, with costs to the plaintiff to abide the final award of costs. This conclusion renders it unnecessary for us to consider the appeal brought by the defendant from that part of the decision and judgment which refused costs to him. All concur.

In re BLOSSOM'S ESTATE.

(Supreme Court, General Term, Fifth Department. October, 1889.)

1. INSANITY—COMMITTEE—ACCOUNTING—COMMISSIONS.

A committee of a lunatic is, on final accounting, on the death of the lunatic two months after his appointment, entitled to full commissions for receiving and paying out the property which came into his hands as such committee, without regard to the amount disbursed as expenses.

2. SAME—COUNSEL FEES.

It is in the discretion of the court to allow counsel fees on the final settlement of the accounts of a committee of a lunatic.

3. SAME—ASSETS—NOTES OF COMMITTEE.

It is the duty of the committee to turn over to the administrator his own notes found among the papers of the lunatic, though barred by limitation at the time of his appointment as such committee.

Appeal from Monroe county court.

Proceedings for the final accounting of Henry Killick, as committee of the estate of William Blossom, a lunatic, deceased. The administratrix of the lunatic appeals from the decree allowing certain items to the committee.

Argued before BARKER, P. J., and DWIGHT and MACOMBER, JJ.

E. Van Voorhis, for appellant. *Ed. Webster*, for respondent.

BARKER, P. J. The committee received into his hands, of the personal property of the lunatic, cash items, bonds and mortgages, and notes. Two months after his appointment the lunatic died, and Maria A. Blossom was appointed the administratrix of his estate. The committee paid out, as expenses, in the due administration of his trust, the sum of \$282 only. The aggregate of the personal estate was \$9,584.75. The court below allowed commissions on the aggregate amount of the personal estate, for receiving and paying out

the same, computed on the same basis as those allowed executors and administrators on final settlement of their accounts. The appellant insists that commissions for receiving and paying out should be limited to the sum of \$282, the amount actually disbursed. The trust terminated with the death of the lunatic, and he has rendered a final account, and has turned over to the personal representative of the deceased the entire estate undisbursed. He is entitled to the same compensation by way of commissions as if his ward had lived and been restored to the enjoyment of his mental faculties, and his estate returned to him under the order of the court. In such a case the committee would be entitled, on rendering a final account, to full commissions. In this case the trustee has in all respects faithfully executed his trust, and has earned the compensation awarded him by the statute. Code Civil Proc. 2338; *Ward v. Ford*, 4 Redf. Sur. 34; *In re De Peyster*, 4 Sandf. Ch. 511. The rule adopted in cases where trustees are removed, or retire on their own application, or die, has no application, for the manifest reason that the trust remains unadministered at the time of the accounting.

The committee was allowed the item of \$75, as a fee to be paid his counsel. The court had the power within its discretion to make the allowance as a proper and necessary disbursement. A faithful trustee is always allowed his expenses out of pocket, which includes a reasonable fee paid his counsel. *Downing v. Marshall*, 37 N. Y. 380; *Wetmore v. Parker*, 52 N. Y. 450. While it appears that the committee had no difficult question to consider up to the time of the death of his ward, and we see but little reason for consulting counsel, we would be disinclined, if we had the power, to interfere with the allowance, as the estate was quite large, consisting of both real and personal property, and the custody of the lunatic was also given to the committee. In such cases it cannot be said, without inquiry into the facts and circumstances, whether the committee acted judiciously for the estate, or for his own protection, in consulting counsel. The court below did so, and came to the conclusion that the trustee should be allowed the item of \$75, to be paid counsel. This court cannot review the judgment of another court except for legal error: *Thurber v. Townsend*, 22 N. Y. 517; *Reiley v. President*, 102 N. Y. 383, 7 N. E. Rep. 427; *Stebbins v. Cowles*, 30 Hun, 523; *Wavel v. Wiles*, 24 N. Y. 635; *Osborn v. Nelson*, 59 Barb. 375. As this item was largely in the discretion of the court below, we cannot strike it out of the credits allowed the trustee.

We think it was the duty of the trustee to turn over his own notes which he found among the papers of the lunatic to the administrator, although they appear to have been outlawed at the time of his appointment. It appears that they were present and given in evidence on the hearing, and the counsel for the committee offered to dispose of them in the way ordered by the court. As the order does not make any disposition of the notes, it should be modified so as to direct the committee to pay them over to his successor in office; and, as modified, the order should be affirmed, with \$10 costs. All concur.

ASHLEY v. WROUGHT IRON BRIDGE CO.

(Supreme Court, General Term, Fifth Department. October, 1889.)

PRINCIPAL AND AGENT—CONTRACT—COMMISSIONS.

In an action to recover commission on sales, it appeared that plaintiff's decedent was an agent of defendant, selling on commission; that the commissions were fixed by a written proposition from defendant, as follows: 10 per cent. on contracts up to \$999; 8 per cent. from \$1,000 to \$1,999; 7 per cent. from \$2,000 to \$2,999; 6 per cent. from \$3,000 to \$3,999; 5 per cent. on amounts of \$4,000 and over,—to which was added, "large contracts will not stand as large commissions as small ones, and are generally taken at about the same expense per contract;" that prior thereto the commissions had been 8 per cent. on the gross amount of the sale. Held, that commissions on sales should be computed at one rate on the entire amount of each sale.

Appeal from judgment entered on report of referee.

Action by Frank M. Ashley, as administrator of the estate of John McCoun, deceased, against the Wrought Iron Bridge Company. Judgment for plaintiff, for damages, \$128.25; for costs, \$720.50. The original plaintiff died since the entry of judgment and the bringing of this appeal, and the respondent has been substituted as his administrator. The defendant is a foreign corporation doing business in the state of Ohio, as a manufacturer of iron bridges, and the decedent was its agent in the state of New York for several years prior to the 20th day of January, 1881. For some time immediately preceding that date the plaintiff was allowed a commission of 8 per cent. upon the gross amount of sales. On that day the defendant's agent addressed a letter to the plaintiff relative to commissions on future sales, as follows: "We will charge your commissions, viz., 10 per cent. on contracts up to \$999; 8 per cent. from \$1,000 to \$1,999; 7 per cent. from \$2,000 to \$2,999; 6 per cent. from \$3,000 to \$3,999; 5 per cent. on amounts of \$4,000 and over. This we think will give you a much better chance to work, as large contracts will not stand as large commissions as small ones, and are generally taken at about the same expense per contract." The deceased accepted the terms proposed, and made sales thereafter of five bridges with prices varying from one to two thousand dollars for each bridge. One of the questions presented on the trial was as to the mode and manner of computing commissions upon the sales made. The plaintiff contended that a proper construction of the written proposition entitled him to 10 per cent. upon \$999 of the price for which each bridge sold, and 8 per cent. upon the balance, which claim was allowed by the referee; while the defendant contended that, as each sale amounted to more than \$1,000, and did not exceed \$2,000, he was entitled to 8 per cent., and no more. The difference in the mode of computation amounted to \$99.90, and was allowed the plaintiff in the account, as stated by the referee. Defendant appeals.

Argued before BARKER, P. J., and DWIGHT and MACOMBER, JJ.

Albert C. Tenant, for appellant. *E. M. Ashley*, for respondent.

PER CURIAM. We think it obvious that, under the agreement for commissions as stated in the defendant's letter of January 20, 1881, they were to be computed at one rate on the sum for which each bridge was sold, and not different rates for making a sale if the contract price was above \$999, as claimed by the plaintiff, and allowed by the referee. The words of the contract led us to this conclusion. The question does not admit of much discussion. The letter states that the company could not afford to pay the same rate of commissions for making a large contract as for making a small one. This expression indicates the intention of one of the parties, to which the other must have understandingly assented. The mode of computing commissions, as claimed by the plaintiff, if adopted, would thwart the purpose of the defendant, in changing the amount of commissions to be allowed on each sale. For instance, if a sale of a bridge was made amounting to \$5,000, the commissions, as claimed by the defendant, would amount to \$250. If computed in the manner claimed by the plaintiff, it would amount to \$360. By adopting the plaintiff's contention he would get two and one-half times more for making a sale of a bridge for \$5,000 than he would receive for making a sale of a bridge for \$1,000. These being our views, the item of \$99.90, claimed and allowed to the plaintiff as unpaid commissions under the contract, was error, and leads to a reversal of the judgment. The refusal of the referee to allow interest on the item of the \$400 seems to be in accordance with our views, as stated in our opinion when this case was here on a former appeal. (44 Hun, 623, *mem.*) We do not attempt to correct the error pointed out by reducing the amount of the judgment, as there is a controversy between the parties over other items, which were disallowed the plaintiff. If he should support his entire claim, he may recover a judgment which would entitle him to costs. If the judgment is mod-

ified by deducting the \$99.90, then the plaintiff's recovery will be less than \$50, and he will be chargeable with costs of this litigation, which are now very large. Judgment reversed, and a new trial granted before another referee, with costs, to abide event.

HOLLOWAY v. CITY OF LOCKPORT.

(*Supreme Court, General Term, Fifth Department. October 19, 1889.*)

1. MUNICIPAL CORPORATIONS—DEFECTIVE SIDEWALKS—CONTRIBUTORY NEGLIGENCE.

In an action against a city for personal injuries sustained by reason of a defect in a plank sidewalk, it appeared that as plaintiff stepped on one of the planks, which were laid crosswise on stringers, it tipped up, and, catching his other foot, threw him down; that the plank was warped and unnailed, and had been so for some time; that plaintiff passed over the walk every day, going to and from his business; that one of defendant's deputy street commissioners passed over the walk daily, for months, immediately preceding the accident. *Held* that contributory negligence being a question for the jury, a verdict for plaintiff would not be disturbed.

2. SAME—INSTRUCTIONS—DEGREE OF CARE.

An instruction that, "if the plaintiff was familiar with it, [the place,] and it was out of order, there is stronger probability that he must have known that there were loose planks there, and it became his duty to be careful and prudent, in view of the knowledge which he had," when supplemented by a further instruction that, "if the jury find that the plaintiff was familiar with the walk in question and its condition, and passed over it daily, it was his duty to use more than ordinary care in passing over it on the day that he received the injury complained of, and that it was his duty to be more vigilant if he knew of the defect, than if he had been ignorant of the fact that it was out of condition,"—correctly states the rule of law as to the degree of care necessary for the plaintiff to exercise to escape the imputation of negligence.

Appeal from circuit court, Niagara county.

Action by George L. Holloway against the city of Lockport, for personal injuries caused by the defendant's neglect to keep a sidewalk within the city limits in a safe condition. At the close of plaintiff's evidence defendant moved for a nonsuit, which was denied. Defendant appeals from a judgment entered on a verdict of \$375 for plaintiff, and from an order denying the defendant's motion for a new trial, founded on a case containing exceptions.

Argued before BARKER, P. J., and DWIGHT and MACOMBER, JJ.

John E. Pound, for appellant. *S. E. Graves*, for respondent.

BARKER, P. J. The exception to the refusal to grant a nonsuit presents the only question which merits much consideration. The plaintiff is a resident of the city of Lockport, and at the time of the accident he resided on Van Buren street, on one side of which there was a plank sidewalk four feet wide, the plank being laid crosswise upon stringers. He passed over this section of the walk daily in going to and from his place of business, his occupation being that of a machine blacksmith. On the day mentioned, while walking along the sidewalk he stepped on one of the planks, which caused it to tip up, and catch the plaintiff's other foot, and he was thrown down on his hands and face, and received an injury to one of his knees, which disabled him for 40 days, from which he had substantially recovered at the time of the trial. The plank was warped, loose, and unnailed, so that when stepped upon the edge of the plank would turn up above the general level or surface of the sidewalk. As the plaintiff fell the plank was entirely removed from its place, and when the plaintiff was down it was between his legs. The evidence tended to prove that this place had been in this condition for a considerable length of time previous to the accident, and from the proofs the jury were justified in finding that the officers of the city having charge of the streets and sidewalks knew the real condition of the walk at this place. One of the deputy street commissioners passed over this part of the walk daily, for months, immediately preceding the accident, and other persons who passed over the walk ob-

served that the plank was not nailed, and was loose, and moved when stepped upon. It is a matter of common observation to all persons who are accustomed to walk upon plank sidewalks that a loose, warped, and unfastened plank, laid crosswise, and on stringers, constitutes a dangerous trap in the sidewalk; so, if it be true, as the plaintiff's evidence tended to establish, and which was not much disputed by the defendant's witnesses, enough was shown as to the condition of the walk to justify the finding that the defendant was guilty of negligence in permitting this walk to remain in an insecure and unsafe condition. The duty of the defendant was to keep the streets and sidewalks, constructed under its orders and directions within the city limits, in a reasonably safe and secure condition. If the plaintiff did in fact know of the real condition of the walk before the accident happened, that circumstance alone does not deprive him of a right of action. That circumstance, however, with all the other facts bearing on the question, was to be considered and weighed by the jury in determining whether the plaintiff was guilty of contributory negligence. We think that the jury properly disposed of that question; at least the case, as presented by all the evidence, is such as not to permit us to disturb their finding on the question.

This question was asked one of the plaintiff's medical witnesses who attended him during the period of his lameness: "What do you say as to this injury to his knee being a permanent one?" The defendant's counsel objected to the question as being incompetent and immaterial, and the objection was overruled, and the defendant's counsel excepted. But this question was not answered, and the court propounded to the witness the following question: "Have you any opinion on the subject whether he will entirely recover from it?" No objection was made to this question, and the witness answered, "I hardly think he will, entirely." We think the first question entirely proper, but, as it was not answered, it does not need further consideration.

The defendant's counsel asked the court to charge that if the jury find "that the plaintiff, being familiar with the place where the accident took place, used no more care and precaution in passing than if he were wholly ignorant of its condition, then he cannot recover." The court declined so to charge, but stated in response to the request, "that, if the plaintiff was familiar with it, and it was out of order, there is stronger probability that he must have known that there were loose planks there, and it became his duty to be careful and prudent, in view of the knowledge which he had," to which charge the defendant duly excepted. By a strict construction the exception is limited to the charge as made, and is not an exception to the refusal to charge as requested. It needs no argument to show that the charge requested did not in any manner define the degree of care and caution which it was necessary for the plaintiff to exercise, if he knew, as a matter of fact, that the walk was out of repair, to escape the imputation of negligence on his part, and the court properly refused to assent to the proposition. The instruction which was given to the jury on the subject, so far as it went, stated the rule of law correctly relative to the subject. The court, after the exception was taken, gave to the jury the further instruction: "That if the jury find that the plaintiff was familiar with the walk in question, and its condition, and passed over it daily, it was his duty to use more than ordinary care in passing over it on the day that he received the injury complained of, and that it was his duty to be more vigilant if he knew of the defect than if he had been ignorant of the fact that it was out of order." The appellant has no right to criticise these instructions to the jury, and it appears that he was satisfied with the same, as they were made at his request.

The appellant also asked the court to charge the jury that if the plaintiff was aware that the walk was out of repair, and dangerous to pass over at the point where he met with the accident, he should have turned out and gone

around the dangerous place, which was declined, and the defendant excepted. On the argument the appellant did not claim that this exception was well taken, and manifestly it was not. Judgment affirmed. All concur.

ERWIN v. ERWIN *et al.*

(*Supreme Court, General Term, Fifth Department. October 19, 1889.*)

1. WITNESS—COMPETENCY—TRANSACTIONS WITH DECEDENTS.

Code Civil Proc. N. Y. § 829, provides that on the trial of an action a party or person interested in the event shall not be examined as a witness in his own behalf or interest, against a person deriving his title or interest from, through, or under a decedent, by assignment or otherwise, concerning a personal transaction or communication between the witness and decedent. In an action to enforce specific performance of an oral agreement with a decedent to convey land against decedent's grantees, it appeared that decedent was plaintiff's father, and that, in the presence of his wife and plaintiff and his wife, the latter two being seated together, he had turned to them and said: "My son, I give you the farm. I want you to go on it and live. You may have all you make of it. Fix it up, and when I die it shall be yours; but I will keep the title while I live, that you may neither burden or lose it during my life-time." That plaintiff assented thereto. That his wife said nothing, because the father disliked her, and she feared that he would change the arrangement if she spoke. *Held*, that plaintiff's wife was a party to the transaction, though not named in the agreement, as the arrangement was a family affair, and the farm was intended to be a home for plaintiff and his family.

2. SAME—INTEREST IN EVENT OF ACTION—DOWER.

Plaintiff's wife, in such case, is interested in the event of the action, within section 829, because of her inchoate right of dower in the land, which would attach on recovery of a judgment by plaintiff.

Appeal from special term, Steuben county.

Action by Edward E. Erwin against Francis E. Erwin and others, for the specific performance of a parol promise to convey land. The decision directed a conveyance of the premises to plaintiff by such of the defendants as the title was vested in at the time of the commencement of the action. Defendants appeal.

Argued before BARKER, P. J., and DWIGHT, J.

Geo. T. Spencer, for appellants. *A. Hadden*, for respondent.

BARKER, P. J. The plaintiff is the son of the late Francis E. Erwin, who died in the year 1887. As early as 1853 the decedent was the owner of the premises, consisting of 250 acres of farm land, the title to which remained in him until a few months before his death. The plaintiff's case, as alleged by him in his complaint, is that in the year 1853 the plaintiff and his father entered into an oral agreement, whereby it was agreed that, if the plaintiff would enter into the possession of the premises in question, cultivate and improve the same as his own, the same should be the lands of the plaintiff; but that the title to the same should remain in the said Francis E. Erwin during his life-time; and that he, the said Francis, would, at the time of his death, give, convey, devise, or transfer the said lands and premises to the plaintiff, so that the plaintiff should have the title to the said lands at the death of his father, to which the plaintiff assented; that in pursuance of the aforesaid arrangement the plaintiff entered into the immediate possession of the said premises, with the consent of his father, and lived upon and occupied the premises as a home for himself, claiming that he had equitable title thereto under and in pursuance of the said agreement; and that he in all respects kept and observed every material promise on his part. In his life-time, and in the year 1887, a few months before his death, the decedent conveyed the premises, vesting the fee thereof in the defendant Francis Erwin, who is also a son of the deceased. The deceased left a last will and testament, in which he made provision for the support of the plaintiff during his life-time, the

character of which it is unnecessary to mention. At the time of the making of the alleged agreement the plaintiff was married, and his wife was living at the time of the trial, and she was called and examined as a witness in his behalf, and gave evidence tending to prove that the decedent made the parol agreement to convey which the plaintiff is seeking to enforce. Without her evidence as to the terms of the agreement, it is doubtful whether the plaintiff made a case entitling him to relief; at least it appears by the record that she gave the only direct evidence as to the terms of the agreement between the plaintiff and his father. At that time the plaintiff had been married less than a year, and he and his wife were living with his father as members of his family.

The only question which we have deemed it necessary to discuss in disposing of this appeal relates to the competency of this evidence under the Code of Civil Procedure. The provisions of the Code applicable to this question may be abbreviated and stated as follows: "Sec. 829. Upon the trial of an action * * * a party or person interested in the event * * * shall not be examined as a witness in his own behalf or interest, * * * against * * * a person deriving his title or interest from, through, or under, a deceased person, * * * by assignment or otherwise, concerning a personal transaction or communication between the witness and the deceased person." The title which the defendant Francis Erwin claims to have in the lands in question, and which he is seeking to protect against the plaintiff's claim of title, was derived from his deceased father, and it is thus conceded that one of the circumstances exists which it is necessary should appear to sustain the objection of incompetency on the part of the witness. Was the witness interested in the event of the action? The cases of *Steele v. Ward*, 80 Hun, 555, and *Simar v. Canaday*, 58 N. Y. 298, are sufficient authorities in support of the appellant's position that she was directly interested in the event of the action; and that the judgment, if allowed to stand, would be competent evidence to prove the nature and character of such interest in the premises. Her husband, by the force of the judgment, becomes seised of an estate in fee of the premises, and the witness, his wife, has also a claim of an inchoate or contingent right of dower therein, which the law recognizes as property possessing some pecuniary value. The late case of *Witthaus v. Schack*, 105 N. Y. 332, 11 N. E. Rep. 649, is not in conflict with the proposition that an inchoate right of dower in lands is a claim of value, and can only be extinguished with the consent of the wife of the owner of the fee. That case decides that the wife has no estate in the lands during the life-time of her husband which she can convey; that her inchoate right of dower is but a contingent claim, incapable of transfer by grant or conveyance, susceptible only during the inchoate state of extinguishment, and, when she joins her husband in a deed of his land, that act on her part does not constitute her a grantor of the premises; and that the grantee does not derive any title to the premises conveyed through, from, or under the wife, but simply secures an extinguishment of her contingent right of dower.

The chief disputation arises over the next question, which is, did the evidence which the witness was permitted to give relate to a personal transaction or communication between herself and Francis E. Erwin, the defendant's grantor? This is to be tested by the witness' own statements as to the circumstances under which she was present and heard the conversation which she related, which was substantially as follows: The evening the agreement was made the family, including Mr. Erwin and his wife, the plaintiff, and the witness, were in the parlor, and she and her husband were seated on a sofa, when Mr. Erwin turned towards the plaintiff and herself, and said, using the exact language of the witness: "Edward, my son, I have at last got that 60 odd acres that I wanted to add to your farm. I give you the whole farm. I want you to go on it and live. I will help you to build a house and barn.

You may have all you make off the farm, and when I die it shall be yours; but I will keep the title in my own hands while I live, that you may neither burden or lose it in my life-time.' He told Edward to improve and fix it up. Go on to it and improve it and fix it up. I will help you build a house and barn. To this Edward replied: 'Father, that is all right. I agree to that.' " She also stated that her husband and his father that evening drew the plan for a house. The witness also stated that she took no part in the conversation, for the reason that Mr. Erwin did not like her, and she was afraid that if she spoke he would be angry, and oppose the arrangement. It seems plain that Mrs. Erwin was a party to that transaction, within the spirit and meaning of the statute, although she was not named as a party to the agreement. The arrangement was wholly a family affair, and it was manifestly intended that the farm should be a future home for the plaintiff and his family,—a gift by the father to his son, in the nature of an advancement, with an understanding that the title should be secured to the donee by a provision in the last will and testament of the donor. It was a term of the arrangement or agreement that at some time in the future the title to the premises should be conveyed to the plaintiff, and, whenever that should take place, then, by operation of law, the witness would have an inchoate right of dower in the premises, which would have a pecuniary value, of which she could not be deprived without her consent. The judgment decrees a specific performance of the agreement testified to by the witness, and if carried out and fully performed would vest in her an interest in the premises of the nature and character already mentioned. Mr. Erwin, in his offer to give and convey the farm to his son as a homestead, really, and doubtless intentionally, addressed himself to all the members of his family then present, including the witness, so as to give his remarks the character of a conversation between himself and the witness. Although it must appear that the conversation or transaction sought to be excluded under the statute was a personal one, it need not have been private or confined to the witness and the deceased; nor need the witness have been peculiarly interested in the transaction at the time she participated in the conversation. In *Holcomb v. Holcomb*, 95 N. Y. 316, the following general rule was formulated: The policy of the statute excludes the evidence of an interested witness concerning (1) any transaction between himself and the deceased person, or in which the witness in any manner participated; (2) all communications between the person deceased and the witness, including communications in the presence or hearing of the witness, if he in any way was a party thereto, or communications to either of one of two or more persons, if all were interested. In commenting upon these rules the court remarked: "Each of these species of testimony is as much opposed to the spirit and intent of the statute as the other. If the proposed witness has asked a question of the decedent, and it is answered, it is a conversation. If, while the decedent is conversing with a third person, the witness, by word or sign, participates in it, or is referred to, it is evidence of what occurred, and cannot be received." The witness admits that she was present, and listened to the conversation, and also substantially admits that she participated in it within the sense and spirit of the statute. Although she says she did not take any part in the conversation, she gives, as a reason for her silence, that Mr. Erwin did not like her, and she was afraid of making him angry if she said anything, and that he would then oppose the arrangement. That she was desirous that the arrangement should be completed, and was present, giving strict attention to what was said and done, is admitted, and her interest in the negotiations must have been observed by Mr. Erwin, and satisfied him that she was gratified with the proposed agreement. It is impossible to suppose that the witness did not give some sign, by her actions or the expression of her countenance, which was recognized by Mr. Erwin as a sign that the witness assented to the arrangement which he proposed to make for her husband, that he might establish a home for him-

self and family. By means of these signs she became a participant in the conversation, which rendered her incompetent as a witness.

In view of the particular features presented by this case, which in our opinion made the witness incompetent, under the provisions of section 829, it is unnecessary to refer to the cases cited by the respondent, which laid down the general rule that the provisions of the Code do not preclude a party or an interested witness from testifying to the statements of a deceased person made to a third person, in the hearing of the witness, and to distinguish this case, as it readily may be, from the cases referred to. It is so manifest that the appellants were prejudiced by incompetent evidence that a new trial must be granted, without considering the strength of the plaintiff's case upon the legitimate evidence offered and received by the trial court. Judgment reversed, and new trial granted, with costs of this appeal to abide the final award of costs.

ROSEN v. STEIN *et al.*

(*Supreme Court, General Term, Fifth Department. October 19, 1889.*)

1. FALSE IMPRISONMENT—MALICE—PROVINCE OF JURY.

In an action for false imprisonment, it appeared that defendants had employed plaintiff to make a number of coats, and, on their refusal to pay for them on account of some defects therein, plaintiff refused to return those that he had in his possession until he was paid. Failing to obtain the coats after several demands, one of the defendants went before the police justice, who advised him to get a warrant, and wrote an affidavit charging plaintiff with petit larceny, which defendant signed without reading, and a warrant was issued, on which plaintiff was arrested. When plaintiff was discharged on the hearing, such defendant stated that he was satisfied, and only wanted to get back the coats. *Held*, that the question of malice was for the jury.

2. SAME—WANT OF PROBABLE CAUSE—PRESUMPTION.

In such a case, if the jury find that there was no probable cause to make the charge against plaintiff, they may infer that it was made through malice.

3. APPEAL—REVIEW—HARMLESS ERROR.

Where it is admitted that plaintiff intended to keep the goods of defendants, the latter are not injured by excluding a question put to one of them as to whether he believed that plaintiff did so intend.

Appeal from circuit court, Monroe county.

Action by Morris Rosen against Nathan Stein, Leopold Bloch, Louis Stein, and Abraham N. Stein for false imprisonment. There was a judgment for plaintiff, from which, and from a denial of a motion for a new trial, made upon the minutes, defendants appeal.

Argued before BARKER, P. J., and DWIGHT and MACOMBER, JJ.

Raines Bros., for appellants. *D. C. Feely*, for respondent.

BARKER, P. J. This is an appeal from a judgment recovered by the plaintiff at the Monroe circuit, and from an order denying the defendants' motion for a new trial, made upon the minutes. There appears to be little conflict in the testimony offered at the trial as to the main facts in the case. It appears that the plaintiff, Rosen, was a journeyman tailor, and, as such, was given by the defendants' firm the material and trimming to make a dozen coats, for which he was to be paid a stipulated sum per coat. The work was done outside the defendants' establishment. When the coats were completed by the plaintiff, it was discovered that there was something wrong with the linings of some or all of them. The defendants claimed that the trouble was caused by the mistake of the plaintiff, Rosen, in mixing two different shades together, and insisted that Rosen should take out the defective linings, and replace them with others, for which he was given the stuff. Rosen, it appears, afterwards returned to the defendants' store, and claimed that upon again testing the lining, and pressing the same, the same discoloration was caused, and that the trouble was entirely the result of the quality

of the lining, and not any fault of his in making. The plaintiff claims that the defendant Louis Stein still insisted that he should fix the coats, and stated that, unless he did remedy the defects, he would not get paid for his work. This he refused to do, and the plaintiff was directed to return three of the coats, which he had not already brought to the defendants' establishment. He refused to do so unless he got his pay. The defendants then sent their messenger to the plaintiff's house for the coats, and he again refused to give up the coats without his pay. Then they sent the messenger to the plaintiff's house with a police officer, and demanded the coats, but Rosen refused to let them have them, or take them to the defendants' place, without being paid for his work; all the while insisting on the right to retain the property until he was paid. There is no evidence in the case, so far as can be discovered, showing any purpose on the part of Rosen, the plaintiff, other than to assert his supposed legal right to keep the three coats in question until his services for making had been fully paid. The evidence also shows quite conclusively that the defendant Louis Stein was fully advised of the plaintiff's position and claim. After the fruitless effort of the officer to get possession, it appears that the defendant Louis Stein went before the police justice of the city of Rochester, where he claimed he stated the facts to the justice, and was advised by him that the only thing to do was to get a warrant. The justice wrote the affidavit, which charged the plaintiff with petit larceny. Stein signed and swore to the affidavit, as he claimed, without reading it, and a warrant for the arrest of the plaintiff was issued. Upon the warrant, the plaintiff, Rosen, was arrested, taken through the streets to the station, detained there for a couple of hours, then paroled, and upon an adjourned day discharged.

It is claimed by the defendants' counsel that the evidence in the case showed that the defendants proceeded in good faith, that there was no evidence in the case from which malice could be inferred, and that Stein, who procured the warrant, was acting on the advice of the justice who issued it, and not on his own judgment. The justice who issued the warrant was called as a witness on the trial, but was unable to recall the particular circumstances attending the issuing of the warrant. It does appear, however, from the testimony of Louis Stein, that he signed and swore to the affidavit, charging the plaintiff with petit larceny, without reading the paper; and he stated at the time of the hearing before the police justice, when the plaintiff was discharged, that he was satisfied, and that all he wanted was to get back the coats, which he had obtained. That there was no probable cause for the arrest of the plaintiff the evidence clearly establishes. It is quite possible that the defendant Stein did not fully realize or reflect on the character of the criminal charge he made against the plaintiff; but he knew that, by putting the machinery of the criminal law in motion, he was subjecting the plaintiff to arrest, public indignity, and humiliation; and certainly a jury was justified in finding that he who would resort to the criminal law to enforce a civil right was actuated by malice. The question of malice, under the circumstances, was for the jury to pass upon, and was properly submitted to them by the court; and this court cannot say, as a matter of law, that the evidence does not sustain this finding.

It is insisted by the appellants' counsel that the trial court erred in charging the jury that, if they found there was no probable cause to make this charge against the plaintiff, from that fact alone they might infer that it was made through malice only. The counsel for the appellants cites to this court the case of *McCormack v. Perry*, 47 Hun, 74, as sustaining the contention of the appellants. The case cited does not go to the extent claimed. The evidence tending to show want of probable cause may be of such a character as also to show malice; and so, in the case now under consideration, the court properly said that, if the jury found want of probable cause from that fact, they

might infer malice; not that the want of probable cause raised any presumption of law of the existence of malice, but was a feature or element in the case from which malice might be inferred, and found as a fact by the jury. Accordingly, the court said in the case of *McCormack v. Perry* that "if the jury are not satisfied from the evidence, which shows that probable cause did not exist, that the defendant was guilty of malice, then they have a right to demand of the plaintiff further proof on that issue, before they are called upon to give a verdict in his favor." We do not understand that the trial court, in its instructions to the jury, laid down any other or different rule. The charge, taken as a whole, was eminently favorable to the defendants, and their counsel took no exception to that particular portion of the charge of which they now complain.

The appellants' counsel also contend that the court erred in sustaining the plaintiff's objection to the following question, put to Stein as a witness: "Question. At the time [i. e., at the time of the application for the warrant] did you believe that this man meant to retain and keep from you the coats that he had?" It is competent for a defendant, in actions of this kind, to testify that he acted in good faith, and was actuated by no ill will towards the plaintiff, and believed the truth of the charges made. *McKown v. Hunter*, 30 N. Y. 625; *Farnam v. Feeley*, 56 N. Y. 456. The point in issue here was whether or not the plaintiff intended to steal the goods, which was the crime charged in the proceedings before the justice. There is no claim by the plaintiff that he did not intend to keep the goods, and not deliver them. That is conceded by all parties; and the defendants cannot claim that they were injured by excluding the question and answer to a fact about which there was no contention whatever. If the question had been whether or not the witness believed the plaintiff intended to steal the goods, it would have been competent; but, not being addressed to that issue, we think the defendants cannot be said to have suffered by its exclusion.

The defendants' counsel also contend that the verdict of the jury for \$1,000 was excessive. A motion to set aside the verdict on that ground was addressed to the trial court, and it was peculiarly the province of the judge at circuit to pass upon such an application. He has denied the motion, and we think properly. We cannot say that the damages assessed by the jury are excessive, or the result of prejudice, and are not disposed to reverse the judgment on such grounds. The judgment and order appealed from should be affirmed, with costs. All concur.

WOOD v. ROCKWELL et al.

(*Supreme Court, General Term, Fifth Department. October 19, 1889.*)

NEW TRIAL.—INSUFFICIENCY OF EVIDENCE.

Where it was admitted that plaintiff was in defendants' employ from March 1, 1872, to February, 1875, but the referee only allowed compensation from March 1, 1872, to February 1, 1874, the judgment confirming his report must be reversed, and a new trial ordered.

Appeal from special term, Monroe county.

Action by James G. Wood against A. L. Rockwell and another. The original defendants were Norman Blodgett and Lucy Jane Blodgett, his wife. The husband survived his wife, and, upon his death, the present defendants were appointed his administrators, and substituted as defendants. The action was for work and labor performed by the plaintiff as a miller, alleged to have been rendered for the common benefit of both of the original defendants, and upon their joint promise to pay him therefor. The defendants served a joint and several answer, in which they put in issue the plaintiff's averment of joint liability on their part to pay him for his work and labor; but they admitted that Lucy Jane Blodgett was the owner of the mill, but that the same

was run and operated on the sole and separate account of Norman, who alone promised to pay the plaintiff for his work and labor. Plaintiff appeals from a judgment confirming the report of a referee dismissing his complaint. For former report, see 2 N. Y. Supp. 804.

Argued before BARKER, P. J., and DWIGHT and MACOMBER, JJ.
J. D. Decker, for appellant. *W. A. Sutherland*, for respondents.

BARKER, P. J. The plaintiff set forth his cause of action in two separate and distinct counts. It was admitted in the answer, and also upon the trial, that the plaintiff did work and operate the grist-mill from March 1, 1872, to February, 1875. In his disposition of the case the learned referee only allowed the plaintiff for his services from the 1st of March, 1872, to February 1, 1874, thus defeating a recovery for his services for one whole year, during which period he was confessedly in the employment of Norman Blodgett running his grist-mill. This wrong should be corrected, and can only be done by reversing the judgment and ordering a new trial. From the record, we think it apparent that this mistake occurred by a misconception as to the proper construction which should be given to the plaintiff's complaint. The plaintiff first alleges that he worked and labored for the defendants from the 1st of March, 1872, to the 1st of February, 1875, and they agreed to pay him therefor what his services were reasonably worth; and that there remained due him, over and above all payments, \$500. In the second count it is alleged that the plaintiff worked for the defendants from February, 1874, to February, 1875, under a special agreement as to his compensation, the terms of which are fully set forth in the complaint, and there was due him for that year's service the sum of \$350, over and above all payments made on and towards the same. The answer denied all the allegations contained in the complaint, except the one that the defendant Lucy Jane owned the property; but it was admitted that the plaintiff, during the whole period, was in the employment of the defendant Norman. It is true, the complaint does contain inconsistent averments, as the plaintiff alleges that for the last year he was in the defendants' service he was to be paid for his labor under two separate and distinct contracts, each covering the same period of time; but the evidence and admissions of the defendants made on the trial plainly made a case which required the referee to fix the compensation for the whole time, and thus determine all the issues referred to him to try and determine. In his report, the referee finds that the plaintiff did perform services for the deceased, Norman Blodgett, from the 1st of March, 1872, to the 1st of February, 1874, and that he agreed to pay the plaintiff therefor what the services of a first-class miller were worth, and fix the same at \$50 a month, making a total of \$1,150, and that for such services the plaintiff had been fully paid. The plaintiff gave some evidence tending to prove that during the last year he was to be compensated in the manner specified in the special contract set up in the complaint, but the referee refused to find that any such agreement was made. The plaintiff requested the referee to find as a fact that the plaintiff did work for Norman Blodgett from February 1, 1874, to February 1, 1875, and for such services he was entitled to be paid what they were reasonably worth; and this request was refused, and the plaintiff took an exception. Thus it is clearly demonstrated that the plaintiff has not been allowed any compensation for the last year's services, for which he was clearly entitled to something, under the pleadings and the proofs.

The respondents contend that in the bill of particulars the plaintiff gave the defendants credit for a sum which was greater in amount than the value of the plaintiff's services for the whole period, computed and allowed upon the basis found by the referee for the period covered by his report. The defendants made no proof of payment; and the finding of the referee, that the plaintiff had been paid for his services for the period covered by his finding,

relies wholly upon the credits contained in the bill of particulars. The appellant contends against the construction which the respondents put upon the bill of particulars as to the amounts which the original defendants had paid to the plaintiff, and insists that by a proper construction the credits would be less than the value of the plaintiff's services for the whole period of his service. We are not, however, at this time, called upon to decide the question in dispute; for, until a value of the plaintiff's services are ascertained for the whole period, the question does not become material, as the plaintiff admits that he has received towards his services an amount equal to their value for the period found by the referee. Judgment reversed, and a new trial granted before another referee, with costs, to abide event. All concur.

*In re RIDER'S ESTATE.*¹

(*Supreme Court, General Term, Fifth Department. October 19, 1889.*)

VENDOR AND VENDEE—CONTRACT—WHEN TITLE PASSES.

Though persons went to live on testator's land under an arrangement whereby they were to have the same at his death, the arrangement being recognized by the testator during his life-time, and in his will disposing of the land, the title to the land remained in him until his death.

Appeal from surrogate's court, Chautauqua county.

Petition by Bersheba Chipman for the sale of the real estate of Nathaniel T. Rider, deceased, for the payment of debts

Argued before BARKER, P. J., and DWIGHT and MACOMBER, JJ.

Obed Edson, for appellants. C. F. Chapman, for respondent.

BARKER, P. J. This proceeding was begun by petition to the surrogate's court of Chautauqua county to compel the sale of the real estate of Nathaniel T. Rider, deceased, for the payment of his debts. The application was opposed by Emily J. B., Warren M., George W., and Grant A. Hunt, who claimed an interest in the real estate sought to be sold, and who denied the jurisdiction of the surrogate's court over the parties and subject-matter. The contestants also denied that the said Rider, at his decease, had title to, or was the owner of, or had any interest in, the real estate in question, or that the said Rider was seised or possessed of said real estate, or any real estate, at the time of his death. The contestants further allege that, prior to the death of the said Nathaniel T. Rider, the said Emily and Judah B. Hunt were in possession of said premises under an agreement or understanding between them and the said Nathaniel T. Rider, previously made, that they should have and own said real estate upon the performance of certain conditions and considerations, which were fully performed and fulfilled, and they thereupon became the holders and owners thereof, and were such owners at the decease of said Rider. Upon the issues thus presented, the surrogate of Chautauqua county made an order, pursuant to section 2547 of the Code of Civil Procedure, directing the following questions of fact to be tried at a circuit court, to-wit: "*First.* Whether the said Nathaniel T. Rider died seised of the title to said real estate. *Second.* Did the said Nathaniel T. Rider, at his death, own any title or interest in said lands? and, if so, what title or interest?" The issues thus framed were brought to trial before the Chautauqua county court and a jury. The jury answered the first question of fact submitted to them in the affirmative. The second question was not answered. A motion for a new trial was made by the contestants before the surrogate of Chautauqua county, in pursuance of section 2548 of the Code, and the surrogate denied the motion, and from the order denying the motion for a new trial this appeal is taken.

¹ Affirming 8 N. Y. Supp. 274.

Upon the trial, it appeared by the undisputed evidence in the case that the contestants Judah B. Hunt and Emily Hunt moved onto the real estate in question, some time about 1862, under an arrangement with said Rider by which they were to acquire an interest in the real estate in question. The arrangement is differently stated by different witnesses examined on the trial. In the last will and testament of the said Rider the testator recites that "whereas, I have lived with, and have had my support and maintenance with, J. B. Hunt and Emily Hunt, his wife, (who is my niece,) for many years past, with the understanding that they should have my real estate at my decease, now, in consideration thereof." The will proceeds to dispose of his real estate to the contestants and their children. Mrs. Emily Hunt testified that the arrangement was that if "we go there, and take care of him through sickness and in health, we was to have what was left of the farm, and everything else that he had." Other witnesses were called, stating the arrangement in different language, as admitted or stated by the testator in his lifetime. In any event, it appeared that at the time of the death of the testator the legal title remained in Nathaniel T. Rider, who devised it by his will to Mrs. and Mr. Hunt and their children. There can be no question but that the contestants J. B. Hunt and his wife, Emily, however, acquired by the verbal agreement with the testator, and their acts in pursuance of it, an equitable interest in the property in question; but, upon their own showing, that agreement did not entitle them to the ownership of the property in question until the death of Rider. Whatever that verbal agreement was, equity will enforce; but, notwithstanding the equities of the contestants, Rider was and remained seised of the legal title to the real estate in question at the time of his death. We are therefore of the opinion that, upon the case as presented by the contestants themselves, the jury could only have answered the question submitted to them in the affirmative. If this be true, then the contestants cannot well claim here that they have suffered injury by the finding of the jury or the rulings of the court on the trial. For these reasons alone, the order appealed from should be affirmed. We are, however, constrained, in this connection, to say that in our opinion the finding of the jury has not, and cannot, aid the surrogate in the final disposition of the application for the sale of testator's real estate; for, whatever equities the contestants have in the real estate in question, it becomes the duty of the court to protect, in the final disposition of this proceeding, notwithstanding the fact that Rider may have died seised of the real estate. Just what those equities are we do not now undertake to determine. These matters are left for the consideration of the court in the future proceedings had herein. Order appealed from should be affirmed. All concur.

SMITH *et al.* v. WHITE *et al.*

(Supreme Court, General Term, First Department. November 7, 1889.)

ASSIGNMENT FOR BENEFIT OF CREDITORS—ACCOUNTING OF ASSIGNEE—DISBURSEMENTS.

Where an assignment has been set aside as fraudulent, and the court has found that the assignee confederated with the assignor to defraud his creditors, the assignee is not entitled, on an accounting, to an allowance for attorneys' fees or debts paid to preferred creditors of the assignor, or for any disbursements except wages paid to the assignor's employees, which are expressly authorized by law.

Appeal from special term, New York county.

Action by Martin V. B. Smith and others against Charles Wise and others to recover property of plaintiffs' debtor, James White, theretofore held to have been fraudulently assigned by him to the defendant Charles Wise, (see 2 N. Y. Supp. 855,) and for an accounting. Reference was ordered to ascertain the amount of property in the hands of the assignee. On the report of the referee the court overruled his refusal to allow a certain item as a disbursement by the assignee, from which order plaintiffs appeal; and from the fur-

ther orders of the court, sustaining the findings of the referee, defendants also appeal.

Argued before VAN BRUNT, P. J., and BRADY and DANIELS, JJ.

Blumenstiel & Hirsch, for plaintiffs. *Otto Horwitz*, for defendants.

DANIELS, J. A judgment was recovered in favor of the plaintiffs, setting aside as fraudulent a general assignment made by the defendant James White to the defendant Charles Wise. The plaintiffs were judgment creditors of White, and, after the return of executions issued upon their judgments against property unsatisfied, they commenced this action. The court, upon the trial, not only found the fact to be that the assignment was executed with the intention, on the part of the assignor, to hinder, delay, and defraud his creditors, but also that the assignee and his partner in business were actuated by the same design, and confederated with the assignor to secure this result. An appeal was taken from the interlocutory judgment to the general term of this court, and the judgment was affirmed. By virtue of this, and the final judgment, the accounting under their provisions was referred to a referee for the purpose of ascertaining the property in the hands of the assignee which should be delivered over to the receiver appointed in the action. The referee took the accounting and made his report, exceptions were filed by the parties to different portions of the report, and these exceptions were determined and disposed of by the order from which the appeal has been taken. In the proceedings before the referee it appeared that the assignee had paid the sum of \$4,871.94 to the Irving National Bank, in pursuance of a preference of the bank for that amount in the assignment. The referee disallowed this payment, and by the order from which the appeals have been brought the court overruled the decision of the referee, and decided in favor of the allowance of this payment. And if the assignee had not been a party to the fraud, and had made the payment in good faith, under the direction contained in the assignment, he no doubt would have been allowed a credit for this payment, under the rule stated by the chancellor in *Wakeman v. Grover*, 4 Paige, 23. But that was not his position, as the facts were found and determined upon the trial of the action. It was then found and decided by the court, by way of conclusions of fact, that the defendant Charles Wise, who was the assignee, and Leopold Wise, his partner, to induce the assignor to make the assignment, promised to pay him the sum of about \$2,000, and agreed to continue the business with the assigned property, and employ the assignor and his wife in it at large salaries. It was further found that they agreed to assign to the wife of the assignor portions of the assigned property for his and her benefit, and that, pursuant to the agreement so made, both the assignor and his wife were employed by the assignee in the business afterwards carried on with the assigned property, at a salary to the assignor himself of \$100 a week, and to his wife of \$50 a week; and that they paid to the assignor the sum of \$440, being a portion of the money agreed to be paid him at the time the making of the assignment was under consideration; and that they combined with the assignor, as a part of the plan under which the assignment was to be, and was, made, to continue the business of the assignor, with the assets of the estate for their and his mutual benefit. It was further found by the court that a fictitious sale of the tangible property of the assigned estate, which was a shoe factory, and its contents, was made to the defendant Leon M. Hirsch; that this sale was formal only, for the benefit of the assignor and his partner, who furnished the money to pay the price for which the property was bought. The business was after that continued by the assignee and his partner, with the assent of this purchaser, and the assignor and his wife were employed in the business; and while it was carried on in this manner the assignor and his partner received the benefits, profits, and income of the business.

The evidence upon which these conclusions of fact existed had not been in-

cluded in the case, and it is accordingly to be assumed that it was ample to warrant these findings; and they exhibit a degree of fraud not only unusual in cases of general assignments, but surprising and startling. As the facts have been stated, a deliberate combination was entered into between the assignor and the assignee and his partner that the assignment should be executed and delivered to place the property beyond the reach of the creditors, and secure its appropriation for the mutual benefit and advantage of these parties. They were each implicated in the intentional fraud perpetrated and brought about in this manner, and through the sale afterwards made under the assignment by the assignee. The case is one of actual and positive fraud on the part of each of these individuals, and, where that may be the nature and character of the transaction, there the well-settled principle of the courts, as well as of sound morality and fair dealing, is to withhold all aid or assistance from either party to the fraud by way of extricating him, from, or protecting him against, the complications and risks in which he has involved himself. The assignment in this manner made is absolutely and entirely void from the beginning, and can afford no protection whatever to the parties who, under color of its authority, interfere with the property or assets of the assignor. It is the same, for all legal purposes, as if it never had been executed. The parties acting under it can derive no advantage from it, and in no form are able to appeal to it for protection, beyond that which may be found to be necessarily extended by reason of statutory provisions of the law.

This subject has been examined by the courts of different states under circumstances certainly no more aggravated by the fraud of the parties to the transactions than those now presented, and the conclusion has uniformly been maintained that the courts will extend no protection to the fraudulent assignee in the disposition which he may have made of the assigned property, pursuant to directions contained in the fraudulent instrument; but he is to be held accountable for the property passing into his hands in all respects as a wrong-doer, without any protection further than that which may be positively directed for his interference with the debtor's estate. *Sands v. Codwise*, 4 Johns. 536; *Wood v. Hunt*, 38 Barb. 302-309; *Swift v. Hart*, 35 Hun, 128; *Drewsey v. Moyer*, 72 N. Y. 70; *Davis v. Leopold*, 87 N. Y. 620; *Wilson v. Horr*, 15 Iowa, 489; *Goodwin v. Hammond*, 13 Cal. 168; *Holland v. Craft*, 20 Pick. 321; *Bleakley's Appeal*, 66 Pa. St. 187; *Borland v. Walker*, 7 Ala. 269. And the correctness and stability of this rule were in no manner denied in *Hunt v. Weiner*, 89 Ark. 70, or in *How v. Camp*, Walk. (Mich.) 427, or in *Ames v. Blunt*, 5 Paige, 18.

The payment of this amount by the assignee to the bank was a tortious and unlawful intermeddling with the property of the debtor, and as the assignment, by reason of the mutual fraud of the parties to it, was of no validity or effect, the assignee was rightly held liable by the referee to account for and pay over to the receiver the amount so disposed of. The amount paid by way of preference, under the assignment, to the assignee and his partner of course is included within what has already been said, and was justly, as well as legally, disallowed to the assignee. So was the sum paid by him to counsel for services rendered to him under the assignment. As he had no power or authority by virtue of that void instrument to interfere with the property at all, it follows that he could not render the estate liable for the services performed by counsel under his direction. The same conclusion follows as to the amount paid to the persons who appraised the stock and machinery prior to the sale made by the assignee to the defendant Hirsch; and that disposition was in like manner warranted of the charge made for moneys paid to stenographers. As the assignee had no right to interfere with the property in any respect whatever, he could not charge it with either of these alleged disbursements.

By the conclusions adopted by the referee, the defendants were charged with the costs and expenses of the accounting, but this charge was disallowed

by the order from which the appeal has been brought. On what ground this disallowance was directed does not appear from the case, but it is entirely clear that the disposition of these costs and expenses, directed by the referee, was not only supported by the facts but sanctioned by the law. It was the wrong of the assignee, and the persons confederated with him, that had placed the estate in the condition in which this accounting became necessary for its recovery and appropriation to the payment of the debts of the creditors; and there is no sound principle that will permit them to be rewarded by the allowance of these charges against the property placed in the peril in which it was by their misconduct and wrong.

The tenor and effect of the decision of the court, as it has been stated in the interlocutory and final decree, was that the plaintiffs should recover their costs against the defendants. That part of the decision of the court was warranted by the fact that the action became necessary to redress the wrong perpetrated by the defendants, and to secure the protection of this estate; and it follows, from the same theory, that the expenses of the accounting should not be charged against the property, but should be charged against the defendants themselves. They are part of the expenses of redressing their willful and intentional wrong, and they, as wrong-doers, should bear and pay the amount. They voluntarily placed themselves in this position, and they are entitled to no aid or assistance whatever at the hands of the court, in the way of relieving them from its consequences.

It was, however, directed by the final judgment that the accounting should be subject to diminution by "any lawful disbursement made or incurred by said assignee." No such lawful disbursement was proved or established before the referee beyond the amounts paid by the assignee to the employees of the assignor for wages due them at the date of the assignment. Those payments were lawful disbursements, within the language of the judgment, for chapter 283 of the Laws of 1886 has directed that in all distributions of estates under assignments the wages and salaries actually owing to the employees of the assignor shall be preferred before any other debt; and this is the only item to which this language of the decree can have any application. The referee allowed these payments. The order made upon the determination of the exceptions to his report continued and maintained that allowance, and to that extent the defendants are entitled to their benefit; but as to all other payments made by the assignee, inasmuch as the assignment was absolutely void by reason of this fraudulent co-operation with the assignor in bringing into existence and managing the property and estate afterwards under it, neither he nor those acting with him are entitled to any protection whatever, but should account for and pay over the full amount of the property which passed into his or their possession, subject only to this single deduction, and they should be charged with all the costs and expenses of the hearing and accounting before the referee.

The order should accordingly be modified in these respects, rejecting all allowances made for payments by the assignee except the single one for the payment of the wages of the persons in the employment of the assignor at the time of the assignment, and the plaintiffs should be allowed their costs and disbursements on the appeals. All concur.

WELSH v. TAYLOR.

(*Supreme Court, General Term, First Department. November 7, 1889.*)

EASEMENTS—ABANDONMENT.

An easement acquired by grant may be extinguished by actual abandonment for a period less than 20 years.

On rehearing. For former report, see 2 N. Y. Supp. 815, 3 N. Y. Supp. 765.

Argued before VAN BRUNT, P. J., and BRADY and DANIELS, JJ.
Martin J. Keogh, for appellant. *John E. Parsons* and *Samuel Riker*,
for respondent.

DANIELS, J. The appeal from the judgment in this action has already been heard and decided by this general term, (*Welsh v. Taylor*, 2 N. Y. Supp. 815.) But since that decision was made the case of *Snell v. Levitt*, 110 N. Y. 595, 18 N. E. Rep. 370, has been published, and by that decision it has been held that an easement acquired by grant may be lost by actual abandonment during a shorter period than that of 20 years. In this action it has been found, as a matter of fact, that the owners of the adjacent property, afterwards conveyed to the plaintiff, had by their acts manifested an intention to abandon, and did abandon, the right to use the alley over which the existence of the easement was alleged on behalf of the plaintiff as the foundation of his right of action. How far the application of this principle is intended to extend has not been definitely declared in the case last referred to; but the general proposition has been announced as supported by the law, that an actual abandonment or non-user of the easement for less than 20 years may result in its extinguishment: and, following this principle, it was deemed to be necessary to order a reargument of the present appeal. This reargument has taken place, and the determination of the court upon it is that, under this decision of the court of appeals, the judgment in this action should be affirmed, leaving the plaintiff to present the case there, if it can be so far distinguished from the decision there made as to entitle him to maintain this action. The judgment from which the appeal has been taken will accordingly be affirmed. All concur.

HIRSHBACH v. SCHMALZ *et al.*

(*Supreme Court, General Term, First Department. November 7, 1889.*)

REFORMATION OF CONTRACTS—EVIDENCE.

Evidence that plaintiff's purpose in making a contract could not be accomplished unless a clause alleged to have been omitted were inserted, is not sufficient to show that the clause was omitted from fraud or mistake, so as to warrant reformation, where plaintiff's husband, who was her agent, testifies that he heard the agreement read, made no objection thereto, and knew that the clause in question was omitted.

Appeal from special term, New York county.

Action by Francesca Hirshbach against John E. Schmalz and Theresa Schmalz. Complaint dismissed on the merits after a trial, and plaintiff appeals.

Argued before VAN BRUNT, P. J., and BRADY and DANIELS, JJ.

Edmund F. Oldham, for appellant. *David Leventritt*, for respondents.

VAN BRUNT, P. J. This action was brought for the reformation of a written contract, executed by the parties hereto in January, 1887, and the specific performance thereof when reformed. The defendants, John E. and Theresa Schmalz, were the owners of certain letters patent for certain machines adapted to the manufacture of cigars. The plaintiff sought to purchase of them a portion of their respective rights, and the negotiation resulted in a written agreement, dated in January, 1887. The plaintiff complains that in and from said contract there was omitted a provision for the formation of a corporation, to which said letters patent were to be assigned, and that the omission arose from a mistake of the plaintiff, of which mistake the defendants took undue and unlawful advantage, and sought by this action, among other things, to reform said contract by the inserting of said omitted provision. The defendants denied that there was any omission whatever from the contract in question, but, on the contrary, asserted that it accorded with the in-

tention and understanding of both parties. This was the issue presented by the pleadings, and upon the evidence the learned judge who tried the case refused to find that there was any misunderstanding between the parties as to what the agreement should be; but, upon the contrary, found that the written contract set up between the parties was intended to and did express all that was agreed upon between them, and consequently dismissed the complaint, and from the judgment thereupon entered this appeal is taken.

The grounds of the appeal seem to be that, because it was necessary, in order that the plaintiff should attain the object which he desired to reach by reason of the agreement in question, that the clause claimed to be omitted should have been inserted in the agreement, it must have been omitted by mistake of the plaintiff, and the undue and unlawful advantage of such mistake taken by the defendants. In the consideration of the evidence, the question presented upon this appeal being purely one of fact, it is necessary to have in mind the rule that written agreements entered into between parties are not to be lightly varied either by subtractions from or additions to. To entitle a party to a decree reforming a written instrument he must show, by clearly satisfactory proof, that the parts written or omitted were so, contrary to the intent of all the parties, and under a mutual mistake, or that it was omitted contrary to the intent of one of the parties, and the other party knew that the other party to the agreement supposed it to be therein contained, and fraudulently concealed the fact of its omission. It is necessary that the evidence establishing these propositions should be clear and satisfactory, because otherwise the sanctity of written agreements can be destroyed by simply a preponderance of parol evidence, and a party having a written agreement would stand in no better position than one acting under a parol agreement, and where no precautions had been taken to guard against misunderstandings or omissions. Therefore, unless the evidence in this case shows clearly that the learned judge was wrong in the conclusion at which he arrived, and it is plain from the record that the contention of the plaintiff is supported by clearly satisfactory evidence, the judgment in question must be affirmed.

As has already been stated, the reason upon which the plaintiff founds her claim that the evidence is clearly satisfactory that the omission took place is because her plan could not be carried out otherwise. This affords no reason to conclude that the other party has been guilty of fraud in the suppression of the fact of this omission; and, upon an inspection of the evidence, it appears that the husband of the plaintiff, who was her agent, and carried on all the negotiations which resulted in this agreement, swears that he heard the agreement read,—he heard it dictated; that he made no objection to the form of the agreement; and that the question in regard to the formation of a corporation was purposely left out of the agreement, and that he knew it; and the evidence shows that the question of the formation of a corporation was discussed, and the conclusion which we must necessarily arrive at is that the provision in regard to the formation of the corporation was, as is testified to by the husband of the plaintiff, purposely left to depend upon future negotiations. It is true that the witness in question modified this testimony somewhat where he says that he did not understand, right from the beginning, thoroughly, what was in that agreement; but there is nothing which modifies the testimony previously given, that he knew that this provision in regard to the corporation was left out of the agreement before it was executed. Under such circumstances it would certainly be a stretch of the power of the court to insert into that agreement that which apparently had been excluded from the agreement between the parties, because one of the parties found he had made a mistake in allowing it to be left out. That is not the kind of mistake which can be corrected in an action for the reformation of a written agreement.

The evidence upon the part of the defendants certainly was sufficient to rebut the claim made on the part of the plaintiffs; and the argument based upon the necessities of the plaintiff's position—the necessity of the insertion in this agreement of this provision in order that the objects sought for might be attained—adds nothing to the effect of the evidence. This necessity was an after-thought,—a discovery subsequently made. It was deemed, at the time of the negotiations resulting in this agreement, that the question of the formation of a corporation might be safely left for future consideration. If a mistake was made on the part of the plaintiff in this respect, the court cannot remedy the embarrassment in which at present she finds herself. Therefore there seems to be no ground for interfering with the finding of the learned court below, and the judgment appealed from should be affirmed, with costs. All concur.

BELDING v. LADD et al.

(*Supreme Court, General Term, First Department. November 7, 1889.*)

VENUE IN CIVIL CASES—CHANGE TO PLACE OF CONTRACT.

Where, in an action for the alleged breach of warranty in the sale of horses, brought in a county distant from that where the sale took place, it appears that defendants have a greater number of material and necessary witnesses than plaintiff, and that they reside at the place where the horses were purchased, and where they had been handled and observed for more than a year before the sale, it is improper to refuse defendants' motion for a change of venue to that place, though the court, as a condition of the denial, exacts a stipulation that defendants might examine their witnesses at such place before a referee.

Appeal from special term, New York county.

Action by Milo M. Belding against Eugene H. Ladd and William E. Smallman upon an alleged breach of warranty in the sale of horses at Malone, Franklin county. Defendants moved for a change of venue from New York county to Franklin county. Defendant Smallman, in his moving affidavit, asserts that he requires twenty-seven witnesses, all residing at or near Malone, Franklin county, and the affidavits of four of these witnesses were presented. Plaintiff resides in New York city, and shows by his affidavit that he has six witnesses, besides himself, residing in the city of New York or vicinity, and the affidavits of whom are presented. The motion was denied at special term, and defendants appeal.

Argued before VAN BRUNT, P. J., and DANIELS and BARRETT, JJ.

Kellas & Munsill, for appellants. *Putney & Bishop*, for respondent.

BARRETT, J. The motion to change the place of trial should, upon well-settled principles, have been granted. Where the number of material and necessary witnesses on each side is substantially equal, the place where the transaction occurred ought generally to control. *Peck v. Parker*, 15 Wkly. Dig. 142; *Whittall v. Moshier*, 7 N. Y. St. Rep. 390. In the present case, the affidavits clearly show that the defendants have a far greater number of witnesses in Franklin county than the plaintiff has in New York. Upon examining these affidavits carefully, in connection with the pleadings, we are satisfied that, while some of the witnesses named in the moving papers might have been omitted, very many of them are unquestionably material and necessary. Indeed, of those who, upon a critical analysis of the papers, appear to be strictly material and necessary, the preponderance is plainly with the defendants. It is eminently proper that this case should be tried where the horses, which form the subject of the action, were purchased, and where they had been handled and observed for more than a year prior to the sale. The plaintiff's witnesses speak of a vice (called "cribbing") observed since the sale, which vice they claim must have existed prior thereto. The defendants' witnesses speak of the entire absence of that vice prior to the sale, and they

claim to so speak from actual and constant observation. It would be entirely unfair to compel the defendants, who sold their horses (and made whatever contract of guaranty there was) in Franklin county, to come down to New York, with a large number of witnesses, to rebut inferences deducible from observation since the sale by proof of the actual condition of the horses at and prior to the time of the sale. One side or the other must undoubtedly be inconvenienced; but, on the proofs before us as to the number of necessary and material witnesses, the place where the transaction occurred should certainly turn the scale. The motion should therefore have been granted. In granting it, the court might properly have imposed reasonable conditions, making the change as little burdensome to the plaintiff as possible. Instead of that, the court denied the motion, exacting from the plaintiff, as a condition of the denial, a stipulation to permit the defendants to examine their witnesses in Franklin county before a referee. Thus the just order of things was reversed; and the defendants, who were entitled to produce their witnesses before a jury in Franklin county, were simply enabled to read their depositions before a jury in New York. As the defendants are unwilling to risk a trial upon paper testimony, they are thus compelled to leave the locality of the bargain, and, at great inconvenience and expense, to bring all their witnesses to this city. In other words, they are deprived of the change of venue which the facts entitle them to, upon the plaintiff's agreeing, in substance, to let them have a jury trial in New York, shorn of one of its most important and valuable features. We think this condition did not help the matter, and that the denial of the motion was not justified by its imposition. The order appealed from should therefore be reversed, with \$10 costs and the disbursements of the appeal; and the motion should be granted, with \$10 costs to abide the event. All concur.

O'CONNOR v. MECHANICS' BANK.¹

(*Supreme Court, General Term, First Department. November 7, 1889.*)

1. BANKS AND BANKING—DEPOSITS—RECEIVERS.

On supplementary proceedings against one of the heirs of a decedent's estate, the cashier of a bank disclosed that funds had been deposited in the bank to the credit of the estate. A receiver was appointed, who sent to the bank a written notice stating the appointment of the receiver, and demanding payment of the heir's share of the deposit, and alleging that the amount was due the heir by virtue of a check drawn by the executor of the estate in favor of the heir, and sent to the heir. The bank disregarded the demand, and paid the check when presented. *Held*, that the receiver could recover of the bank so much of the heir's share as was necessary to satisfy the execution, together with interest, costs, and commissions.

2. JUDGMENT—PREMATURE ENTRY.

The court cannot direct judgment for an estimated amount pending the determination of the exact amount which the receiver can recover, but the amount must be ascertained before judgment is entered.

3. EXECUTION—SUPPLEMENTARY PROCEEDINGS—APPOINTMENT OF RECEIVER.

Under Code Civil Proc. N. Y. § 2464, providing for appointment of the receiver, and dispensing with notice to the judgment debtor if the judge is satisfied that the judgment debtor cannot with reasonable diligence be found in the state, in which case the order must recite the fact, a recital that it was brought to the attention of the judge that the debtor was a resident of a distant territory is sufficient to justify the judge in dispensing with service of the notice.

Appeal from circuit court, New York county.

Action by Charles E. O'Connor, as receiver, against the Mechanics' Bank. Both parties appeal. For opinion at circuit, see 2 N. Y. Supp. 225. Argued before VAN BRUNT, P. J., and BRADY and DANIELS, JJ. Edwin R. Leavitt, for plaintiff. W. C. Beecher, for defendant.

¹ Reversing 2 N. Y. Supp. 225.

DANIELS, J. The plaintiff was appointed receiver of the property of Herbert F. Beecher in supplementary proceedings taken upon the return of an execution unsatisfied, issued upon a judgment recovered against him. The proceedings were taken under subdivision 3 of section 2432 of the Code of Civil Procedure. In those proceedings the cashier of the defendant was examined as a witness, and from his testimony it was made to appear that moneys had been deposited in the bank to the credit of the estate of Henry Ward Beecher. This had been done by his executors, and they concluded to make a distribution of such money among the persons entitled to receive it under the will of the testator, Henry Ward Beecher. In making this distribution, they allotted to the judgment debtor the sum of \$2,286.92, and on the 30th of January, 1888, drew their check, payable to his order, upon the defendant, for that sum of money, and the check was paid by the defendant on the 10th of March, 1888. The order by which the plaintiff was appointed receiver was made on the 3d of February, 1888, and on the 8th of the same month his bond as receiver, approved by one of the justices of this court, was filed in the office of the clerk of the county of New York. On the same day a demand was made upon the bank in writing for the delivery or payment to the receiver, or to his attorneys, of any and all personal property, of any kind, nature, or description, money or funds, belonging to Herbert Foote Beecher, and in the custody or under the control of the bank. This demand was further extended by an additional written demand, served on the same day, stating the appointment of the plaintiff as receiver, and demanding payment to him "of the sum of \$2,000, amount of the funds of the estate of Henry Ward Beecher, deceased, now on deposit with you, belonging to the judgment debtor, or due to him from you by virtue of a certain check drawn against said funds by Henry B. Beecher, as executor of said estate, within two or three weeks past, to said judgment debtor's order, and being sent to him (said judgment debtor) by said executor at Port Townsend, Washington Territory, being for the balance of his share in the distributions of the personal effects of the said estate." These demands were disregarded by the defendant, and the money paid over upon the presentation of the check; and it was because of that payment, with these facts previously brought to the attention of the officers of the bank, that the action was brought by the receiver for the recovery of the money.

It has been objected that his appointment did not authorize the plaintiff to maintain this suit, for the reason that notice of the application for it was not given to the judgment debtor, but from a recital in the order it is to be inferred that knowledge of the fact was brought to the attention of the judge that the judgment debtor was a resident of Washington Territory, and for that reason the notice required to be given could not be served upon him; and that was sufficient, under section 2464¹ of the Code of Civil Procedure, to justify the judge in dispensing with that service. It is no doubt true, as a general legal proposition, that the deposit of money with a banking institution creates no more than the relation of debtor and creditor between the bank and the person or persons to whose credit the deposit is made; but that principle does not control the rights of the parties to this action, for the moneys which were received by the executors, and deposited with the bank, were placed there as the property of this estate, and not of the person or persons making the deposit. It was, upon the face of the account, impressed with a trust in favor of the persons who should prove to be entitled to participate in its distribution. The judgment debtor was one of these persons; and after a division of the money on deposit was made by the executors, and an apportionment of this part of the money made in favor of the judgment debtor, the check was drawn

¹ Code Civil Proc. N. Y. § 2464, providing for appointment of a receiver in supplementary proceedings, authorizes the judge to dispense with notice to the debtor if he is satisfied that he cannot with reasonable diligence be found in the state, and requires the order to recite the fact.

in his favor for its payment to him, and this allotment and division of the fund was sufficient to entitle him to this part of the money. It, in substance, became his property, and was thenceforth subjected to the rights of the plaintiff as receiver, by the proceedings which had been taken, and the demand which was served, accompanied by the information contained in it, before either the check itself was paid, or had appeared to pass into the hands of a *bona fide* holder. That the money did become the property of the judgment debtor by the division which the executors made is sustained by what was held by the court in *Van Alen v. Bank*, 52 N. Y. 1; *Baker v. Bank*, 100 N. Y. 31, 2 N. E. Rep. 452; *Viets v. Bank*, 101 N. Y. 563, 5 N. E. Rep. 457. If the bank was not fully apprised of the grounds upon which the receiver claimed to be entitled to this money, it did have sufficient information to render it the duty of its officers to inquire into the circumstances, and to ascertain from the executors the true situation of this part of the fund on deposit; and, having been placed in that position in this manner, it could not disregard the duty created, and pay over the money as it did, without incurring the risk of again making payment to the plaintiff as receiver. When the check was paid, the money, so far as it was required to pay the judgment and expenses, had become, in fact, the property of the receiver in his official capacity; and as it was paid over, in disregard of his rights, after such information had been received by the officers of the defendant as would reasonably, if its indications had been properly followed, have fully informed them of the existence of this right, it was paid without authority, and to that extent the plaintiff was entitled to recover.

It was not, however, proved upon the trial what the precise amount was which would be necessary to pay the judgment on which the supplementary proceedings had been instituted, the interest upon the amount, the costs of the proceedings, and the commissions and disbursements of the receiver; but the court directed a judgment for the sum of \$1,800 until these various amounts could be fixed and determined. This was not authorized. What the plaintiff, in his official capacity, was entitled to recover, was so much money only as would pay the judgment, with interest upon it, the costs of the supplementary proceedings, and the disbursements and commissions of the receiver, together with the costs of the action; and that should have been ascertained definitely, and fixed by the judgment, before it was allowed to be entered, and upon that execution could regularly be issued against the defendant for the collection of the amount. In this particular the judgment was defective, and it should be vacated, and further proceedings directed to ascertain and determine the amount required to pay and satisfy these various items; and when that amount shall have been ascertained, either by a reference or otherwise, then the plaintiff will be entitled to a judgment for the recovery of that sum. These directions will dispose of the appeals of each of the parties, and neither should recover costs of either of the appeals.

BRADY, J., concurs. VAN BRUNT, P. J., concurs in reversal of judgment only.

TILDEN v. GREEN *et al.*¹

(*Supreme Court, General Term, First Department. November 7, 1890.*)

1. WILLS—CONSTRUCTION—EXECUTORY DEVICES—CHARITABLE BEQUESTS.

The Revised Statutes of New York abolished the distinction between executory devices and contingent remainders, and included both under estates in expectancy, which included future estates. These were defined as limited to commence in possession at a future day, and were classified as vested and contingent; the latter being limited to or upon some uncertain person or event. A will, after making vari-

¹Reversing 2 N. Y. Supp. 584.

ous provisions, contained the following clause: "*Thirty-Fifth*. I request my said executors and trustees to obtain * * * an act of incorporation of an institution to be known as the 'Tilden Trust,' with capacity to establish and maintain a free library and reading-room, * * * and to promote such scientific and educational objects as my said executors and trustees may more particularly designate. * * * In case said institution shall be incorporated in a form and manner satisfactory to my said executors and trustees," within two lives in being, "I hereby authorize my said executors and trustees to organize the said corporation, designate the first trustees thereof, and to convey to, or apply to the use of, the same, the rest, residue, and remainder of all my real and personal estate not specifically disposed of, * * * or so much thereof as they may deem expedient," subject to the special trusts therein created. "But in case such institution shall not be so incorporated" within the times mentioned, "or if my said executors and trustees shall deem it inexpedient to convey said" residue, "or any part thereof, or to apply the same, or any part thereof, to the said institution, I authorize" them to apply it, "after making good the said special trusts herein directed to be constituted, * * * to such charitable, educational, and scientific purposes as in the judgment of my said executors and trustees will render the rest, residue, and remainder of my property most widely and substantially beneficial to the interests of mankind." *Held*, that this clause was not an executory devise, as the beneficiary took nothing by virtue of the will itself, but only by the acts of the trustees, who had power to determine whether it should be benefited at all or not, and as the portion it was to take was uncertain; but that it created a trust, or conferred on the executors and trustees a power in trust.

2. SAME—CHARITABLE BEQUESTS—TESTAMENTARY POWERS AND TRUSTS—CERTAINTY.

1 Rev. St. N. Y. p. 734, § 96, provides that every trust power, unless its execution is made expressly to depend on the will of the grantee, is imperative, and may be enforced in equity for the benefit of interested persons. Section 97 provides that a trust power does not cease to be imperative where the grantee has the right to select any, and exclude others, of the designated beneficiaries. Sections 100, 101, provide that if the trustee of a power die without executing it, or if a will create a power in trust without designating a trustee, the court of chancery shall execute the power. *Held*, that the same rules were applicable to trusts for charitable uses as to powers in trust; and whether the will created the one, or conferred the other, it could not be held valid, unless sufficiently definite in subject and object to be enforced by judicial decree.¹

3. SAME.

Even if the provision for the Tilden Trust be considered a separate and independent gift, distinct from that provided for in the last part of the clause, as the power of that corporation to take was made to depend on the approval by the executors and trustees of the form and manner of its incorporation, and on their determination of the expediency of endowing it, the amount of the endowment being in their discretion, the provision was void for indefiniteness if it created a trust; and also if it conferred a power in trust, unless the execution of such power was made expressly to depend on the will of the trustees and executors.¹

4. SAME.

The latter portion of the clause authorizing the executors and trustees, in case the Tilden Trust should not be incorporated within two lives in being, or if they should deem it inexpedient to endow it, to apply the residue of the estate to such other charitable purposes as they deemed expedient, showed that the execution of the power (if it was a power) was not to depend on the will of the trustees and executors; and hence, if the provision created a power in trust, it was void for indefiniteness.¹

5. SAME.

It is immaterial that the clause may be rendered definite by the action of the executors, as the question must be determined as of the time of the testator's death.¹

6. SAME.

The will created various special trusts, and one clause provided that these should be distinct and separate from the "general trust." Another clause referred to the power of the trustees, during the continuance of "the trust" of testator's general estate, to apply any surplus income towards the "special trusts;" and in other places the will referred to the residue of the property, after instituting the several trusts for specific persons, as constituting the subject of "the trust." *Held*, in view of the fact that the executors and trustees, if they withheld any portion of the residue from the Tilden Trust, were still directed to apply it to charitable, educational, and scientific purposes; and that, even after the incorporation of the Tilden Trust, they were not positively directed to endow it; that the first provision of

¹ See note at end of case.

the thirty-fifth clause, providing for endowing the Tilden Trust, could not be considered as a specific trust, distinct from the latter portion of that clause, and so upheld.¹

DANIELS, J., dissenting.

Appeal from special term, New York county.

Argued before VAN BRUNT, P. J., and BRADY and DANIELS, JJ.

Joseph H. Choate, Smith M. Weed, L. W. Brewster, and Delos McCurdy, for appellants. James C. Carter and Daniel G. Rollins, for respondents.

VAN BRUNT, P. J. This action is brought for the construction of the will of Samuel J. Tilden, who died in August, 1886, leaving the said will, which had been executed in April, 1884. Mr. Tilden left him surviving, as his only next of kin and heirs at law, one sister, two nephews,—one of whom is the plaintiff in this action,—and four nieces. By his will, after naming the executors and trustees thereunder, and making provision for their compensation, and as to the manner of the exercise of the powers to be conferred upon them, and for the appointment of the successors of such of his trustees as should die, resign, or become incapacitated to act, he provides by the eighth clause thereof as follows: "*Eighth.* My said executors and trustees are directed to constitute the trusts for specific persons hereinafter more particularly described and defined. My said executors and trustees shall be trustees of the special trusts by them so constituted, but the said trusts shall be distinct and separate from the general trust under this instrument. In their capacity of trustees of trusts for specific persons, they shall have power to manage the several trusts; to collect the income thereof, and to apply the same as herein directed; to sell, in their discretion, the securities, and to reinvest the proceeds thereof." The testator then, by the ninth, tenth, eleventh, twelfth, thirteenth, fourteenth, fifteenth, seventeenth, eighteenth, nineteenth, twentieth, twenty-second, and twenty-third clauses, creates certain special trusts for the benefit of particular individuals therein named, each of which is separate and distinct, and each independent of the other, complete in itself, and created by a separate paragraph in the will. By the twenty-fifth clause the testator provides as follows: "*Twenty-Fifth.* I direct my executors and trustees, in case any special trust hereby directed to be constituted shall fail, in whole or in part, by depreciation of securities, to make the same good out of my general estate, so long as the general trust to my executors and trustees shall continue; and in case the said executors and trustees shall convey any portion of that estate to a corporation designated as the 'Tilden Trust,' or shall vest the same in any trust or trusts for charitable purposes, to do so on the express condition that the said conveyance shall be subject to the obligations to make good the funds devoted to the said special trusts, and shall exact from the grantee, in every such case, an acknowledgment of such obligation, and agreement to fulfill the same. This provision is made subject to the condition that the corporation shall be duly authorized by law, by a special act or otherwise, to accept the grant, subject to the obligations herein directed to be imposed upon or assumed by the said corporation. I also direct my said executors and trustees to obey such instructions as I may hereafter give to them in respect to the allotment or selection of securities for the said special trusts, or any of them." By the twenty-sixth clause he provides as follows: "*Twenty-Sixth.* I hereby authorize and direct my executors and trustees, during the continuance of the trust of my general estate, to apply any surplus income to or towards the several special trusts hereby directed to be constituted, in the same manner as they might apply the principal of my said estate to the said purposes." By the twenty-seventh and twenty-eighth clauses he gives certain annuities. By the twenty-ninth clause he gives directions as to the management of the se-

¹ See note at end of case.

curties originally purchased for, or set apart for, the special trusts; and by the thirtieth clause he also gives an annuity. By the thirty-first clause he gives certain specific legacies. By the thirty-second clause he directs his executors and trustees to apply \$10,000, or such part of it as may be necessary, according to such instructions as he might thereafter give to them from time to time, in writing or verbally. By the thirty-third clause he provides as follows: "*Thirty-Third*. I authorize my executors and trustees to cause the establishment of a library and free reading-room in my native town of New Lebanon, in the manner following, that is to say: They shall obtain title to the land upon which the building stands which was erected by my brother, Henry A. Tilden, and which has been occupied by a school, buying in the mortgage on the same, amounting to about \$15,000, and, if necessary, obtaining releases from the heirs of my brother, Henry A. Tilden, from my sister, Mary B. Pelton, or her heirs, and from Mrs. Lucy F. Tilden. They shall vest the title in a corporation, if a charter shall be granted on their application to the legislature, or a corporation can be formed under any general law. My said executors and trustees are hereby authorized to require, if needful, proper conveyances to be executed by the heirs of the said Henry A. Tilden, by Mary B. Pelton or her heirs, and by Lucy F. Tilden, as condition precedent to the payment of the legacies herein given to them, respectively. They shall also convey to the corporation, if one be created, any interest which I may have in the said premises. My executors and trustees are authorized to expend for the creation and equipment of, and to invest as a permanent fund to maintain, the said library and reading-room, the sum of \$65,000, and any further sum, not exceeding \$35,000, which I may in writing instruct my said executors and trustees to apply to those objects. They are also authorized to use the said building, and endowment hereby provided, in part for a school for the training of girls, if they find the same expedient, in connection with the free library and reading-room." By the thirty-fourth clause he provides as follows: "*Thirty-Fourth*. I hereby authorize my said executors and trustees to appropriate out of my estate, in such manner as they may deem most expedient, the sum of \$50,000 towards the establishment of a library and free reading-room in the city of Yonkers, and such further sum, not exceeding \$50,000, as I may hereafter instruct my said executors and trustees to apply to that object. My said executors and trustees are requested to apply to the legislature for a special charter to enable them to carry out this provision, or to form a corporation under any general law, which in their judgment shall be most desirable." By the thirty-fifth clause he provides as follows: "*Thirty-Fifth*. I request my said executors and trustees to obtain, as speedy as possible, from the legislature, an act of incorporation of an institution to be known as the 'Tilden Trust,' with capacity to establish and maintain a free library and reading-room in the city of New York, and to promote such scientific and educational objects as my said executors and trustees may more particularly designate. Such corporation shall have not less than five trustees, with power to fill vacancies in their number; and in case said institution shall be incorporated in a form and manner satisfactory to my said executors and trustees during the life-time of the survivor of the two lives in being, upon which the trust of my general estate herein created is limited, to-wit, the lives of Ruby S. Tilden and Susie Whittlesey, I hereby authorize my said executors and trustees to organize the said corporation, designate the first trustees thereof, and to convey to, or to apply to the use of, the same, the rest, residue, and remainder of all my real and personal estate not specifically disposed of by this instrument, or so much thereof as they may deem expedient; but subject, nevertheless, to the special trusts herein directed to be constituted for particular persons, and to the obligations to make and keep good the said special trusts, provided that the said corporation shall be authorized by law to assume such obligation. But in case such institution shall not be so

incorporated during the life-time of the survivors of the said Ruby S. Tilden and Susie Whittlesey, or if, for any cause or reason, my said executors and trustees shall deem it inexpedient to convey said rest, residue, and remainder, or any part thereof, or to apply the same, or any part thereof, to the said institution, I authorize my said executors and trustees to apply the rest, residue, and remainder of my property, real and personal, after making good the said special trusts herein directed to be constituted, or such portions thereof as they may not deem it expedient to apply to its use, to such charitable, educational, and scientific purposes as in the judgment of my said executors and trustees will render the said rest, residue, and remainder of my property most widely and substantially beneficial to the interests of mankind." And by the thirty-sixth clause he authorizes his executors and trustees to reserve any books which the testator might have from any disposition made by his will, and authorizes them to dispose of the same in such manner as in their judgment would have been most agreeable to him. By the thirty-seventh clause he provides as follows: "*Thirty-Seventh.* In case, at any time during the trust embracing my general estate, any interest in any special trust hereby directed to be constituted shall lapse, or no disposition of such interest contained in this instrument shall be effectual to finally dispose of the same, such interest shall go to my said executors and trustees, to be disposed of under the provisions of this will; or if the said general trust shall have ceased, but a corporation designated as the 'Tilden Trust' shall be in operation, such interest shall go to the said corporation." And by the thirty-ninth clause he devises all the rest, residue, and remainder of his estate as follows: "*Thirty-Ninth.* I hereby devise and bequeath to my said executors and trustees, and to their successors in the trust hereby created, and to the survivors and survivor of them, all the rest, residue, and remainder of all the property, real and personal, of whatever name or nature, and wheresoever situated, of which I may be seised or possessed, or to which I may be entitled, at the time of my decease, which may remain after instituting the several trusts for the benefit of specific persons; and, after making provision for the specific bequests and objects as herein directed, to have and to hold the same unto my said executors and trustees, and to their successors in the trust hereby created, and the survivors and survivor of them, in trust, to possess, hold, manage, and take care of the same during a period not exceeding two lives in being; that is to say, the lives of my niece, Ruby S. Tilden, and my grandniece, Susie Whittlesey, and until the decease of the survivor of the said two persons; and, after deducting all necessary and proper expenses, to apply the same, and the proceeds thereof, to the objects and purposes mentioned in this my will."

The questions presented upon this appeal arise in reference to the validity of the general trust spoken of in the eighth clause of the will, and which is attempted to be established by the thirty-fifth clause above cited. In the consideration of this question it is of course necessary to bear in mind the cardinal principles which are to govern courts in the construction of a will, and they have been so repeatedly laid down that it is not necessary to cite authorities in their support, because they have become axioms. It is the duty of the court to give such a construction to the provisions of a will as will effectuate the general intent of the testator, as derived from an examination of the whole instrument, even though it may be necessary to transpose words and phrases, or even to insert or leave out a provision, if it be necessary to do so in order to accomplish the clearly expressed intention of the testator. There is also another rule of construction, which provides that where two or more meanings are presented for consideration, one of which will hold a devise as void, and the other of which will enable the will of the testator to be operative, we ought not, without absolute necessity, to adopt the construction which necessitates the holding of the devise as void. And also, where several trusts are contained in the will, some of which are legal and others ille-

gal, if they are so connected together as to constitute an entire scheme, so that the presumed wishes of the testator would be defeated if one portion were held legal and other portions illegal, or if manifest injustice would result to the beneficiaries, or some of them, by holding one portion legal and the others illegal, then all the trusts must be considered together, and all must be held to be illegal, and must fall together. But where several trusts are created independent of each other, each complete in itself, and the legal can be separated from the illegal, and be upheld without doing injustice to or defeating what the testator might in the emergency be presumed to wish, the illegal trusts may be cut off, and the legal ones permitted to stand, and thus the intention of the testator be effectuated so far as the law will permit. Under the last rule of construction, the respondents claim that the latter part of the thirty-fifth clause may be cut off; and that the clause in said section referring to the corporation to be called the "Tilden Trust" is a separate, distinct, independent trust, which may be held valid although the other trust mentioned in the clause in question should be held to be invalid. And this is the main contention which has been presented by the briefs of counsel, and it is upon this ground that the learned judge below sustained the devise in question.

It is claimed that the provisions of the will in respect to which this controversy arises, either constitute a trust in the trustees to be executed for the benefit of the Tilden Trust, or it conferred upon said trustees a power in trust, or it was an executory devise; and the learned judge below held the provision in the will to be of the latter character, and that it was a devise similar to that which was contained in the will under consideration in the case of *Burrill v. Boardman*, 43 N. Y. 259. In this we think the learned judge fell into an error, in overlooking the true nature of an executory devise under our statutes, and the difference between the provisions of the will in question and the one under consideration in *Burrill v. Boardman*. What was understood as an executory devise prior to our Revised Statutes was, however, abolished by their adoption, and all distinctions between contingent remainders and executory devises were by them abolished; both coming under the definition of estates in expectancy. Estates in expectancy are divided into estates commencing at a future day, denominated "future estates," and reversions. A future estate is defined to be an estate limited to commence in possession at a future day, either without the intervention of a precedent estate, or on the determination, by lapse of time or otherwise, of a precedent estate created at the same time. Future estates are further declared to be either vested or contingent. They are contingent while the person to whom, or the event upon which, they are limited to take effect, remains uncertain. And then we have the further provision that expectant estates are descendible, devisable, and alienable in the same manner as estates in possession. It is clear, therefore, in the case of all expectant estates, when the contingency arises upon which they are limited to take effect, that they vest by force of the instrument creating them. By an executory devise, therefore, or a gift in the nature of an executory devise, the expectant takes a vested right to the property; and this right cannot be defeated or diminished in any manner by any person. In other words, in the instrument creating the estate, the subject and object of the devise must be ascertained and certain. It is clear, upon a reading of the will of the testator, that it was not his intention to create any such estate. In the first place, the beneficiaries under the will take nothing by virtue of the provisions of the will itself. The estate is attempted to be vested in the trustees, (the evidence of which we will consider hereafter,) and it is by force of their action that the estate is to become vested in the beneficiaries. It is true that it is claimed, upon the part of the respondent, that the action of the trustees or executors under the will derives its validity from the powers conferred by the will, and that therefore it is to

be deemed as the action of the testator; but an estate created under such conditions is provided for by another part of the Revised Statutes, and does not come within the definition of an expectant estate, as contained in the provisions of the statute to which reference has been had. In the case of *Burrill v. Boardman* it was held that, the moment the corporation came into being, the estate which had been devised to the executors in trust to be administered by this corporation upon its formation vested in the corporation; that it required no action upon the part of the executors; and that it was entirely similar to the case of a devise to a person not *in esse* at the time of the death of the testator, but who should be brought into being within the time limited for the suspension of the power of the alienation of estates. The court say: "The limitation to the incorporated hospital being valid as a contingent executory bequest, neither the appointment of the trustees nor their title was essential to the validity of the contingent limitation. The law would compel the application of the property to the purposes of the lawful bequest wherever it might be found,"—and cite with approval the proposition of Lord Chief Justice WILMOT, who says: "So, in this case, the testator does not declare his intention to give to a person not *in esse*, but is actually giving directions for the creation of that person; and there is no difference between the cases but that one is an executory trust for a natural person to be created, and the other is a political person to be created." *Attorney General v. Downing*, Wilm. 16.

It is also claimed by the learned counsel for the respondent that the precise legal description of the disposition made in favor of the Tilden Trust is that it is an executory devise and bequest; and, after calling attention to the distinction between executory devises and contingent remainders as they existed before our Revised Statutes, he states that the executory bequest and devise in the present case is made subject to two conditions: (1) That the corporate body described as the donee shall come into existence within the prescribed limits; (2) that the executors and trustees shall not deem it inexpedient to endow the institution. This statement assumes two things which do not exist, as we shall attempt presently to show, viz., that there is a donee who takes under the will, and that such donee takes by force of the will alone, unless the executors and trustees named in the will should deem it inexpedient that any such donee should take; in other words, that there is a donee named in the will who would take, upon coming into existence, without any action whatever upon the part of the executors and trustees. And the learned counsel further states that "this was declared to be the nature of a precisely similar gift in *Burrill v. Boardman*, 43 N. Y. 254. That was made subject to one only of the above conditions, viz., the first. But that involved the discretion of the persons named. The gift could not take effect unless the charter was a liberal one, and the discretion to judge of this would appear to have been lodged with the person named as trustee." In what part of the devise this discretion appears to be lodged in the person named as trustee we have been unable to discover. Nothing is said in the will about the trustee having any discretion, and the court expressly held that the trustee had no discretion, but that the estate devised vested in the corporation as soon as it came into being, and that neither the appointment of the trustees nor their title was essential to the validity of the contingent limitation; and the bequest was held, because of these features, to be in the nature of a contingent executory bequest. Whether the charter of the corporation was such an one as entitled it to take in the case of *Burrill v. Boardman*, was clearly a question for the court to determine, and with which the executors under the will had nothing to do. If it could take at all, it took the whole of the bequest. In the case at bar the Tilden Trust took nothing upon its incorporation. The appointment of the trustees was absolutely essential, and they were to convey to the corporation, if they deemed it expedient, and only so much of the trust-

estate as they deemed expedient. Such is the express, plain, unequivocal language of the will. It seems, therefore, that the devise in question does not fulfill any of the conditions which pertain to an executory devise, as the portion of the estate which the Tilden Trust was to receive was uncertain; and it was further within the discretion of the executors to determine whether the Tilden Trust should benefit at all, or not, by the provisions of the will. It is not the case, therefore, of a vesting under the will, and a divesting by the exercise of the power of selection given to the executors by the will; on the contrary, if the executors do not act, nothing vests. There was therefore uncertainty, both in subject and in object, which is fatal to an executory devise. The provisions of the will in question, therefore, established a trust in the executors and trustees therein named, or conferred upon them a special power in trust; and it seems to be immaterial to the result which must necessarily follow whether it is to be construed as the one or the other.

It is evident, upon considering the provisions of the will, that it was not the intention of the testator to confer upon his executors and trustees a power in trust, because he devises to them the estate, and commits its control, care, and management to them, and impliedly he provides for the collection of the income of the whole estate by them,—of that which the trustees were to set apart as constituting the several special trusts, as well as the residue which might remain after the constituting of those trusts, the payment of the legacies provided for in the will, and the doing of the other things which were distinct and separate from the general trust mentioned in the eighth clause, and which he called in said clause the “general trust.” A very significant indication of this idea of the testator is contained in the twenty-sixth clause, where he authorizes and directs his executors and trustees, “during the continuance of the trust of my general estate, [evidently referring to that which he had mentioned in the sixth clause as the ‘general trust,’] to apply any surplus income to or towards the several special trusts hereby directed to be constituted, in the same manner as they may apply the principal of my said estate to the same purpose.” He therefore intended that the trustees should be invested with the ownership of the property which composed the residue of his estate until they should divest themselves of such ownership by, pursuant to the directions contained in the thirty-fifth clause, conveying and applying the same to the charitable uses therein mentioned, as they were, as already stated, to have the care and management thereof until such time; and they evidently were expected to collect the income, because there are directions as to the application of the surplus income arising therefrom prior to such application, which they could not control had they not the power of collection. Therefore, as far as it was possible for the testator to signify the intention, he signified his intention that his executors and trustees should be vested with the title of this residue until they divested themselves of the title in carrying into effect the “general trust” which he spoke of in the eighth clause and in the twenty-sixth clause, and for the instituting of which he made provision in the thirty-fifth clause.

Using the words of Justice WRIGHT in *Levy v. Levy*, 33 N. Y. 107, “if there is a single postulate of the common law established by an unbroken line of decisions, it is that a trust, without a certain beneficiary who can claim its enforcement, is void, whether good or bad, wise or unwise.” Therefore, if these provisions of the will are to be construed as a trust, and they are so indefinite as to be incapable of being executed by a judicial decree, they are bad. The same conclusion must follow if it is held that only a power was conferred upon the executors, although such a construction would be antagonistic to the plainly expressed intention of the testator. It is claimed upon the part of the respondent that, because a testator might give by his will a legacy to such person or persons as A. B. shall designate, therefore, conceding that there is no certain beneficiary who is entitled to claim the enforcement of the pro-

visions of the thirty-fifth clause of the will in question, the gift is a valid one. It may be conceded that, if the gift had been in that form, it would have been perfectly valid. It would have been merely conferring a power upon the executors which they would have had the right to exercise or not at their own pleasure. The estate would have descended to the heirs and next of kin of the testator, subject to the execution of the power. It would have come under the definition of a general power, which is defined to be one which authorizes the alienation of lands embraced in the power to any alienee whatever. This, however, was not the power conferred upon the executors and trustees of Mr. Tilden by the terms of his will. By the terms of his will, Mr. Tilden directed his executors, or, if you please, empowered his executors, to dispose of the residue of his estate to a person or class of persons other than the grantee of the power. This, under our statutes, is defined to be a special power in trust; and if the trust which was created by the testator fall within the provisions of section 58, 1 Rev. St. p. 729, and should be held to be valid as a power in trust, it is a special power in trust as defined in the chapter of the Revised Statutes relating to powers. It is provided by section 96, 1 Rev. St. p. 734, that every trust power, unless its execution or non-execution is made expressly to depend upon the will of the grantee, is imperative, and imposes a duty on the grantee, the performance of which may be compelled in equity for the benefit of the parties interested. By section 97 it is provided that a trust power does not cease to be imperative where the grantee has the right to select any, and exclude others, of the persons designated as the objects of the trust. Now, it is clear that whether a trust has devolved upon these executors, or simply a power, it is a trust or a power which they are bound to execute; and that it was not intended that it should depend upon the will of the grantees of the power as to whether they would execute it or not. Therefore, in the contemplation of the statute, where a special power in trust is created, the same rule applies in reference to the beneficiaries of the power that applies to the case of the beneficiary of a trust, namely, that such beneficiary shall be so definite as that his rights may be enforced by a judicial decree, unless the execution of the power is made expressly to depend upon the will of the grantee, which is not claimed in the case at bar. If there was any doubt in regard to this proposition, reference to sections 100 and 101 of the same statute would seem to remove the same. Section 100 provides that if the trustee of a power with a right of selection shall die, leaving the power not executed, its execution shall be decreed in equity for the benefit equally of all the persons designated as objects of the trust. And section 101 provides that where a power in trust is created by the will, and the testator has omitted to designate by whom the power is to be exercised, its execution shall devolve upon the court of chancery. Therefore, if this devise is to be construed as a special power in trust, it must be, both as to subject and object, of so definite a character that the court of chancery might execute it, should the trustees of the power fail to perform their duty. And hence, in laying down the rules which are to govern gifts to charitable uses in the adjudicated cases, no distinction, point, or question has been made as to whether such devises and bequests were trusts, or powers in trust, the same rules, in the respects stated, being applicable to both. The executors of Mr. Tilden are the trustees of a trust created in respect to the rest, residue, and remainder of his property mentioned in the will, or they are the grantees of a special power in trust in respect to such rest, residue, and remainder; and whether the executors be trustees of a trust, or grantees of a power, the gift under consideration being to a charitable use, to be held valid it must be sufficiently definite to be capable of enforcement by a judicial decree. *Power v. Cassidy*, 79 N. Y. 602; *Prichard v. Thompson*, 95 N. Y. 76; *Holland v. Alcock*, 108 N. Y. 312, 16 N. E. Rep. 305.

The learned judge in the court below was of the opinion that the thirty-fifth article contained two distinct and separate alternative gifts, the first and

primary gift being to and for the benefit of the Tilden Trust, and the secondary and ulterior gift (in the event of the primary gift not taking effect) for such charitable, educational, and scientific purposes as in the judgment of the trustees would render the rest, residue, and remainder of the testator's property most widely and substantially beneficial to the interests of mankind. Conceding that what he calls the "secondary and ulterior gift" would be void, he claims that it was the intention of the testator to make the Tilden Trust the primary object of his bounty with respect to the rest, residue, and remainder of his estate, and that it was separate from and independent of such void ulterior trust; and applying the principle that where the general intent of the testator may be sustained by cutting off a void trust which is separable from other valid trusts, in a case where the trust which is valid is independent of the other dispositions of the will, and subordinate to them, and is not an essential part of the general scheme, he disposes of the question upon the theory that the last clause of the thirty-fifth section constitutes a trust, which is separable from that which is created by the first clause, that it is independent of it, and was not an essential part of the testator's general scheme. The question presented under this view of the case (namely, that the provision for the Tilden Trust is a separate and independent gift) is, therefore, does the gift under which the Tilden Trust claims, fulfill the conditions heretofore named? Let us turn for a moment to the devise as contained in the will. The testator, after requesting (which request, it is conceded, amounts to a command) his executors and trustees to obtain a charter for an institution to be known as the "Tilden Trust," authorizes them, in case such institution should be incorporated in a form and manner satisfactory to them within the time limited by the will, to organize the corporation, designate the first trustees thereof, "and to convey to, or apply to the use of, the same, the rest, residue, and remainder of all my real and personal estate not specifically disposed of by this instrument, or so much thereof as they might deem expedient." In other words, in case of the satisfactory incorporation of the Tilden Trust, he authorizes his executors and trustees to convey to, or apply to the use of, this corporation, so much of the rest, residue, and remainder of his property as they might deem expedient. This clause cannot be considered, as is claimed by the counsel for the respondent, to be a direction by the testator to his executors and trustees to endow this institution, unless they shall deem it inexpedient to do so, without a perversion of the whole tenor of the language of the clause, as it was the clear intention of the testator not to confer upon the Tilden Trust, even after incorporation, any power to claim anything from the hands of these executors and trustees as a matter of right. The whole power of the corporation to take, depended upon the approval by the executors and trustees of the form and manner of its incorporation, and upon their determination that it was expedient, in view of all the facts known to them, and of all the powers conferred upon them, to endow the corporation, the amount of such endowment being in their absolute discretion. Therefore, without action upon the part of the executors, the Tilden Trust could not possibly claim anything; and its power to claim an endowment is not taken away only, in case the trustees should determine that it was inexpedient to endow it, but its very power to take anything depends upon the affirmative judgment of the executors and trustees that it is expedient that it should be endowed with some amount, which must be determined by the trustees before it could be applied to the use of the corporation. Such being the condition of the power conferred, it was incapable of being executed by a judicial decree, because there were no parties interested under the power itself, and no fund set apart which, even had the party been definite, such party could claim. Whether there would ever be such parties or such funds depended entirely upon the affirmative action of the executors and trustees. Hence, if the executors or trustees, after all the conditions precedent had been fulfilled, had died, resigned,

or become incapacitated from acting prior to the arrival of the time when they would be entitled to act, considering the first clause of the paragraph by itself, no court could have decreed the execution of the trust or power, and the will of the testator would be absolutely defeated, his heirs and next of kin taking the estate contrary to his expressed intention,—a result which can never happen, as we have seen, in those cases where a valid trust, or power in trust, has been created. If the provisions of the will relating to this rest, residue, and remainder are to be deemed a trust, therefore, they are void; and, if they are to be deemed to confer simply a power in trust upon the executors and trustees, they are equally invalid for indefiniteness, unless the execution or non-execution of the power was made expressly to depend upon the will of the grantee of the power.

It is not claimed by anybody that it was the intention of the testator to make the execution or non-execution depend upon the will of his executors. The testator did not intend that, under any circumstances, his heirs or next of kin should get from his estate anything more than the provision which he had made for them therein. This is plainly evident from a reading of the will, and therefore he did not intend that such heirs or next of kin should receive any portion of the rest, residue, and remainder; neither did he intend that, under every circumstance, even if incorporated, the Tilden Trust should receive, as matter of right, the whole or any part of this rest, residue, and remainder, but he did intend that it should be devoted to some charitable use, —to the Tilden Trust if incorporated, and if his executors deemed it expedient, but in any event to some charitable use; and hence the last clause in the paragraph of the will under consideration: "But in case such institution shall not be so incorporated during the life-time of the survivor of the said Ruby S. Tilden and Susie Whittlesey, or if, for any cause or reason, my said executors and trustees shall deem it inexpedient to convey said rest, residue, and remainder, or any part thereof, or to apply the same, or any part thereof, to the said institution, I authorize my said executors and trustees to apply the rest, residue, and remainder of my property, real and personal, after making good the said special trusts herein directed to be constituted, or such portions thereof as they may not deem it expedient to apply to its use, to such charitable, educational, and scientific purposes as in the judgment of my said executors and trustees will render the said rest, residue, and remainder of my property most widely and substantially beneficial to the interests of mankind." These considerations show, not only that the testator did not intend that the execution or non-execution of the power (if it is to be deemed a power) should depend upon the will of the grantee, but also how impossible it is to separate that part of the thirty-fifth clause relating to the Tilden Trust from the latter half of the paragraph, relating to the application of the rest, residue, and remainder to other charitable uses, without defeating the plain intention of the testator. The execution of the power (if it is a power) not expressly depending upon the will of the grantee, it is (even if the final clause of the thirty-fifth paragraph be cut off) so indefinite that it could not be executed by a judicial decree, and it is invalid. The trustees have full discretion, both as to the legal entity to be called into being, and as to the application of the estate to its use, if called into being. This power or authority, thus conferred, could not be executed by judicial decree, because, unfortunately, there is no fund or estate which by the will must be given to any person or class of persons. There is an estate which may be given, in whole or in part, to one possible institution, or which may be applied to indefinite "purposes." Under the Revised Statutes, (section 99, p. 734, vol. 1.) there may be a power of selection and exclusion with regard to the designated objects of the testator's bounty, and still the trust power does not cease to be imperative. But there both the fund and the designated objects are specific. The trustee of the power must distribute the entire fund between such des-

ignated objects, selecting and excluding as he pleases, but exhausting the fund upon lawfully designated beneficiaries. A court of equity can and will enforce the performance of that duty; and the only variation in its execution, in case of the death of the grantee of the power, leaving the power unexecuted, is that the power of selection ceases, and equity decrees an equal distribution among the objects as prescribed by statute. How could a court of equity compel the performance of the duty here devolving upon these trustees? How could the court perform such duty, in case of the death of such trustees before they had had an opportunity to perform? The indefinite and uncrystallized "purposes" could not well file a bill. The corporate institution might, but it could not interplead the "purposes." If it filed a bill alone, the answer would be, not that the trustees have a power of selection and exclusion with regard to a class made up of the corporation and the "purposes," (which power they have, as far as they could, exercised in favor of the corporation;) but that, as to the corporation treated singly, they have an absolute discretion. This discretion is proved doubly, for it is contained—*First*, in the power to apply to the use of the corporation so much of the estate as the trustees may deem expedient; and, *second*, the further power to do something else with it, in whole or in part, if they deem it inexpedient to give it to the corporation, in whole or in part. As has already been suggested, what, it may be asked, would become of this residue if the executors had never qualified, or had died before the execution of the power? Could the supreme court take upon itself the exercise of this discretion,—decide whether the corporation was incorporated in manner and form satisfactory to the trustees, and whether it should take the whole, or only a part, and, if so, what part? It is plain that the discretion which is vested in these trustees cannot be controlled, and cannot be exercised, by any other person or court, and thus no duty has been imposed upon them, the performance of which can be compelled by a court of equity; and this is the test of the validity of such a power as a power in trust. The radical vice of the entire provision seems to have arisen from the testator's unwillingness to confer any enforceable rights upon any qualified person or body. He seems to have had absolute confidence in his executors, but in no one else,—confidence (it is to be regretted) to the exclusion of that necessary definiteness for which educational or trust discretion cannot be substituted under our system of law.

It is no answer that the clause may be made definite by the action of the executors. The question must be determined as of the time of the death of the testator. A trustee cannot make that valid which is invalid; nor can he invalidate that which is valid. If the trust or power is valid, he can be compelled to execute it; if invalid, he stands, as to the property not disposed of by the will, as trustee for the heirs and next of kin, and an equitable interest is vested in them immediately upon the death of the testator, subject only to the payment of his debts and the expenses of administration. In the case of *Holland v. Alcock* it is said, where a trust is attempted to be created without any beneficiary entitled to demand its enforcement, the trustee would, if the trust property were in his possession, have the power to hold it to his own use, without accountability to any one, and contrary to the intention of the testator, but for the provision that in such a case a resulting trust attaches in favor of whoever would, but for the alleged trust, be entitled to the property. This equitable title cannot, on any sound principle, be made to depend upon the exercise by the trustee of an election whether he will or will not execute the alleged trust. In such a case there is no trust, in the sense in which the term is used in jurisprudence. "The existence of a valid trust, capable of enforcement, is consequently essential to enable one, claiming to hold as trustee, to withhold the property from the legal representatives of the alleged donor. A merely nominal trust, in the performance of which no ascertainable person has any interest, and which is to be performed or not as the person to whom

the money is given thinks fit, has never been held to be sufficient for that purpose." Therefore the circumstance that the Tilden Trust has been incorporated, and that the executors have attempted to convey to it the rest, residue, and remainder of the testator's property, in no manner affects the question as to whether, at the death of Mr. Tilden, any trust was created, or any power in trust was conferred upon these executors and trustees, which authorized them to withhold the property from the legal representatives of the alleged donor.

But it seems to us that it is impossible to hold that that portion of the thirty-fifth clause which relates to the Tilden Trust can be considered and construed separately from the balance of the paragraph. In the first place, an inspection of the will shows that the testator has been particular to distinguish throughout between the special trusts and the general trusts. He has created these special trusts by separate and distinct paragraphs. He has by the eighth clause declared that such special trusts shall be distinct and separate from the general trust, under the will; the general trust evidently meaning the one single, undivided trust to charitable uses which is provided for by the thirty-fifth clause of the will. Again, by the twenty-sixth clause of the will, he speaks of the power of his trustees, during the continuance of the trust—not the "trusts," but the "trust"—of his general estate, to apply any surplus income to or towards the several special trusts by the will directed to be constituted; showing, again, in language as significant as could be used, that the testator had in his mind a single devise in trust to charitable uses, and that he did not intend, or did not suppose, that there were various independent, separate devises to primary, secondary, or tertiary charitable uses, but that there was one devise and one trust for charitable uses, his executors having the power of selection. Undoubtedly, he desired his executors to give the preference to the Tilden Trust; but that is as far as he went. Again, in the thirty-ninth clause, he speaks of the rest, residue, and remainder of his property, which forms the subject of the provisions contained in the thirty-fifth clause. He says: "I hereby devise and bequeath to my executors and trustees, and their successors in the trust hereby created, and to the survivors and survivor of them, all the rest, residue, and remainder of the property," etc., "which may remain after instituting the several trusts for the benefit of specific persons, and after making provision for specific bequests and objects as herein directed, to have and to hold the same," etc. If it had been the supposition of the testator that he had made a specific bequest to the Tilden Trust, by which, upon its satisfactory incorporation, it would have become invested with the title to this rest, residue, and remainder, is it possible that he could have made use of any such language? In that case there would have been no rest, residue, and remainder which he could have devised to his trustees. He there makes a distinction, plain and pointed, between the devises to specific persons (and by the word "persons" he evidently meant to include corporations, for by the thirty-fourth clause he makes a specific devise to a corporation to be called into being, and which devise is to be taken out before the rest, residue, and remainder can be ascertained) and the trust created by the will,—in some places called the "general trust,"—which is to be carried into effect according to the provisions of the thirty-fifth clause of the will. Furthermore, it is evident that it was not the intention of the testator, as has already been stated, that the only charitable use to which his executors and trustees should have the right to devote this property should be the Tilden Trust. It is conceded that, under the language of the will, the executors had the power to determine the amount in which, if any, the Tilden Trust should be endowed. Now, what were the circumstances, under which the testator intended that his executors and trustees should come to a determination upon this question? Was it that they were bound to convey the whole of the rest, residue, and remainder of his estate to the Tilden Trust, or permit his heirs

and next of kin to receive it, who he had declared should not have any other portion of his estate than such as he had provided expressly in the will? Clearly not. That was not the question which was to determine the expediency of the endowment of the Tilden Trust. If such had been the intention of the testator, it is clear he would not have left anything in the discretion of his executors, but he would have devised the rest, residue, and remainder to this corporation when it should have been called into being, as was done in the case of *Burrill v. Boardman*, without the necessity of any intervention on the part of his executors and trustees. But he did not do this. He expressly confers the power upon his executors to withhold from the Tilden Trust, unless they deemed it expedient that it should receive. What was to be done with it in case they did withhold? What were the considerations which were to enter into the question of the expediency of withholding? What the circumstances which were to enter into the consideration of the quantity or amount of the endowment; whether the Tilden Trust should receive the whole, or so much thereof as they might deem expedient? The testator intended that his executors and trustees, in determining this question, should have in mind the fact that if they withheld the whole, or any part, of this rest, residue, and remainder from the Tilden Trust, they could still carry out his intention to devote this rest, residue, and remainder to charitable uses by giving it to other charities. This was a circumstance which these executors and trustees had a right to have in mind, in determining the question whether or not they should endow the Tilden Trust with the whole, or any part, of the testator's estate. It was not that, in case they did not endow the Tilden Trust, therefore the heirs and next of kin would get the property, which the testator did not intend; but it was that, if they did not give it to this charitable use, the testator empowered them to give it to others. And from the character of the will, and the character of the trusts in other respects reposed in the executors, it is to be assumed—it must necessarily be assumed—that these executors were the confidential friends of the testator, were acquainted with his wishes, and he had supreme reliance upon them that they would carry out his wishes to the fullest extent. How can it be said, in this condition of affairs, that the last clause of the thirty-fifth paragraph is independent of, and has no relation to, the first? By such a construction the trustees of this will are placed in an entirely different position from that which the testator intended. As already stated, he did not intend that his executors should be compelled to choose between the Tilden Trust and his heirs and next of kin. But the declared and expressed intention, in language as strong and as pertinent as could be used, is that they shall choose between the Tilden Trust and such other charitable, educational, and scientific purposes as in their judgment would render the rest, residue, and remainder of his property most widely and substantially beneficial to the interests of mankind. To further illustrate this view, it is only necessary to call attention to the fact that even after the corporation called the "Tilden Trust" is called into existence at the request of his executors and trustees, and they have approved of the manner and form of its incorporation, he yet does not require them to convey or apply anything to the use of this corporation.

It is admitted upon the part of the respondents that, for any cause happening subsequent to the incorporation, they would have had the right to refuse to endow the Tilden Trust; but they insist that such refusal must result from a reason not connected with the wisdom of this form of charity; that that matter the testator had determined for himself. But where is to be found this limitation of their discretion we cannot conceive. Who is to call for the cause or reason? To whose judgment are the executors to submit this cause or reason? To their own, and nobody else's. And whether that cause or reason depends upon the form of the charity, or upon something which has occurred since the incorporation,—no matter what,—we see no limitation of

the right of the trustees to determine whether they will or will not endow the Tilden Trust. It may be true that the testator intended that the Tilden Trust should have a preference in the matter of endowment, and that is undoubtedly the fact; but he is scrupulously careful to commit the whole question, notwithstanding his solicitude, into the hands of his executors, so that they had a right to refuse to convey, even after the incorporation of the institution in a form and manner satisfactory to themselves. This idea of separating these charities for the benefit of whom this general trust was instituted did not occur to the learned counsel who presented the case of *Prichard v. Thompson*, nor to the court which decided that case. There was as broad an antithesis between the two classes of charities named in the will under consideration in that case as there is between those mentioned in the said thirty-fifth clause, (if the Tilden Trust and the other charities there mentioned can possibly be construed as two classes of charities.) In the case cited, the devise was upon trust to distribute among such incorporated societies, organized under the laws of the state of New York or the state of Maryland, having authority to receive, etc. It was not dreamed that the provision for the charities in the state of Maryland could be cut off, and the validity of the devise determined, by construing the provision as though it were a trust to distribute among such incorporated societies, organized under the laws of the state of New York, as had authority to receive, etc. And it is plain why no such idea entered into the consideration of the case. The executors, if they had any power of selection at all, had the power to select among two classes, namely, societies incorporated under the laws of the state of New York, and societies incorporated under the laws of the state of Maryland. They were in form alternative gifts, but they were related to and dependent upon each other, and the will of the testator could not be carried into effect unless the trustees had the power of selection over the whole subject, including both classes. So, in the case at bar, by the thirty-fifth paragraph the devise is to the executors to distribute to the Tilden Trust, or to such charitable, educational, and scientific purposes as in their judgment would render the rest, residue, and remainder most widely and substantially beneficial to the interests of mankind. That was what Mr. Tilden desired,—that the power which he conferred upon his executors should be exercised, they having in view the totality of the power given to them; and you can no more separate the Tilden Trust from the other charitable objects mentioned in the last clause than could be separated the New York from the Maryland corporations in the case of *Prichard v. Thompson*. In the cases cited to sustain the view that the latter portion of this trust might be cut off, and the first part remain, there were separate, distinct, independent schemes. In most of them a complete trust had been created during the time limited under our statutes, and after the completion of that trust there had been an attempt to extend the limitation beyond the provisions of the statute; and the courts have held that the first limitation is good, and the succeeding one bad. In one case, after having established a valid limitation, two alternative limitations were attempted to be established, dependent upon the condition of affairs at the determination of the first estate. One of these alternative limitations was good, and the other was bad. They had no connection with each other. They could not exist at the same time. If one took effect, the other could not exist; and the court held that if, upon the determination of the first estate, the condition of affairs was such that the valid alternative limitation could take effect, it might go into operation notwithstanding the other alternative had been invalid from the moment of its creation, (*Schettler v. Smith*, 41 N. Y. 328,)—a case very different from the one at bar. In the case at bar there was but one general trust, as the testator has plainly declared; and in the execution of that trust the duty has devolved upon his executors of selecting the beneficiary, giving to the Tilden Trust a preference; and that is all. We cannot

see how, under the plain rules governing the construction of gifts to charitable uses, such a devise can be upheld. If it is, it must be by reversing the plain principles which seem to have governed devises of this description through all the adjudications, and in violation of what seems to be the plain provisions of the statute. It is undoubtedly a great misfortune that the intention of the testator to found a trust of the character mapped out by his will should be frustrated, and that the city of New York should not receive the advantages of the munificence by which it was intended that its people should be benefited; but this consideration ought not to cause the court to violate rules and statutes which have been adopted as best subserving the interests of the people, and thus unsettle principles which have obtained through a long course of decisions controlling the rights and interests of property.

Many other points have been raised by the counsel for both the appellants and respondents, but it is not thought necessary to consider them, in view of what we deem the vital points of the case. We are therefore of opinion that the judgment appealed from should be reversed, and a new trial ordered, with costs of all parties to be paid out of the fund.

BRADY, J., (*concurring.*) The questions discussed by the Presiding Justice and Justice DANIELS are not free from difficulty or doubt; but I think, on authority and proper judicial interpretation, the solution of them by the Presiding Justice is the more acceptable. I concur with him, therefore.

DANIELS, J., (*dissenting.*) The action has been brought to obtain a construction of the will of Samuel J. Tilden, who died on or about the 4th of August in the year 1886. His will was made on the 23d of April, 1884, and it has been admitted to probate as a will by the surrogate of the county of New York. He was unmarried, and left no descendants. At the time of his decease he left a sister, together with nephews and nieces and other relatives, surviving him. For these relatives numerous trusts were directed to be created by the will. They were designated by him as "special trusts," and in their extension did not transcend the time in which the statutes of the state have provided that such trusts may legally be continued, and as to those trusts no controversy has arisen in the action, but they have been assumed to be valid and conformable to the laws of the state. After providing the means for the creation and continuance of these trusts, the testator gave directions for the disposition of the rest, residue, and remainder of his estate, and it is concerning the directions contained in the will for this purpose that the controversy has chiefly arisen between the parties to the action. The plaintiff, together with other parties sustaining a similar relation to the testator, have affirmed these directions to be in violation of the law defining the powers of a testator in the disposition of his estate. The directions brought in controversy in this manner are chiefly contained in the thirty-fifth paragraph of the will. By this paragraph the testator requested his executors "to obtain, as speedy as possible, from the legislature an act of incorporation of an institution to be known as the 'Tilden Trust,' with capacity to establish and maintain a free library and reading-room in the city of New York, and to promote such scientific and educational objects as my said executors and trustees may more particularly designate. Such corporation shall have not less than five trustees, with power to fill vacancies in their number; and in case said institution shall be incorporated in a form and manner satisfactory to my said executors and trustees during the life-time of the survivor of the two lives in being upon which the trust of my general estate herein created is limited,—to-wit, the lives of Ruby S. Tilden and Susie Whittlesey,—I hereby authorize my said executors and trustees to organize the said corporation, designate the first trustees thereof, and to convey to, or to apply to the use of, the same the

rest, residue, and remainder of all my real and personal estate not specifically disposed of by this instrument, or so much thereof as they may deem expedient, but subject, nevertheless, to the special trusts herein directed to be constituted for particular persons, and to the obligations to make and keep good the said special trusts, provided that the said corporation shall be authorized by law to assume such obligation. But in case such institution shall not be so incorporated during the life-time of the survivors of the said Ruby S. Tilden and Susie Whittlesey, or if, for any cause or reason, my said executors and trustees shall deem it inexpedient to convey said rest, residue, and remainder, or any part thereof, or to apply the same or any part thereof to the said institution, I authorize my said executors and trustees to apply the rest, residue, and remainder of my property, real and personal, after making good the said special trusts herein directed to be constituted, or such portions thereof as they may not deem it expedient to apply to its use, to such charitable, educational, and scientific purposes as in the judgment of my said executors and trustees will render the said rest, residue, and remainder of my property most widely and substantially beneficial to the interests of mankind."

The testator nominated and appointed John Bigelow, of Highland Falls, Andrew H. Green and George W. Smith, of the city of New York, executors and trustees under his will, and they were charged, by the directions contained in it, with the control and management of his estate for the purpose of carrying his desires into execution. These persons took upon themselves the execution of the trust, and letters testamentary were issued to them upon proof of the will by the surrogate of the county of New York. After receiving letters testamentary upon the estate the executors, for the purpose of creating the Tilden Trust, mentioned in this paragraph of the will, applied to the legislature of the state for a charter creating the corporation, which was to be brought into existence under this paragraph. By this act these trustees and their associates were created a body politic and corporate under the name and title of "The Tilden Trust." The three trustees were empowered to select others to act with them, so that the number of the trustees should not be less than five. The act then provided for selecting the successors of these trustees, and continuing the number so designated in office. It was further provided that "the said corporation shall have, in addition to the powers now conferred by law upon all corporations as such, the capacity and power to establish and maintain a free library and reading-room in the city of New York, and for these purposes it shall have power to demand, recover, accept, and receive all such money and other property, real or personal, as is given to it by virtue of the will of Samuel J. Tilden, or shall be conveyed or transferred to, or in any manner bestowed upon, it by the aforesaid executors and trustees, by virtue of the powers therein conferred upon them; and the said corporation shall have power to hold, manage, improve, dispose of, and convey all property at any time received or acquired by it in such manner as may be best calculated to carry out its objects and purposes. Section 6. The said corporation shall accept and receive all such money or other property as is given to it by the said will of Samuel J. Tilden, or shall be conveyed or transferred to, or in any manner bestowed upon, it as aforesaid by the aforesaid executors and trustees, subject to the terms and conditions expressed in, and imposed by, the said will of Samuel J. Tilden in respect to the gifts therein and thereby made or provided for, to a corporation to be formed and to be known as the 'Tilden Trust,' and the said corporation shall have power to make and enter into any obligation or obligations to secure due compliance with such terms and conditions. Section 7. The said corporation shall possess the powers, and, except as may be otherwise provided by this act, be subject to the provisions, liabilities, and restrictions, contained in the third title of the eighteenth chapter of the first part of the Revised Statutes; but noth-

ing herein contained shall affect the rights of any parties to any action now pending, or of any heir at law of said Samuel J. Tilden, deceased." By these provisions the corporation in this manner created was empowered to establish and maintain a free library and reading-room in the city of New York, and the further authority given to the corporation was designed to contribute to the advancement of this object, in conformity to the provisions contained in the will. The corporation was vested with the power to accept the property which should be conveyed to it by the trustees under the will, and such other property as it might become entitled to by reason of the lapse of any of the special trusts also contained in the will. This act appears to have been satisfactory to the trustees. It empowered the corporation to accept so much of the rest, residue, and remainder of the estate of the testator as should be conveyed and transferred to it by the trustees to maintain this object. The trustees were authorized to add additional objects, to be promoted by the corporation; but they were not directed to add any further object to be subserved by the company than that of maintaining a free library and reading-room in the city of New York. Whether this object should be extended by securing an increased capacity for the corporation was not made mandatory upon the trustees, but was left to be determined by them in the exercise of their discretion. For this purpose the testator empowered them to obtain an act of incorporation, which should permit the promotion of such scientific and educational objects as the executors and trustees might more particularly designate. This, however, was not mandatory upon them, but it extended no further than to submit the matter to their judgment and determination; and, as they did not consider it to be wise to enlarge the capacity of the corporation, no defect in its creation, or in the powers confided to it, can result from this omission.

The primary object of the testator, if the Tilden Trust should in fact be created, was to provide for and establish and maintain a free library and reading-room in the city of New York. If the trustees and executors acted at all under these provisions of the will, they were bound to act so far as to produce these results; but they were not required, otherwise than in their own discretion, to proceed further than this, and the act which was in fact so passed was ample for obtaining this primary end of the testator; and, as long as the fact is that in this form it was satisfactory to the trustees and executors themselves, no fault can be found with it by the plaintiff, or the other parties joining with him in resisting the maintenance of this part of the testator's will. They were required to obtain this act of incorporation within the life-time of Ruby S. Tilden and Susie Whittlesey, or of the survivor of them, and that did not transcend the limits which the law permitted to be prescribed for the creation of this corporation. It has, however, been suggested that the time for its organization, and the conveyance of so much of the testator's estate as it might become the recipient of, exceeded, or might exceed, the bounds of the lives of these two persons. But it is quite evident from the provisions contained in the will that such a disability was not within the contemplation of the testator, for, by all its provisions, he appears to have been aware of the restraint of the law by which the title to property has not been permitted to be suspended for a greater period than that of two lives in being at the time when the direction for that object should take effect, for throughout his will he has limited all the special trusts created by him in subordination to these restraints of the law. It is evident, therefore, that its provisions were familiar to him as a lawyer, and that they were present in his mind at the time when this will was drawn, and that he did not intend that his executors, as to any portion of the will, should transcend the restraint in this respect imposed upon his power of disposition by the statutes. He accordingly may be held not to have intended the possibility that his executors and trustees should transcend these restraints by their action in creating the Til-

den Trust, and endowing it with so much of his estate as they deemed it proper to appropriate to that end; and, in view of these several provisions, the objection which has in this manner been taken may be characterized as being extremely technical, and not entitled to the approval of the court, as was said of the same objection presented in *Burrill v. Boardman*, 43 N. Y. 254. And it may be further added in this connection that the trustees and executors have acted upon this understanding of the directions employed for their government. They have not only in fact obtained the act of incorporation which was necessary for this purpose, but they have formally conveyed the rest and residue of the testator's estate to the corporation, for the promotion of the objects in this manner mentioned in the will, and sanctioned by the act of the legislature creating the Tilden Trust.

It was not important that the corporation which might be brought into existence, invested with these powers, should exist at the time of the decease of the testator; but it was sufficient, for all the purposes of the law, that it should be created within the lives of these two persons, as that, in fact, was done by the act of the legislature. No infirmity, therefore, arises in the case by reason of the circumstance that this corporation was to be created after the decease of the testator. The same point was elaborately considered and argued in the case just cited, and it was there held that the creation of the corporation by legislative authority, within the time during which the absolute ownership of the estate might lawfully be suspended, was sufficient for all the purposes of a devise and bequest to it. This authority, therefore, with the suggestions which have already been made, will dispose of the formal objections that have been presented against the legality of the directions for this purpose contained in the testator's will.

It has, however, been further urged that the testator has exhibited his intention to be to create a technical trust to carry these directions into effect, and it appears that he did believe that might be made effectual by the thirtieth paragraph of the will, in which he has in form devised and bequeathed the property, in this manner permitted to be employed, to his executors and trustees, and he has characterized what he proposed in this manner to provide for as the creation of a trust. But such was clearly not its effect; for the statute of this state has permitted express trusts to be created for only four different objects, and they have been explicitly defined by section 55, art. 2, c. 1, Rev. St., and the trust in this manner described by the testator is not one of those which this statute has provided might be created. But a mistake on his part, or in this respect, or a designation of what he intended might be done, to be a trust, when it was not a trust, in no manner abridged or prejudiced what he intended might be done in the disposition of his estate. That he fell into an error in making these directions will not defeat the attainment of his object, under other provisions of the law; for it has been further provided by section 58 of this part of the Revised Statutes that, "where an express trust shall be created for any purpose not enumerated in the preceding sections, no estate shall vest in the trustees, but the trust, if directing or authorizing the performance of any act which may be lawfully performed under a power, shall be valid as a power in trust, subject to the provisions in relation to such powers contained in the third article of this title." This section includes all such directions for the disposition of the estate of a testator as may not be capable of being maintained as an express trust, but are yet sustainable under the provisions of the statute relating to, and defining the existence of, powers in trust. This is the language of the section, and it has been so clearly expressed as to be free from ambiguity, and not the necessary or proper subject of construction. It has been urged, however, that *Garvey v. McDevitt*, 72 N. Y. 556, is in conflict with this conclusion; but it clearly is not entitled to that effect, for there it was the sole object of the testator to create one of the trusts mentioned in the section of the statute defining ex-

press trusts, and it was held by the court that he had failed to create such a trust, and, where this failure had in this manner arisen, that the case was not one intended to be provided for by this latter section of the statute; and that is substantially all, so far as it affects this case, that was decided on that occasion. The statute in this respect has in no manner been infringed by anything that has taken place either in making or executing the testator's will; but, although he has designated what he intended as a trust, which, in a general sense, it is, yet, as long as his directions may be construed to create no more than a power in trust, they may be carried into effect, as they have been made under this section of the statute.

At the time of the revision of the statutes, which took effect in 1880, very great, as well as fundamental, changes were made in the Revision, as that was accepted and adopted by the legislature. The provisions permitting the creation of trusts greatly abridged and restricted them, as they had previously been understood, and trusts were thereby subjected, in many respects, to rigid rules not previously applicable to them. But, in reducing and declaring the scope and extent of express trusts, it was not the object of the revisers, or of the legislature afterwards sanctioning their work, to limit the disposition of property to their instrumentality, as they were in this manner defined, but it still remained, in great part, the intention of the law, as it was then changed, to permit parties to direct and control the disposition of their estates by means of powers in trust, and, for this purpose, as the grantees of the power would not be required to collect the rents or profits of the property, to permit it to descend to the heirs and next of kin, subject only to the subsequent execution of the power. Neither the revisers nor the legislature proposed to restrict the future control which the testator might possess or exercise over his estate in this manner, except that the restraints adopted as the limit of future estates should not be extended by the exercise of the authority to be created. The same rigid rules which have been prescribed for the creation and management of trusts have not been carried into the provisions of the statute so far as powers or powers in trust have been provided for and defined, but greater flexibility and freedom has entered into this part of the law, allowing the testator to control the final disposition of his estate, subject to the vesting of the title in the manner already stated, through the creation and vesting of the authority which the law has in this way liberally permitted. It is indeed true, for the purpose of carrying these provisions of the statute into execution, that a definite person or class of persons, not too numerous for practical identification and selection, shall be either mentioned or referred to as the person or persons to be beneficially aided in the execution of the power. This rule was carefully observed in the directions which the testator gave concerning the disposition of this rest and residue of his estate; for there was but one person, and that was this corporation, that might, in the first instance, become entitled to this portion of it, and it was only in case the institution mentioned by him should not be incorporated during the two lives, or the executors and trustees should deem it inexpedient to convey this part of the estate, or any part of it, to the institution, that he then authorized his executors and trustees to apply such rest and residue to such charitable, educational, and scientific purposes as in their judgment would render it most widely and substantially beneficial to the interests of mankind. This alternative power of disposition attempted to be created is, under the authorities, undoubtedly void, for the reason of the general and indefinite nature of the directions to be observed in this matter; but, as this was clearly expressed by the testator, it was no more than a distinct and alternative disposition of the property, not to be brought up for any practical object, unless there should be a previous failure in the conveyance under the preceding power of this part of the estate, or the corporation which it was provided should, in the way that has been done, not be brought into existence. The conveyance of the estate to the corpora-

tion was in no manner made, in the slightest degree, dependent upon these alternative and final directions, and they could become important only in the event that the trustees and executors should not convey or transfer the property to the corporation, or of a failure to create the corporation itself; and where that may appear to be the case, as it does in this instance, the primary authority which the testator has declared it to be his purpose to effect will not be in any manner rendered invalid by an ulterior contingent direction of this unlawful character. This subject has frequently been considered by the courts, and the rule has become well settled that legal directions contained in the testator's will may be observed and carried into effect, notwithstanding there may be present in the instrument others which are in conflict with the law, and cannot be maintained, where the former may be separated from the latter without in any manner infringing upon the purposes of the testator, as they are embodied in the will. *Van Schuyver v. Mulford*, 59 N. Y. 426; *Adams v. Perry*, 43 N. Y. 488; *Kennedy v. Hoy*, 105 N. Y. 134, 11 N. E. Rep. 390.

By the operation of the testator's will, which in this manner may be sustained if the directions contained in it are legal, he has conferred upon the trustees and executors a discretion, by which they were placed at liberty to convey, or not to convey, or to apply, or not to apply, to the use of the corporation, the rest, residue, and remainder of his real and personal estate, not specifically disposed of, or so much thereof as they might deem expedient for that object; and it is the creation of this discretion that has been the most directly assailed, as not, under the law, being within the competency or power of the testator; and the cases of *Prichard v. Thompson*, 95 N. Y. 76, and of *Holland v. Alcock*, 108 N. Y. 312, 16 N. E. Rep. 305, are prominently relied upon as sustaining this objection. But an examination of the decisions made in these cases does not sustain this position; for they did not, in either instance, fail because of any general directions or discretion, proposed to be delegated to the executors for the disposition of the estate itself; but they failed for the reason that the beneficiaries under the power were not sufficiently designated or ascertained to enable the provisions of the will relating to that subject to be carried into execution. No such defect arises in this case, for the beneficiary to whom the residue of the estate, in whole or in part, might be transferred, was definitely indicated by the testator in his will, and has, in the manner already stated, been brought into existence by act of the legislature. This case, consequently, is not liable to be affected by anything contained in these decisions, for the court did not condemn the delegation of discretion of this description to the trustees and executors, for the bestowment of the property, if they should deem it proper to bestow it at all, upon the party ascertained and designated by the testator to be in that event its recipient; and that a discretion of this description may be delegated to executors and trustees in the execution of powers in trust was practically held in *Powers v. Cassidy*, 79 N. Y. 602. There the testator gave one-third of the rest of his estate to his executors, to be divided among Roman Catholic charities, institutions, schools, and churches in such proportions as a majority might decide; and this was held to be a lawful power in trust. That a discretion for the disposition of the estates could lawfully be delegated to others by the testator, was, in general terms, also held in the case of *Hartnett v. Wandell*, 60 N. Y. 346, and so it was in the case of *Taylor v. Morris*, 1 N. Y. 341, where the court held that a discretionary authority for the disposition of property contained in a will might be exercised and carried into effect, even by a single surviving executor, and this conformed to no more than the very general legal proposition which has been deemed to be sustained by other decided authorities, (2 Perry, Trusts, 2d Ed. § 508; and a discretionary power, depending wholly on the volition of the grantee, was assumed by the court to be valid in *Hull v. Hull*, 24 N. Y. 647, and it is inferentially supported by *Cos-*

tabadie v. Costabadie, 6 Hare, 410, 414; *Davey v. Ward*, L. R. 7 Ch. Div. 754; *Proctor v. Heyer*, 122 Mass. 525; and *Richardson v. Hall*, 124 Mass. 228, 235; and this appears to be no more than has, upon this subject, been provided for by the statutes of the state, which have not been so framed as to change this preceding rule.

The provisions authorizing the creation and definition of powers, as they are contained in the Revised Statutes, have been held, so far as they may be applicable, to include the disposition of both real and personal property, (*Hutton v. Benkard*, 92 N. Y. 296;) and while, by their language, they have been made to relate more especially to the definition and regulation of powers concerning the disposition of real estate, they are still to be applied as well to personal estate, where that may prove to be practicable; and in this case no obstacle stands in the way preventing that application. By section 106, art. 3, tit. 2, c. 1, pt. 2, Rev. St., it has been provided that a power may be granted by a devise contained in a last will and testament; and, by section 74 of the same article, a "power" has been defined to be "an authority to do some act in relation to lands, or the creation of estates therein, which the owner granting or reserving such power might himself lawfully perform." While this section mentions lands as the object to be affected, it is not to be literally construed; for, by the preceding section, powers, as they previously existed in law, were abolished, and in the case already mentioned the court of last resort has held that these provisions, though mentioning land alone, are to be applied, not only to real, but also to personal, property. This definition is exceedingly broad from the language which has been employed to make it, and it has, in the most general way, provided for the delegation of the authority to do an act which the owner of the property himself might lawfully perform. And there can be no room for doubt, if the testator had obtained the creation of this corporation during his life-time, he might, in the exercise of his discretion, have done precisely what he has declared it to be his intention that his trustees and executors after his decease might do. He has, therefore, attempted to confer upon them no more or greater measure of authority than, under this section of the act, he was in general terms empowered to bestow.

The statute has further proceeded to define the different classes of powers which may be created, and they have been designated as general, or special and beneficial, or in trust; and that discretionary powers were intended in this manner to be permitted to be created, dependent solely upon the will and disposition of the grantee of the power, is rendered evident by the language of section 96 of the same title; for, while that section has provided that imperative powers, actually creating a duty for the grantee, may be compelled to be performed by a court of equity for the benefit of the persons interested, it has also made an exception to this power of compulsion of powers expressly dependent on the will of the grantee, and if powers could not be legally created, where they should be made expressly to depend on the will of the grantee of the power, there would be no room for making the exception or reservation of them in this manner contained in this section of the statute. By making it, both the revisers and the legislature have demonstrated their intention to be to sanction and permit the creation of powers for the benefit of an ascertained and designated beneficiary, as the power in this case has been created, wholly dependent afterwards for their execution on the will of the grantee, which may, or may not, according to his will, be carried into execution. Their legality has been assumed and made the subject of implied statutory protection. The language clearly evinces as much as this to have been the design, and it excludes this class of cases, as they necessarily must be, from the compulsory interposition and aid of the court, leaving them dependent alone for their execution on the will of the grantee of the power; and, having been in this manner reserved, this power has been in this case, as it well could be, left to depend, as the will has provided for the disposition

of the authority, wholly upon the voluntary act of the grantees of the power. By no other provision or section of this title has this discretionary class of cases been either excluded or brought within the controlling jurisdiction of a court either of law or of equity. In other cases authority has been given to the court to act. They include those of powers to be used for the benefit of several different persons, without specifying the share or sum to be allotted to each, and provide for the manner of executing that power. So it has been further provided, where a trustee of a power, with the right of selection, shall die, leaving it unexecuted, that its execution may be decreed in equity for the benefit equally of the persons designated as objects of the trust. And where a power in trust is created by a will, and the testator has omitted to designate the person by whom it is to be exercised, there its execution has been devolved upon the supreme court; but in no instance has the law, in either of these sections, or any others contained in it, abridged the authority of the testator to vest in his executors a discretionary power over his estate, to be expressly dependent upon, and exercised according to, the will of the grantee for the benefit of the designated person or party; and that such a power may be legally created appears further from sections 77 and 78 of the same title. The first of these two sections sanctions the creation of a general power, authorizing an alienation in fee by means of a conveyance, will, or charge of the lands embraced in the power, to any alienee whatever; and the following section has defined a special power to exist where the person or class of persons to whom the disposition of the lands under the power is to be made are designated. And this will is within that description of authority, for it has authorized the disposition of the testator's property to a designated corporation, which it has been provided should be brought into existence for that end; and this section has, by no form of words or construction which it will support, confined a special power to one which may be imperative upon the grantee, or which can be enforced by a court of equity; but the person or persons for whose benefit the power may be created are alone required to be designated.

It is, then, left wholly to the option of the testator what the form of the power may be, and to what extent he may deem it proper to make it dependent upon the discretion or prudence of the grantee for the attainment of the end to be accomplished. By section 95 of the same article this special power is further declared to be "in trust when the disposition which it authorizes is limited to be made to any person or class of persons other than the grantee of such power;" and, like the other sections, it is entirely consistent with the existence of uncontrollable discretion vested in the grantee. This will did authorize such a disposition of the residuary estate of the testator, for it empowered the trustees and executors to transfer that part of the estate to the body corporate described and referred to in this manner in the will. It stands in entire harmony with the class of cases mentioned in the next succeeding section, in which the execution or non-execution of the power is made expressly to depend on the will of the grantee. Taken together, these sections of the statute supplied ample authority for the creation of this power. It was a power, as this has been mentioned in section 96 of the title, whose "execution or non-execution is made expressly to depend on the will of the grantee." That fully describes it, and sanctions what the testator endeavored to accomplish by this delegation of power to his trustees and executors. Section 102 of the same article has declared that the provisions contained in the preceding article, from section 66 to section 71, both inclusive, in relation to express trusts and trustees, shall apply equally to powers in trust and the grantees of such powers; but neither of these sections has taken away the authority permitted by the provisions concerning powers to create a discretionary power in trust. If they apply at all to such a trust, they were intended to provide the means for its execution, if the persons to whom the

power should be delegated should die without at all entering upon the exercise of the discretion confided to them; and the circumstance that the legislature have applied no more than these provisions of article 2 to the cases of powers, disclosed the intention to have been that the other sections of article 2 should in no way apply to the authority to be exercised in cases of this description. For that reason, while it may be true that a trust could not be maintained or carried into effect by a court without some mandatory direction including it, it by no means follows that a discretionary power in trust shall be dependent on that authority. The conclusion is necessarily otherwise; for, as long as the statute has, by its language, sanctioned the creation of powers whose execution or non-execution has been expressly made dependent alone on the will of the grantee, they are necessarily legally entitled to be maintained. This principle clearly includes this case, and sustains the legality of the power which the testator designed should be vested in his executors and trustees for the disposition of the residue of his estate in favor of the corporation known as the "Tilden Trust."

A further objection has been presented to the manner in which the law has provided for the management of this Tilden Trust; but that relates only to its government. The objection is more formal than real, and does not interfere with the substantial and beneficial administration of this estate. The object of the testator was to endow this corporation, subject to the approval of his executors and trustees, for the benefit of the masses of the public; and no informal error or irregularity in the mode of its action can be permitted to frustrate that intention, or prevent it from being carried into effect. As the case appears from the will, and the other proof which has been produced, the power itself conferring this trust upon the trustees and executors has the sanction of the law, and they have conformed to its requirements, as well as to those of the will, in carrying the power confided to them by the testator into execution. The judgment should be affirmed.

NOTE.

CHARITABLE BEQUESTS—CERTAINTY OF BENEFICIARIES. A bequest "to the poor" of a certain city, in which there are no city paupers and no poor fund at testator's death, is void for uncertainty. In re *Hoffen's Estate*, (Wis.) 36 N. W. Rep. 407. So is a direction to executors to expend money "for charitable purposes." But a bequest to a designated institution, "for the relief of the resident poor," is valid; as is a bequest, on a contingency, to be given "to any of my heirs who are in need, or not in very comfortable circumstances, as to my executors may seem fit and proper;" or to establish a school for "the education of young persons in the domestic and useful arts." *Webster v. Morris*, (Wis.) 28 N. W. Rep. 358. This case is also authority for saying that a bequest for two or more alternative charitable uses is not wholly invalidated by the invalidity of one of the uses. A residuary legatee of property, "to be disposed of by him for such charitable purposes as he shall think proper," takes it subject to distribution for charitable purposes. *White v. Ditson*, (Mass.) 4 N. E. Rep. 606. And it will be applied to charitable purposes under direction of the court, where the trustee has died, leaving the residuary estate undisposed of. *Minot v. Baker*, (Mass.) 17 N. E. Rep. 839. But, where no person is designated to apply a legacy "for charitable purposes," it is void. *Norcross' Adm'rs v. Murphy's Ex'rs*, (N. J.) 14 Atl. Rep. 908, reversing 9 Atl. Rep. 112. A residuary legacy to be distributed by a court of chancery among the "worthy poor" of a certain city is valid. *Hunt v. Fowler*, (Ill.) 12 N. E. Rep. 331. So is a bequest to a certain town for its "worthy and unfortunate poor." *Dascomb v. Marston*, (Me.) 13 Atl. Rep. 838. See, also, *Camp v. Crocker's Adm'r*, (Conn.) 5 Atl. Rep. 604; *Beardsley v. Selectmen, etc.*, (Conn.) 3 Atl. Rep. 557; *Howe v. Wilson*, (Mo.) 3 S. W. Rep. 390. A direction to testator's sisters to apply the income from a certain fund to the relief "of the poor and unfortunate whom we have aided in past years, and also to others, as their judgments may dictate, strictly for private charities," is valid. *Bullard v. Chandler*, (Mass.) 21 N. E. Rep. 951. So is a provision to be applied by the executor for the relief of testator's "most destitute" relatives, within certain degrees, *Gafney v. Kenison*, (N. H.) 10 Atl. Rep. 706; and a gift "to aid indigent young men" of a certain town "in fitting themselves for the evangelical ministry," *Trustees, etc. v. Whitney*, (Conn.) 8 Atl. Rep. 141; also a bequest to an incorporated parish in trust for its poor; and it is not necessary that there should be any poor persons in the parish at testator's death, *Appeal of Goodrich*, (Conn.) 18 Atl. Rep. 49. See, also, *Wilson v. Perry*, (W. Va.) 1 S. E. Rep. 302. But a clause authorizing an

executrix to disburse such sums as she pleases, not to exceed a certain amount, "to such worthy persons and objects as she may deem proper," is inoperative. *Bristol v. Bristol*, (Conn.) 5 Atl. Rep. 687. And a bequest to a certain person of property to use for "religious and charitable purposes" in such mode "as will, in his judgment, best promote the cause of Christ," is void for uncertainty. *Maught v. Getzendanner*, (Md.) Id. 471. A devise to a church or society incapable of taking, simply because not incorporated, is not void, but a trust arises for the benefit of the devisee until it shall become incorporated. *Byers v. McCartney*, (Iowa,) 17 N. W. Rep. 571.

PEOPLE v. NORTH RIVER SUGAR REFINING CO.¹

(Supreme Court, General Term, First Department. November 7, 1889.)

1. CORPORATIONS—COMBINATIONS—CORPORATE ACTS—TRUSTS.

The action of the trustees and stockholders of a company in transferring its capital stock to the persons in control of a combination of all the corporations engaged in the same business, thereby placing the control of its business in the hands of such persons, being in conformity with the provisions of the agreement for the formation of such combination, makes the corporation, as such, a party to the combination, though the agreement was not signed by it.

2. SAME—DELEGATION OF POWERS—FORFEITURE OF CHARTER.

By such abandonment of the authority to manage its affairs vested in it by statute, and transfer of the same to a body, distinct from that designated for its exercise, the corporation offends against the provisions of the act under which it was created, and becomes liable to an action for its dissolution, as provided by Code Civil Proc. N. Y. § 1798, subd. 1.

3. SAME—RESTRAINT OF TRADE—MONOPOLIES.

An agreement or arrangement to bring about the combination of all the firms and corporations engaged in sugar refining in the United States, and place their affairs in the hands of a board, which is to have control of the business, plainly contemplates the removal of competition, and the advancement of prices of a necessary of life, though such objects be not expressed by its terms; and such a combination is unlawful and criminal, under Pen. Code, § 168, subd. 6, making it a misdemeanor for two or more persons to conspire to commit any act injurious to trade or commerce.²

4. SAME—DISSOLUTION—ACTION BY ATTORNEY GENERAL.

Becoming a party to such a combination is a subversion of the objects for which the corporation was created, and renders it liable to dissolution, under Code Civil Proc. § 1798, providing that the attorney general may bring an action against a corporation to annul its charter upon the ground that it has violated any provision of law whereby it has forfeited its charter, or become liable to be dissolved by the abuse of its powers.

Appeal from circuit court, New York county.

Action in the nature of *quo warranto*, brought by the people of the state of New York, for the forfeiture of the defendant's corporate franchises, and for its dissolution. A decree of dissolution was entered, and defendant appeals. Code Civil Proc. N. Y. § 1798, provides that the attorney general may bring an action against a corporation to annul its charter upon the ground that it has offended against the provisions of the act under which it was created, or has violated any provision of law whereby it has forfeited its charter, or become liable to be dissolved by the abuse of its powers.

Argued before VAN BRUNT, P. J., and BRADY and DANIELS, JJ.

Charles P. Daly, James C. Carter, and John E. Parsons, for appellant.
Charles F. Tabor, Atty. Gen., and Roger A. Pryor, for the People.

DANIELS, J. The judgment from which this appeal has been brought, dissolved the defendant as a corporation previously formed and existing under the laws of this state. It was organized under chapter 40 of the Laws of 1848 as a manufacturing corporation, and its business was generally that of refining and selling sugar, syrups, and molasses. It was incorporated for this object in February, 1865, and continued to carry on its business until the close of the year 1887. Before that time, but in that year, a plan was formed and

¹Affirming 8 N. Y. Supp. 401.

²See note at end of case.

adopted for the formation of what was called the "Sugar Refineries Company," to go into effect on the 1st of October, 1887. Its general object was to bring together the parties and corporations engaged in the manufacture, refining, and sale of sugar, and to place their affairs under a board of 11 persons, subject to a further increase to the number of 13, having to a large extent the management and control of this business. The company in this manner provided for was not, neither was it intended to be, a corporation, but it was in the nature of a partnership or combination, designed to include, as far as that should prove to be practicable, the companies and persons engaged in this business in the United States. Its objects were generally stated, in the deed adopted for this purpose, to be (1) to promote economy of administration, and to reduce the cost of refining, thus enabling the price of sugar to be kept as low as is consistent with reasonable profit; (2) to give to each refinery the benefit of all appliances and processes known or used by the others, and useful to improve the quality and diminish the cost of refined sugar; (3) to furnish protection against unlawful combinations of labor; (4) to protect against inducements to lower the standard of refined sugars; (5) generally to promote the interests of the parties hereto in all lawful and suitable ways. And the manner in which they were to be promoted and attained was to bring the several companies and parties into an association, under the articles or deed adopted for that purpose. Where the business was carried on by individuals, it was declared that they should become corporations, and, as such, associates under this plan. And while the corporations becoming parties to the agreement were still to maintain their separate organizations, and carry on and conduct their own business, that was to be done under the control and management of the association, through the board selected to exercise its authority. That the corporations becoming parties to the agreement were not designed or expected, through the intervention of their own stockholders, to maintain their organizations, and carry on their business, is quite evidently disclosed by other provisions of this deed or plan of association; for the stock of each of the corporations becoming in this manner associated was to be finally transferred to this board of 11 members, and in its place shares were to be issued by the association, and divided among the corporations, and distributed to their respective stockholders in the proportions previously held by them in the corporations themselves, and ultimately to the amount of the shares of the Sugar Refineries Company. The earnings or profits of the business of the associated corporations were required to be paid over to the board, and that board was empowered to designate the dividend which should be proportionately distributed to the holders of the certificates issued by the board for its shares; and the certificates of stock of the corporations were to be held by this board, and it was empowered by the deed or plan only to transfer so much of them, from time to time, to such persons as it might be desired to qualify as trustees or directors or other officers of the corporations, and which were to be held by them "subject to the provisions of this instrument." No period of time was declared during which this association should continue to exist, and manage the affairs of the corporations; but that it was intended to be of a durable character is evinced by the provisions made for the management of the business, and for the selection and continuance in office of members of the board. They were first selected and named in the agreement, one class of which were to hold office for seven years, the second class for five years, and the third for three years; and at the expiration of their respective terms of office their successors were to be elected for the term, in each case, of seven years. The association was plainly, therefore, intended to be one of a durable and continuing character. And from the members of the board it was empowered to appoint a president, vice-president, treasurer, and secretary, and to create other offices, and appoint persons to fill them; and also to designate the duties and prescribe the power of the several officers and committees

of the association, and to "make by-laws; and all arrangements for meetings, elections, and all details not herein specifically provided for, shall be made by the board." The capital of the association was fixed at the sum of \$50,000,000, a portion of which was to be retained to bring in other refining companies, but in every instance to be first incorporated, and make them parties to the agreement or plan. This instrument was subscribed on the 16th of August, 1887, by 12 different corporations and individual concerns, the defendant being made a party to it at that time only by the signature of its secretary, and the power to do that was afterwards revoked. Other corporations engaged in the business afterwards became parties to the arrangement, aggregating finally 17 different companies employed in this business; leaving in the United States certainly no more than 6 other companies or firms engaged in this business. The association, therefore, appears to have been intended to include all the companies and firms of individuals engaged in this business in the United States; and, so far as it should prove successful in associating them, it would completely extinguish all competition between the corporations becoming members of the association. Those who became parties to it were not only located in the state of New York, but in the state of Massachusetts, and apparently, from the names of the companies, in the state of Ohio, in Missouri, in the state of Louisiana, and the city of San Francisco.

To maintain the action, it was alleged that the defendant did become a party to this association or combination, although it revoked and withdrew the authority of its secretary to subscribe its name to the agreement. This was denied on behalf of the defendant; it being insisted, in support of the denial, that what had taken place was done by the stockholders of the company, as distinguished from its trustees and the company itself. And the further position has been taken that the action proved to have been had by the stockholders was inoperative in the way of bringing in the defendant as a party to this combination. It is undoubtedly true, as the law was stated to be in *Car Co. v. Railway Co.*, 115 U. S. 587, 6 Sup. Ct. Rep. 194, that while the stockholders of corporations, in a general sense, own its property, they "are not the managers of its business, or in the immediate control of its affairs. Ordinarily, they elect the governing body of the corporation, and that body controls its property." 115 U. S. 597, 6 Sup. Ct. Rep. 199. And that this was the scheme, generally, under which the defendant was incorporated, appears from the act of 1848, and its various amendments. But it is far from following, from the existence of this general principle, that the defendant did not become a party to this association and agreement. That it intended to become such party appears from the minutes of the meeting of its stockholders held on the 22d of April, 1887; for a resolution was then adopted empowering three persons, who were members of its board of trustees, as "a committee to make arrangements to perfect the said consolidation in behalf of the North River Sugar Refining Company, with full power to act, and to sign all contracts and agreements in the name of the said North River Sugar Refining Company, of whatever name or nature, concerning said consolidation;" and further authorizing the president and secretary of the company "to sign all contracts, agreements, and papers which the above-named committee may make in relation to the said consolidation." And it was under this authority that the secretary did subscribe the name of the corporation to the deed or agreement. On the 4th of November, 1887, another meeting of the stockholders of the defendant was held, in which the proceedings of the previous meeting were referred to, and revoking the powers thereby conferred upon the president and secretary, and discharging the committee from further consideration of the subject, and canceling and annulling the preceding resolutions. But that it was designed to decline in this manner to become a party to the deed and the association appears not to have been the fact; for a further meeting was held by the stockholders of the company on the 25th of November, 1887, at which it was finally resolved, through

a committee of three selected for that purpose, to deliver the stock of the company "to John E. Searles, Jr., or, at his request, to John E. Parsons, John R. Dos Passos, and Franklin Bartlett, trustees, on receipt of the sum of three hundred and twenty-five thousand dollars, the proceeds to be divided among the stockholders of this date according to their respective shares." This resolution was carried unanimously by the votes of the persons present, who included all the stockholders in the company with the exception of two, but who were stated in fact to have consented to the delivering up of their stock. The design did exist, therefore, to transfer the entire stock of the company to the person or persons named in the resolution. And it was proved by what afterwards took place that this transfer was intended to make the defendant a party to the association; for, pursuant to the resolution, the stock was so transferred to Mr. Searles, who was a member of the board of the Sugar Refineries Company, and it was transferred by him to that board. And certificates of shares in that company were issued to him in place of this stock, and divided and distributed among the stockholders of the defendant, meeting, acting, voting, and consenting in this manner to the consolidation of their company. What was delivered to the stockholders in the defendant by way of certificates in the Sugar Refineries Company was precisely what they were entitled to have under the plan or agreement made for the association of these manufacturing companies. The stipulations upon that subject were all fully observed and carried into effect. And from what transpired in this manner, and the fact that only corporations could enter the association, it is evident that the intention was to make the defendant, in its corporate capacity, a party to this association or combination, as the deed or agreement provided that might be done, but without adding its formal signature to the instrument itself. And that it could be made a party to the association or combination in this manner results from the authority delegated by and vested in the persons who acted upon the subject; for they not only included all the stockholders who owned the legal entity known as the "corporation," (*Oil Co. v. Marbury*, 91 U. S. 587, 589, 590,) with the two exceptions already mentioned, owning but 18 shares of the stock, but they also included every member of the board of trustees of the defendant. They all acted together in this manner,—trustees and shareholders; the former in both capacities, as they lawfully could, (*Pauldin v. Steel Co.*, 94 N. Y. 335, 341;) and, with the two exceptions already mentioned, voted to transfer the stock of the company in this manner to Mr. Searles, who was an officer of the board, in substantial, though not literal, compliance with the proposals contained in the deed or agreement which had been devised and adopted for this object. The effect of what they did through their committee, who were also a majority of the trustees, was to irrevocably place all the stock of the defendant in the hands, and subject to the control, of the Sugar Refineries Company, to receive through its board shares in that company in place of the stock in this way surrendered, and to permanently place the business and control of the defendant wholly under the dominion of the board, through its authority to designate the defendant's future trustees and officers, and to transfer to the persons selected for those offices such shares of stock only as would be necessary to render them eligible under the law. These persons, acting together in this manner, as trustees and stockholders, not only had the authority, so far as that could be exercised, of making the defendant a party to the association, but they, as a matter of fact, by what transpired, did make it such a party, and subjected it as completely to the power and control of the board of the Sugar Refineries Company as though the deed or plan of the association had in the most formal manner been subscribed under the authority of the board of trustees of the defendant. There is no ground, therefore, to support the position that the defendant did not become a party to this combination. The persons entitled to exercise control over it and manage its affairs consented and resolved to

make it a party; and they did make it a party, and carried out all the arrangements required for that purpose, in conformity with the formal provisions of the agreement made for the association and combination of these corporations, with the solitary exception of subscribing it.

And by this proceeding they practically renounced and abandoned the control which, through its board of trustees, they were to exercise over the management and business of the corporation, and transferred it to the board of the Sugar Refineries Company, and, with the other associates, thereby completely abolished all power of competition between these companies. That was an abandonment of the authority vested in this corporation by the statute for its management and government, and the delegation and transfer of that management and government to a body of men entirely distinct from that designated by the statute for the control and management of the corporation. By these circumstances it ceased to exercise the functions prescribed by law, and placed the corporation under the dominion of an authority unknown to the statute; and it thereby offended against the provisions of the act by and under which it had been created, and for that reason it is asserted to have become liable to this action for its dissolution. Code Civil Proc. § 1798, subd. 1.

But it is not requisite to place the disposition of the case solely upon the effect to be attributed in this manner to what was shown to have taken place; for it is to be inferred from the provisions inserted in and made a part of the deed or agreement, and accepted in this manner by the defendant, that this association or combination of the parties engaged in this business was intended to bring about and secure ulterior advantages in the way of advanced profits to the associates themselves, and the persons who had received their certificates of shares of the Sugar Refineries Company. It has not, it is true, been in words asserted in the deed or agreement that the association was designed to control the sale of sugar, syrups, and molasses throughout the country; neither was it necessary that it should be so stated, as long as that may reasonably be inferred to have been a leading object or inducement to the creation of the association itself. And the case was so tried as to allow that inference to be followed. At the close of the evidence given upon the trial, each party applied to the court to dispose of the action by a direction for a verdict. Neither suggested or claimed that any question of fact had been presented which should be submitted to the jury; and the court, acting upon these applications, directed a verdict in favor of the plaintiff, holding, under the evidence, that an unlawful combination had been entered into by the defendant and these other companies to control the production and sale of sugar in the country. And if that conclusion may be supported, by way of inference, from the provisions contained in the agreement, and the evidence given upon the trial, the direction was right; for the court was at liberty, under these applications, to draw the same inferences from the proofs which the jury would have been justified in drawing if the case had been submitted as a matter of fact to them. *Stratford v. Jones*, 97 N. Y. 586; *Provost v. McEnroe*, 102 N. Y. 650, 5 N. E. Rep. 795. Whatever presumptions or inferences, therefore, may be deduced from the evidence were then, and are now, to be adopted, so far as that may be a necessity, for the support of the verdict and judgment. The law does not require that instruments of this description, before they may be declared to be illegal, shall in plain language affirm the intention to be to prevent competition, and control the market, or advance the prices of necessary commodities, as the articles of sugar, syrups, and molasses clearly are. If it did, it would by that requirement supply a device for evading its wholesome restraints, and rendering its principles utterly nugatory. That has never been exacted. But the courts, as in other cases, are permitted to place themselves in the position of the parties entering into the agreement or arrangement to discover the objects or designs by which they may have been actuated. *Woodruff v. Woodruff*, 52 N. Y. 53. It was there

said: "We must consider the situation of the parties, the subject-matter of the contract, and the surrounding circumstances, with a view of ascertaining the purpose and intent of the parties." Id. 57. And *Knapp v. Warner*, 57 N. Y. 668, supports this statement of the law. The language of the instrument, therefore, is not alone to be consulted, but it is to be considered in view of these circumstances, and of the conduct and probable motives of the individuals engaged in bringing it about; and all that may be implied in this way from the agreement is to be considered as contained in it, for the purpose of discovering what was intended to be accomplished. *Jones v. Kent*, 80 N. Y. 585, 588. By the application of these rules to this case, the leading object is disclosed, with a reasonable degree of clearness, to be that the affairs and business of the combination or association should be so managed and carried on as to promote the profit and gain of the associates. The board, indeed, was expressly authorized to promote the interests of the parties in all suitable as well as lawful ways, and to provide for all details not specifically mentioned. That clearly comprehends the power to prescribe and regulate the selling prices of the articles to be produced. And where the effect of the arrangement is to permanently secure the control, or the substantial control, of this product, and of its sale, as that has been done, it is no more than just to infer that the control is to be used to avoid competition and enhance prices, and in that manner, as it is the ordinary expedient for that end, promote the interests, and add to the profits, of the associates. In this case it was a leading object to combine together the different corporations and individuals engaged in this business, not only in and about the city of New York, but throughout the country, and to secure that control by a substantial organization for an indefinite period of time. This was not to be done, and was not in fact done, for an idle purpose, or merely to furnish the means of protection against unlawful combinations, or for any other mere economical object; but it was manifestly to place this business within the control, and subject to the dictation, of this association, and of the board selected for the government of its affairs. And, after putting forth the efforts necessary to secure that end, it would not only be idle, but absurd, to indulge in the supposition that it was not intended to wield the authority in this manner secured for the pecuniary advantage of the associates; and the direct and usual way in which that is accomplished, following out the common impulses of practical business men, is by the advancement of the prices of the commodities manufactured and sold in the course of the business whose control may be in this way secured. When the opportunity to do that is provided, human selfishness is sure to turn it to a profitable account. A jury certainly would be fully justified in concluding, from the agreement and the other facts in evidence in the case, that the governing object of the association was to promote its interests, and advance the prosperity of the associates, by limiting the supply, when that could properly be done, and advancing the prices of the products produced by the companies. To conclude otherwise would be to violate all the observations and experiences of practical life. This is a controlling feature in this controversy. And that it was intended to be secured by the organization provided for, and which actually took place, is reasonably free from doubt; and, where that appears to be the fact, the agreement, association, combination, or arrangement, or whatever else it may be called, having for its objects the removal of competition, and the advancement of prices of necessities of life, is subject to the condemnation of the law by which it is denounced as a criminal enterprise. The law at this time, as it has for many years, in this state, has made it a misdemeanor for two or more persons to conspire "to commit any act injurious to the public health, to public morals, or to trade or commerce, or for the perversion or obstruction of justice, or of the due administration of the law." Pen. Code, § 168, subd. 6. And combinations and associations of this form have been held, in this and other states, to violate

these provisions of the statute, so far as they prohibit acts injurious to trade or commerce.

In *Stanton v. Allen*, 5 Denio, 434, this precise point was presented under the same statute, as it was then a part of the general laws of the state; and it was there held that an association of boat proprietors on the canals, though not including all of them, under an agreement to regulate the price of freight by uniform scales to be fixed by a committee chosen by themselves, and to divide the profits of their business according to the number of boats employed by each, was unlawful; for it was considered that the effect of the association or agreement was to increase prices and prevent competition in the business to which it related. A similar point came before the court in *Hooker v. Vandewater*, 4 Denio, 349, and the same ruling was made by the court. In *Coal Co. v. Coal Co.*, 68 Pa. St. 173, five coal companies entered into an agreement in this state to divide two coal regions of which they had the control, to appoint a committee to take charge of their interests, which was to decide all questions, and appoint a general agent, through whom the coal mined was to be delivered, each corporation to deliver its proportion at its own cost in the different markets at such time and to such persons as the committee might direct, which was to adjust the prices and rates of freight, and enter into agreements with other companies, and by which the five companies might sell their coal themselves only to the extent of their proportion, and at prices adjusted by the committee, and the agent to suspend shipments by either beyond their proportion, the prices to be averaged and payments made to those in arrear by those in excess, and neither to sell coal otherwise than as agreed upon. And this agreement was held by the court, under the statute already referred to, to be void, and incapable of being carried into effect. It was held to contemplate a business arrangement injurious to the trade and commerce of the state, and for that reason incapable of being legally supported. This case, as well as the others, is direct authority against the legality of the association to which the defendant was made a party. The only substantial difference between the cases is that arising out of the fact that, in those referred to, the parties had expressed by their agreement, what in this case was left to be plainly inferred from it, and from the circumstances attending the consummation of the arrangement, that it was part of the object in view to regulate prices, and in that manner promote the interests of the associates in the sale of their productions. In *Arnot v. Pittston*, 68 N. Y. 558, a quite similar case was brought before the courts in this state; and the agreement there made, including no other essential attributes than those which by plain inference are attached to the present case, was held, for the reasons already mentioned, to be illegal and void. In the opinion which was then delivered it was said: "That a combination to effect such a purpose is inimical to the interests of the public, and that all contracts designed to effect such an end are contrary to public policy, and therefore illegal, is too well settled by adjudicated cases to be questioned at this day." Id. 565. And in support of this conclusion the case just mentioned, decided in the state of Pennsylvania, is cited with approval. A like combination between producers and dealers in salt was in the same manner condemned in *Salt Co. v. Guthrie*, 35 Ohio St. 666. And so it was in *Association v. Kock*, 14 La. Ann. 168, where an agreement was made between several commercial firms for three months not to sell India cotton bagging without the consent of the majority. The court, in its decision, held that "the agreement between the parties was palpably and unequivocally a combination in restraint of trade, and to enhance the price in the market of an article of primary necessity to cotton planters." Id. 169. In *Railroad Co. v. Railroad Co.*, 15 Fed. Rep. 650, the same rule was followed. And so it was in *Hilton v. Eckersley*, 6 El. & Bl. 47. The action was there upon a bond to carry into effect a similar arrangement; and it was held by the court to be void, and that the suit could not be sustained. In *Transporta-*

tion Co. v. Line Co., 22 W. Va. 600, it was held by the court that "the common law will not permit individuals to oblige themselves by a contract either to do, or not to do, a particular thing, when the thing to be done or omitted is in any degree clearly injurious to the public." *Id.* 617. And that was further maintained in *Telegraph Co. v. Telegraph Co.*, 65 Ga. 160. And it was again followed in *Hazlehurst v. Railroad Co.*, 43 Ga. 13. And *Craft v. McConoughy*, 79 Ill. 346; *Raymond v. Leavitt*, 46 Mich. 447, 9 N. W. Rep. 525; *Colles v. Directory Co.*, 11 Hun, 397; *Watson v. Companies*, 52 How. Pr. 348; *Faulds v. Yates*, 57 Ill. 416; and *Foll's Appeal*, 91 Pa. St. 434,—are pointedly to the same effect. And so is the theory maintained in *Gibbs v. Gas Co.*, 130 U. S. 396, 9 Sup. Ct. Rep. 558; for there combinations and associations having in view the advancement of the prices of necessary commodities, for the benefit of the associates, were held to be illegal. And this also secured the approval of the court in *Alger v. Thacher*, 19 Pick. 51. That case, it is true, differed materially from the facts here presented. But the court incidentally, and apparently with propriety, aided that the principle proceeded upon was especially "applicable to wealthy companies and large corporations, who have the means, unless restrained by law, to exclude rivalry, monopolize business, and engross the market. Against evils like these, wise laws protect individuals and the public by declaring all such contracts void." And this was expressly sanctioned in *Stewart v. Transportation Co.*, 17 Minn. 372, (Gil. 348,) where it was concluded to be "against the general policy of the law to destroy or interfere with free competition, or to permit such destruction or interference." 17 Minn. 395, (Gil. 372.) And *Wright v. Ryder*, 36 Cal. 342, sustains the same principle; and so does *Murray v. Vanderbilt*, 39 Barb. 141. In *Reene v. Kent*, 4 N. Y. St. Rep. 431, the association was to advance the price of lard by in part withholding from the market that which was owned or controlled by the associates; and it was held by this court that the agreement was void, and incapable of being enforced in a court of justice. In all these cases the reservation of the power to control the prices of necessary products, whether by express agreement or fair implication, has been condemned as unlawful.

A large class of cases has been cited and relied upon in support of the appeal permitting a limited division or mutual regulation of certain business interests; but they do not seem to be applicable to this controversy, for neither of them maintains the validity of a combination or association made between corporations or individuals engaged in the production and sale of necessary articles, through which competition is to be avoided, and the prices of such articles to the consumers are to be advanced. The case of *Match Co. v. Roeber*, 35 Hun, 421, affirmed 106 N. Y. 473, 13 N. E. Rep. 419, and all other similar cases, are entirely distinguishable in principle from this controversy. And it was considered so in the decision made in the last case by the court of appeals, where it was said that "combinations between producers to limit production, and to enhance prices, are or may be unlawful, but they stand on a different footing." 106 N. Y. 483, 13 N. E. Rep. 422. The facts of the case of *Railroad Co. v. Railroad Co.*, 6 H. L. Cas. 113, where the agreement between the different railway companies was maintained, has been given prominence as sustaining the combination now under examination. But, while that case sustained the agreement which was there made for the limited management of different railways, it is not to be followed as an adjudication having controlling weight over this controversy; for it was not understood or intended to be held by the courts in which that case was examined that an association or combination of this description, extending, as it does, from the Atlantic to the Pacific coast, and obviously designed to advance the price of necessary commodities of life, could be maintained. In fact, the opposite principle was conceded when this case was decided by the court of queen's bench, 21 Law J. Q. B. 89, for it was there added, in the course of the opin-

ion, that if the parties, by their agreement, proposed to endeavor to prevent a competition generally, there might be weight in the objection that it was injurious to the public by giving the plaintiffs a monopoly. Id. 93. The leading cases of *Collins v. Locke*, L. R. 4 App. Cas. 674; *Association v. Walsh*, 2 Daly, 1; *Wickens v. Evans*, 8 Young & J. 318; *Roller Co. v. Cushman*, 143 Mass. 353, 9 N. E. Rep. 629; and *Marsh v. Russell*, 66 N. Y. 288,—are so far diversified in their facts from the leading and controlling circumstances in this case as to be inapplicable to it. And that may also, with propriety, be said of *Leslie v. Lorillard*, 110 N. Y. 519, 18 N. E. Rep. 363, as well as the still later case of *Fowle v. Park*, 131 U. S. 88, 9 Sup. Ct. Rep. 658. This controversy is within the authority and principles of the other adjudications which have been mentioned, so distinctly and entirely as to render it only necessary to depend upon and follow them for its disposition.

As the facts have been developed, the association or combination into which the defendant has in this manner entered was created for an unlawful object; and it has, by making itself a party to that association, renounced and abandoned its own duties for the transaction and management of its business, and placed its interests and affairs under the dictation and control of a board which legally should have no power over it, and rendered itself liable to the judgment which has been recovered in this action. And the possibilities that other business enterprises in the same pursuit may be set on foot to counteract the effect of this combination will not relieve the defendant from this result. That, in view of the large capital and extended combination already secured, is a very remote probability; for other manufacturers, brought in competition with this combination, could easily be driven from the field of trade by it, and its paramount control still maintained and perpetuated. And the probability that its power would be used in this manner is so decidedly fortified by experience that capital would be reluctantly placed at the risk of loss by other persons, with so formidable a competitor to be encountered. But, if it should be otherwise, the law will not tolerate or excuse the combination; for the interposition of third persons, in no way connected with it, to counteract its effects, is no excuse or justification for the wrong this combination has in this manner committed. A wrong-doer is never excused from the consequences of his wrong for the reason that other parties, not acting under his direction or authority, may interpose, and in a measure defeat the consequences of the wrong.

Evidence was given upon the trial tending to prove that the property previously used by the defendant in its business was intended to be taken as a public park by the authorities of the city, and thereby to excuse the cessation of its business, and that proceedings for that object had been instituted. But, while those may be the facts, it is still to be inferred from the other evidence upon the trial that its business was not discontinued by reason of the expectation that the property would be appropriated by the city for this object, but that it was done under the power of this combination to discontinue its productive use, and in that manner diminish the manufacture of refined sugar which it had previously carried on, to the extent of from 275,000 to 300,000 pounds of sugar a day. And this view is confirmed by the fact that it was allowed to participate in the 2½ per cent. dividend declared for the five months preceding the April mentioned in his evidence by Mr. Searles. The company has been subordinated, and its own individual usefulness as a manufacturing competitor terminated, by the power of this combination; and, as it was voluntarily placed there, to this extent its own franchises have been subverted, and for the time being ended. And it became liable to the judgment which has been recovered against it in the action; for it is a condition on which a corporation is allowed to be created and maintained that it shall exercise and use its franchises for the benefit of the public; and when it voluntarily declines to do that, or places itself in a situation in which that may be prevented

as a consequence of its voluntary action, then, under the statute, as well as the decisions of the courts, it may be annulled at the suit of the attorney general. Code Civil Proc. § 1798; *People v. Insurance Co.*, 15 Johns. 358; *People v. Trustees*, 5 Wend. 211; *Arms Co. v. Barlow*, 63 N. Y. 63; *Railroad Co. v. Railroad Co.*, 118 U. S. 290, 6 Sup. Ct. Rep. 1094. What was there said concerning the action of the railway company is equally as applicable to this controversy; and that is that "unless specially authorized by its charter, or added by some other legislative action, a railroad company cannot, by lease or any other contract, turn over to another company, for a long period of time, its road and all its appurtenances, the use of its franchises, and the exercise of its powers; nor can any other railroad company, without similar authority, make a contract to receive and operate such road, franchises, and property of the first corporation; and that such a contract is not among the ordinary powers of a railroad company, and is not to be presumed from the usual grant of powers in a railroad charter." 118 U. S. 309, 6 Sup. Ct. Rep. 1102. To this effect, also, is *People v. Turnpike Road*, 23 Wend. 222, and *People v. Turnpike Road*, Id. 254. *People v. Bank*, 24 Wend. 431, and *Bank v. Matthews*, 98 U. S. 621, and *Bank v. Whitney*, 103 U. S. 99, approve of the same principle. And it has been in no manner disaffirmed by *Slee v. Bloom*, 5 Johns. Ch. 366, which, however, was reversed in 19 Johns. 456. And to the like effect as the other authorities is *State v. College*, 32 Ohio St. 487, and *State v. Association*, 42 Ohio St. 584. It was substantially for these reasons that the verdict was recovered against the defendant upon the trial. The defendant had disabled itself from exercising its functions and employing its franchises as it was intended it should, by the act under which it was incorporated, and had, by the action which was taken, placed itself in complete subordination to another and different organization, to be used for an unlawful purpose, detrimental and injurious to the public. Instead of manufacturing its product, and disposing of it to the public on what might be fair competitive prices, it had become a party to a combination in part, at least, designed to create a monopoly, and exact from the public prices which could not otherwise be obtained. This was a subversion of the object for which the company was created, and it authorized the attorney general to maintain and prosecute this action to vacate and annul its charter. The action was well sustained by the facts which the evidence supported; and the judgment, for the reasons already mentioned, as well as those assigned by the judge presiding at the trial, should be affirmed.

VAN BRUNT, P. J. For the reasons contained in the written opinion, and also for those contained in the opinion of Mr. Justice BARRETT, who presided at the trial, I am of the opinion that the judgment appealed from should be affirmed.

BRADY, J., concurs.

NOTE.

MONOPOLIES—CONTRACTS IN RESTRAINT OF TRADE. A contract for the purposes of forming a combination between all the lumber manufacturers at a certain place, limiting the amount produced, and increasing the price, is void, and unenforceable in any part. *Lumber Co. v. Hayes*, (Cal.) 18 Pac. Rep. 891. See, also, note, Id. So is a contract between two gas companies, each of which is authorized to supply gas throughout the entire city of Chicago, whereby they mutually agree not to compete with each other in the sale of gas within certain districts of the city. *Coke Co. v. Coke Co.*, (Ill.) 13 N. E. Rep. 169. But a contract whereby two rival manufacturers agree on a scale of selling prices for their goods, and one discontinues his business and becomes a partner of the other, is not void, where the manufactured goods are not articles of necessity. *Dolph v. Machinery Co.*, 28 Fed. Rep. 558. See, also, note, Id. An elaborate note by Francis Wharton on the question of the illegality of contracts in restraint of business will be found attached to the report of *Sharp v. Whiteside*, 19 Fed. Rep. 156. See, also, on the same general subject, *Telegraph Co. v. Railway Co.*, 11 Fed. Rep. 1, and note; *Carroll v. Giles*, (S. C.) 9 S. E. Rep. 422, and cases cited; *Fowle v. Park*, 9 Sup. Ct. Rep. 658.

WOLFF v. FLATOW et al.*(Supreme Court, General Term, First Department. November 7, 1889.)***VENDOR AND VENDEE—ASSIGNMENT OF CONTRACT.**

F. agreed to purchase land, and deposited \$500, to be returned if the title failed. He afterwards assigned the contract, and all rights thereunder, to one who assigned all interest in the land and the \$500 to plaintiff. F. assigned to defendants his interest in the \$500, and, the first assignee of the contract having refused the title, defendants took it, and the vendor allowed them the credit of \$500. *Held*, that plaintiff could not recover the \$500 of defendants, as it has not been paid to them, but only allowed as a credit; and if the vendor has not paid the money, and plaintiff is entitled to it, he can recover it directly from him.

Appeal from special term, New York county.

Action by Isaac Wolff against Edward Flatow and another. Plaintiff appeals from a judgment sustaining a demurrer to the complaint.

Argued before VAN BRUNT, P. J., and DANIELS and BARRETT, JJ.

Adolph Cohen, for appellant. *David Leventritt*, for respondents.

VAN BRUNT, P. J. In brief, the allegations of the complaint seem to be that in July, 1888, one Charles Brown entered into a written agreement with one Harris Flatow for the sale of certain real estate in the city of New York; Flatow depositing with Brown the sum of \$500, to be applied upon the purchase price if Flatow completed the purchase, and to be returned to Flatow if the title failed. That in August, 1888, Flatow sold and assigned said agreement, and all rights thereunder, to one Jette Nathan. That Brown was unable to give title as agreed. That Nathan was ready and willing to carry out the agreement. That in October, 1888, Flatow assigned his interest in said \$500 to the defendants, and Brown was induced to allow to them said \$500 on the purchase price of the premises; in other words, that Nathan having refused the title to the property in question, the defendants took said title, and Brown allowed to them the \$500 which had been paid upon the purchase price. The complaint contains the further allegation that Nathan duly sold and assigned to the plaintiff all her rights to the premises and to the \$500. The defendant demurred to this complaint, which demurrer was sustained, and from the judgment thereupon entered this appeal was taken.

If Brown had paid to the defendants the \$500 in question, it might perhaps be claimed upon the part of the plaintiff that he had a right to recover that sum upon the ground that the \$500 was money had and received to the use of the plaintiff or his assignor. But such is not the fact. The defendants have never received the \$500. Brown has only chosen to credit them with \$500 on account of a sum due from them to him (Brown.) With this, plaintiff has nothing to do. If Brown has not paid the \$500, and the plaintiff is entitled to it, he can recover the same from Brown. Under these circumstances, no cause seems to have been set out in the complaint against the defendant, and the demurrer was rightly sustained. The judgment appealed from must be affirmed, with costs. All concur.

*In re WALTHER'S WILL.**(Surrogate's Court, New York County. September 9, 1889.)***WILLS—MENTAL CAPACITY—EVIDENCE.**

On petition to revoke the probate of a will, petitioner's evidence showed that decedent signed the instrument; declared, on its being read to her, that it was her will; and requested her brother and brother-in-law to become witnesses. The will was executed while decedent was suffering from a painful malady, which in a few hours caused her death, but was signed plainly and legibly. Decedent prefixed "Mrs." to her name, which appeared to be an unusual thing for her to do. Her husband was made sole legatee. It appeared that decedent had, during the night before, several times expressed an opinion that she was about to die, and desired to make her will, and gave directions as to her funeral, etc. She knew the draughtsman of the will when he came into her room, told him that she wanted to leave everything to her husband; and said, "Yes," on his reading it to her, and asking if it was right. Witnesses testified that, on being told not to forget her child, decedent said that she wanted her husband, with whom she lived on affectionate terms, to have everything, and that he would care for the child. On signing the paper, she asked that the blinds be raised so that she could see where she was writing. She said that she wanted to have matters "in black and white," so that there would be no trouble when she was gone. *Held*, that decedent was mentally competent.

On petition to revoke probate of the will of Henrietta Walther, deceased. *Booraem, Hamilton & Brackett*, for petitioner. *Henry F. Lippold*, for executor.

RANSOM, S. The will of the decedent was executed on the 5th day of February, 1888. A petition for its probate was filed by her husband, William Walther, who is the executor and the sole legatee. Late in April, 1888, the subscribing witnesses, Charles Riederer, the husband of a sister of the decedent, and Charles Regnault, the decedent's brother, appeared before the probate clerk of this court, and made formal depositions showing the due execution of the will, on which the paper was admitted to probate. On the 1st day of February, 1889, the special guardian of the infant son of the decedent filed a petition for the revocation of probate, alleging the mental incompetency of the decedent, that the paper was not executed according to law, and that its alleged execution was procured by fraud and coercion. The contestant offered no proof to sustain the last allegation. Eight days previous to the preparation and execution of the instrument, the decedent was taken ill with pneumonia. She grew worse. Early in the morning of February 5th her husband notified decedent's brothers, who reside a few blocks away, of her impending death. Later, about 8 o'clock, Mr. Lippold, an attorney, was summoned, and the paper in question was drawn and executed. About 2 o'clock in the afternoon the decedent died.

The sole question to be considered is the decedent's mental competency when she signed the will. I shall first consider the testimony of the witnesses for the petitioner, and among them I must include that of her brother Charles Regnault, one of the subscribing witnesses, who manifestly favors the revocation of probate. He arrived with his wife at the apartments of the decedent between 6 and 7 o'clock in the morning, and found her very ill, with the physician at her bedside. After the physician left, Mr. Regnault went into the decedent's bedroom, and told her that he hoped that she would be better, but she made no reply. Subsequently, Mr. Lippold came in, and said to the decedent: "Good morning, Mrs. Walther. I am sorry to see this." Then Mrs. Riederer and Mr. Riederer told Mr. Lippold that they wanted him to draw a will leaving her property to her husband, and Mr. Regnault states that Mr. Lippold had no further conversation that he heard. Lippold went into the dining-room, between which and the bedroom were open folding doors, drew the will, returned to the bedroom, read the paper to the decedent, and asked her whether it was her last will and testament, and whether it was right, and, getting no answer, he repeated the question, and the decedent

faintly said, "Yes." Lippold then asked her who it was that she wished as witnesses to her will, and decedent looked up, and answered in a very low tone, "My brother Charlie." He then asked her who was to be the other witness, and she looked and said, "My brother-in-law Riederer." The decedent was then lifted in bed, pillows were placed behind her, a book was laid on her lap, and a pen given her; but, before she signed, her brother Philip Regnault called her attention to the fact that she was making no provision for her son, to which the witness states she made no reply. He then whispered to Philip not to interfere. The decedent signed the will, after which Mr. Regnault says Lippold asked Mr. Riederer and himself, in the presence of the decedent, to sign as witnesses, and they did so on the foot of the bed. Mr. Lippold then asked the decedent what she wanted to do with the will, and he repeated the question, and said, "Shall I put it in my safe?" and the decedent nodded. Lippold took the paper, and left the apartments a few minutes after, being accompanied by the two brothers Regnault and the proponent, Mr. Walther.

Miss Miller, a trained nurse from the German Hospital, who had charge of the decedent during the days of her sickness, arrived on Sunday morning about 8 o'clock, relieving the night nurse. She testifies that the decedent signed the will after it was read aloud to her by Mr. Lippold, but that she did not hear her utter a word from 8 o'clock until she died, and she did not hear anything Mr. Lippold said, nor did she see either of the witnesses sign, she being engrossed in her duties with the patient. But, on further questioning, she recollected that Philip Regnault interfered, stating that the decedent should think of her child, and that decedent said she wanted to give her property to her husband, and Mr. Walther said he would take care of the child. At first she thought that this occurrence took place on the evening before, but she coupled the statement of the decedent that she desired the property to go to her husband with Philip's interference. As it is not claimed that Philip's remark occurred at any time except at the execution of the will, it is manifest that the two events took place that morning, as testified to by other witnesses.

Mrs. Regnault, the wife of the subscribing witness, states that after the doctor had left the apartment, a little after 7 o'clock on the morning of her visit, she went into decedent's room, and told her that she felt sorry that she was so sick, and hoped that she would be all right again; and decedent then said, in a very weak tone of voice, that she wished it was all over. She heard Mrs. Riederer say something about the will when near the decedent, and that she wanted it in black and white; but she did not hear decedent say anything other than the statement that she wished it was over. When Mr. Lippold came, he said: "Good morning, Mrs. Walther. I am sorry to see this." Then Mrs. Riederer told him that the decedent wanted to make a will, and Mr. Lippold sat down in the dining-room and wrote it; and when it was completed he took it to the decedent's bedside, and said: "I am pretty sure you will get through this. This is a matter of form;" and either before or after the remark—the witness does not state definitely which—he asked her if she acknowledged the paper to be her last will and testament, and she answered, "Yes." Then her brother Philip Regnault came forward, and said: "Here's where I come in. Hattie, are you not going to think of your child?" Decedent looked at him, but made no answer. A book was then put before her; a pen was dipped for her, and she wrote; and the pen was again dipped, and she, with apparent difficulty, appended her signature. Mr. Lippold then asked the decedent who she wished to be her witnesses, and the decedent then replied, in a very faint tone of voice, "My brother Charlie and my brother-in-law Riederer." Then Mr. Riederer and her brother signed the paper as witnesses. Mrs. Regnault further states that, after Mr. Lippold left, the decedent did not speak unless spoken to, and she answered, "Yes," and her voice

was very low and weak. She remained until about 12 o'clock, and did not hear the decedent say anything more about the will.

Philip Regnault testifies that, when Mr. Lippold came into the room in the morning, he said, generally, "Good morning;" and then Mr. and Mrs. Riederer told Lippold that the decedent wanted to draw up a will leaving everything to her husband. Mr. Lippold went to the foot of the bed, and said, "Good morning, Mrs. Walther," and then seated himself at the table in the dining-room, wrote the will, came back to the foot of the bed, and read it to the decedent, and, after reading it, asked her whether she declared it to be her last will and testament. There being some hesitation in replying, he again put the question to her, and she answered, faintly, "Yes." The witness states that he then stepped to the foot of the bed, and told the decedent that there was nothing in the will providing for her boy, and that she made no reply. His brother Charles pushed him aside, and said that that was not the proper time to interfere. Then Mr. Lippold asked the decedent whom she wanted for witnesses, and, getting no reply, he asked her again, and the decedent pointed to Charles Regnault and Mr. Riederer. Further on in his testimony, he intimates that she mentioned their names. The decedent then signed the paper with difficulty, the pen being dipped twice in the ink for her, and then the subscribing witnesses signed. Mr. Lippold asked the decedent if she would keep the paper, or if he should put it in his safe. Witness did not hear her make any reply, and Lippold put it in his pocket, bade the decedent good-bye, and left with the others. The witness returned in 20 minutes or half an hour, and he did not hear the decedent say anything after his return, though she might have spoken in such a low tone of voice that he could not have heard it in the dining-room.

The petitioner's proofs clearly show a signing of the instrument, a declaration by her that it was her will, and a request that the subscribing witnesses attest its execution by their signatures. As the paper was read to her, she must, if conscious, have known its directions in respect to the disposition of her estate. That she signed it in plain, legible, and strongly written hand, in view of her weakened condition from a distressing malady that in a few hours caused her death, is manifest by an inspection; and that the signing was not a merely mechanical act, without consciousness of what she was doing, (as often happens in the routine of business, where persons sign their names many times during a day,) is apparent from the fact that she did not simply write her name, but prefixed the abbreviation "Mrs." showing a knowledge of her relation to the legatee. And, as the witnesses say this was an unusual thing for her to do, it is an evidence of thought on her part which accompanied the signing, and is conclusive, to my mind, that she was conscious of the nature of her act, and, with the other proofs, that the paper was a reflection of her testamentary wishes. But, if any doubt be claimed to exist in respect to her knowledge of the contents of the will, and of the successive steps taken in its preparation and execution, it is removed by the respondent's proofs.

Mrs. Riederer states that she was with the decedent at 2 o'clock on Sunday morning, and heard her state to her husband, Mr. Riederer, that she was going to die, and she told her that she wanted to make her will, and that her brother, Mr. Charles Regnault, should be called. About that time she told Mrs. Riederer, in the presence of the night nurse, Mrs. Brueggen, that Mrs. Riederer's daughter should have her piano and her wedding dress, Mrs. Brueggen her black cashmere dress, and Mrs. Riederer her diamond ear-rings; and she stated the kind of dress she wanted her body in, how long she wished to be on ice, and that Mrs. Riederer should see that she had a very nice funeral. At 4 o'clock she said to them that she was going to die; that her heart was broken that she must leave her little boy. At 5 o'clock, Mrs. Riederer's children were taken to the bedside, and she spoke to each of them, and bade

them good-bye. When her own child was brought to her, she did not say good-bye to him. She said she knew she was very young, and she would like to live; that when she should die, Mrs. Brueggen (who had attended her as nurse, on the birth of her children) should take care of Mrs. Riederer when sick. When, between 5 and 6 o'clock, Charles Regnault arrived, the decedent told him that she was going to die, and, upon his seeming to make light of her apprehensions, she said again that she would die, and that she wanted to make her will. When Mr. Lippold arrived, he asked the decedent if she knew him, and she said: "Yes; you are Mr. Lippold." When asked whether she wanted her will made, she told Mr. Lippold that she wanted to leave everything to her husband; and when the will was read he asked the decedent if it was right, and she said, "Yes." She further testifies that, when Philip Regnault asked the decedent not to forget that she had a child, the decedent said, in a decided tone of voice, that she wanted everything that she had to go to her husband. Then Lippold asked who she wanted to act as witnesses, and she said her brother Charles and Mr. Riederer. During the morning she said to her brother Charles that her father was buried nine years before on the same day, and that this was the last day she should be here. About 12 o'clock, on learning that the girl intended to make a fire in the front room, the decedent told her not to light it, as she would not live until that evening. Five minutes before she died, Mrs. Riederer was called up, and she asked the decedent how she felt, and she replied that she was in great pain.

Mr. Riederer testifies that when he arrived, between 5 and 6 o'clock in the morning, he asked decedent how she felt, and whether she was any worse; and she replied: "I am going to die." He suggested that her case was not so bad; and she said there was no doubt she was going to die, and wanted to make her will,—wanted to have everything in black and white. He asked how she intended to make it, and she said she was going to leave everything to her husband. When asked if she did not wish to leave anything to the child, she said no; that her husband would take care of him. She also said to Riederer that the paper was going into court; and to avoid any trouble in the family with her husband, and that he should get the money, she was going to have it in black and white before she died. He further states that no one in his presence, except the decedent, made any suggestions as to what should be in the will. She spoke of suffering great pain, and asked the physician when he came for something to stop it. He also testifies to the fact of decedent's bidding good-bye to his children, and shaking hands with her boy, but not saying anything to him, apparently because her feelings were overcome. Lippold asked the decedent in whose favor the will should be made, and she replied that everything should be for her husband; and after the will was written, and was read by Mr. Lippold to the decedent, in response to a question she expressed her satisfaction with its contents. When she was about to sign, she requested Mr. Riederer to raise the blinds so that she could see where she was writing, and she began writing her name, and as there was not enough ink in the pen she took more, and finished the signature. This fact is apparent from an inspection of the paper, for the last name is in heavier lines. About 12 o'clock in the day the decedent again complained of suffering great pain, and asked the physician to give her something to relieve her, saying that she could not stand it any longer, and wanted to die. A few minutes before her death, at 2 o'clock, Mr. Riederer asked her if she had the pains yet, and she replied it was worse and worse, and she could hardly stand it.

Mrs. Brueggen, the night nurse, left at 8 o'clock in the morning, as Mr. Lippold arrived at the house. At 12 o'clock the preceding night, decedent asked her to close the doors between the bedroom and the dining-room, where her husband was lying on the lounge, stating that she had something to say. She then told Mrs. Brueggen that she had had a dream, and had seen her father and mother, and she knew that she was going to die. Mrs. Brueggen expressed a

doubt, but she reasserted her belief, and stated that she wanted to have her will made, and then suggested the same disposition in respect to the piano, her dresses, and her diamond ear-rings as stated by Mrs. Riederer in her testimony, and said all the rest of her property should go to her husband. Mrs. Brueggen told her that she should not forget her child, and decedent said that, if the child should live, her husband would take care of him. When Mrs. Riederer came into the room, at 2 o'clock, Mrs. Brueggen says that the decedent again stated that she was going to die, and that she wanted to have matters in black and white on paper, so that there should be no trouble when she was gone.

The testimony of Mr. Lippold, the attorney, has not been considered by me. No doubt, in some particulars, it is competent, but the due execution of the will is established by other testimony.

Nothing is disclosed in the record of proofs to lead me to doubt that the decedent, at the time she executed the will, fully understood the nature of her estate, the claims upon her of her child and her husband, and that her expressed wish that her property should go to her husband, (with whom the testimony shows she lived on terms of affection,) in full faith that he would take care of the child, was in accordance with an intelligent and well-considered purpose; for it appears by the testimony of Mrs. Riederer that, a fortnight before her death, the decedent stated to her that as soon as she got the money that belonged to her from her mother's estate she should draw a will leaving everything to her husband. Whether the disinheritance of her child, and the trust she reposed in her husband, was wise, or warranted by prudent foresight, it is not for me to say. Holding, as I do, that she possessed, at the time, mental competency, and was not under restraint, she had a right to do as she pleased with her own. A decree denying the petition for the revocation of probate may be submitted.

SIDWAY v. SIDWAY *et al.*

(*Supreme Court, General Term, Fifth Department. October 19, 1889.*)

1. MORTGAGES—IN FORM OF ABSOLUTE DEED—EVIDENCE.

In an action by the grantor's widow to have an absolute deed declared a mortgage, it appeared that defendant loaned the grantor some money, and that thereafter, for a nominal consideration, he executed the deed in question to defendant. There was no written evidence of the loan. The evidence showed that the loan represented a fair market price for the premises, and the only direct evidence that the deed was to be treated as a mortgage was that of plaintiff, who testified that before the loan defendant told the grantor she would loan him the money on security of the premises, and that when he paid her back he could have a release; and that on another occasion defendant told him that he could have the money on security of the property, but grantor did not signify his assent to those remarks. Plaintiff also stated that her husband and defendant had much business together which was not transacted in her presence, and about which she knew nothing. Another witness made contradictory statements as to the import of conversation she overheard relative to the subject, and defendant denied making the statements testified to by plaintiff. *Held*, that the deed would not be declared a mortgage.

2. WITNESS—COMPETENCY—TRANSACTIONS WITH DECEDENTS.

Defendant's evidence as to such statements was admissible under the exception of Code Civil Proc. N. Y. § 829, providing that a party interested in an action shall not be examined as a witness in his own behalf against a person deriving his interest or title from a deceased person, concerning a transaction or communication between the witness and the deceased person, except where the person so deriving interest or title is examined in his own behalf.

3. SAME—PRIVILEGED COMMUNICATIONS—HARMLESS ERROR.

Though the testimony of the grantor's counsel, that the grantor told him that he had a great deal of money from defendant, and requested him to prepare the deed, may be a disclosure of a privileged communication, its admission is not prejudicial to plaintiff.

4. TRIAL—FEIGNED ISSUES—EFFECTS OF FINDINGS.

Though the findings on feigned issues, submitted to the jury, if adopted, would entitle plaintiff to the relief demanded, the judge who presided at the trial may, on trial at special term, disregard such findings and find for defendant.

Appeal from special term, Erie county.

Action by Isabel Sidway against Eliza D. Sidway and others. The action was to reform a deed conveying certain premises located in the city of Buffalo in fee to the defendant Eliza D. Sidway, and to have the same declared a mortgage, to secure the sum of \$5,000, and to allow the plaintiff, who claims to be the present owner of the fee, to redeem the premises therefrom. The deed was made and executed on the 14th day of April, 1884, by William J. Sidway and the plaintiff, his wife, to the defendant Eliza D. Sidway, who was the mother of the said William J., expressing a consideration of one dollar only. At that time the grantor, William J., was the owner of the fee, having derived his title as the sole heir at law of his deceased father, John J. Sidway, subject to the unmeasured right of dower of the defendant, who is the widow of the said John J. Sidway. The premises are located in the business part of the city of Buffalo, and were in part occupied as the residence of the parties to the deed, the first floor being rented to third parties as a place of business. The value of the premises at the time the deed was executed was found by the court to be \$20,000, subject to a mortgage in amount about \$18,000, and the value of the widow's right of dower was estimated by the court to be \$735. After the deed was delivered the parties continued to reside on the premises, living together as one family, until the death of William J., which occurred in June, 1885. At that time the plaintiff was pregnant with child, that was born alive, and died a few days thereafter, and the plaintiff claims title to the premises as its sole heir at law. Special issues were framed to be tried by a jury, which embraced all the material questions of fact in dispute, all of which were answered by the jury in the plaintiff's favor, and, if they had been adopted and embraced in the decision of the court, would have entitled the plaintiff to the relief demanded. Thereafter the trial of the action was moved at special term, held by the same justice who presided at the trial before the jury, and the plaintiff, to maintain the issues on her part, offered in evidence a duly-certified copy of the findings of the jury, together with all the evidence taken upon that trial, which was read and submitted to the court, and thereupon the plaintiff rested, and the defendant offered no evidence. The special term made and filed a decision, passing upon all the material issues, and found and held as a matter of fact that on the 12th day of April, 1884, the decedent, William J. Sidway, and the plaintiff herein, executed and delivered to the defendant Eliza D. Sidway a quitclaim deed of the lands and premises in payment and discharge of the loan of the sum of \$5,000, made by the said Eliza to the said William J., in March, 1884, and that there was no understanding or agreement that the said deed was given as a security for the said loan, and that a fair market price was paid for the premises. The plaintiff made requests that the court make findings of fact in conformity to the verdict of the jury, which was refused, and the plaintiff appeals.

Argued before BARKER, P. J., and DWIGHT and MACOMBER, JJ.

George T. Quinby, for appellant. *William L. Marcy*, for respondents.

BARKER, P. J. The judgment is to be reviewed on this appeal the same as if the trial had been by the court without the intervention of a jury. Where feigned issues have been sent to a jury for trial, the court may adopt the verdict and find the facts in accordance therewith, or may disregard it and make its own findings, and when the case comes up on appeal it is to be reviewed on the findings and decision of the court as if there had been no submission of any question of fact to a jury. *Collie v. Tift*, 47 N. Y. 119; *Acker v. Leland*, 109 N. Y. 5, 15 N. E. Rep. 743; *Carroll v. Deimel*, 95 N. Y. 252. The court may retry the same questions on the evidence taken on the trial before the jury, or proceed *de novo*, and require the parties to produce original proofs. At the special term the plaintiff submitted the case on the

special findings of the jury and the evidence taken on that trial. The same judge presided on both trials. Although no formal order appears to have been made setting aside the verdict, it was wholly disregarded at the special term, and there was a refusal to incorporate in its findings of fact any of the facts found by the jury. These rulings have the effect of setting aside the verdict, and retrying the case on the evidence taken on the trial on the special issues. The learned trial judge was not satisfied from the evidence that the conveyance was intended as a mortgage to secure the grantee for the loan of money made by her to the grantor a few days prior to the execution of the deed. This was the plaintiff's position, and the burden of proof was upon her to sustain the allegation.

It seems now to be well settled that if at the time the deed is delivered for the conveyance of land in fee, it is intended by the parties thereto as a security for a loan of money, or of a pre-existing debt, the fact may be proved by parol evidence, although no fraud or mistake is alleged as a ground for relief. If the transaction was in substance a loan of money, upon the security of the premises, equity will look through the form of the conveyance and declare it to be a mortgage, that the intention of the parties may prevail. This doctrine is so uniformly declared by the courts that it is no longer open for discussion, at least in the courts of this state. The parol evidence, however, upon which the grantor relies to establish that a deed executed by him, absolute in terms, was intended only as a mortgage, must have the force and conclusiveness not required on the trial of ordinary issues. The power of the court to reform such a deed on parol proof, and declare it to have been executed simply as a security for the payment of a debt, is to be exercised with the greatest caution, and only when the alleged grounds of interference are fully made out so as to be clear from doubt. *Campbell v. Dearborn*, 109 Mass. 180. As many of the cases state the rule, the evidence must be clear, explicit, unquestioned, and satisfactory. *Erwin v. Curtis*, 48 Hun, 292, and the cases there cited. We repeat the rule as stated by another tribunal, whose judgment commands the highest respect, (*Howland v. Blake*, 97 U. S. 626,) viz.: "In each case, the burden rests upon the moving party of overcoming the strong presumption arising from the terms of a written instrument. If the proofs are doubtful and unsatisfactory, if there is a failure to overcome this presumption by testimony entirely plain and convincing beyond reasonable controversy, the writing will be held to express correctly the intention of the parties. * * * A deliberate deed or writing are of too much solemnity to be brushed away by loose and inconclusive evidence." We are all of the opinion that this presumption is not overcome by satisfactory and convincing evidence, and we fully concur with the trial court that the evidence is not of that strength and character which the law requires in this class of actions, and that it would be unsafe to rely upon such proofs, and if the plaintiff's demand should be granted, on the evidence produced by her in the case, titles to land, in this state, would be very insecure and uncertain. It is admitted by the defendant that the grantor, her son, was engaged in erecting works for manufacturing purposes, and on the 22d day of March, 1884, she loaned him the sum of \$5,000 to aid him in that enterprise. The deed in question was executed and acknowledged on the 12th day of April the same year. The defendant claims that this deed was executed in satisfaction of that debt. It does not appear that the grantor (the borrower) ever delivered to the grantee any written evidence that he was indebted to her for the money loaned, or that she ever made any claim against the borrower or his estate, on account of such loan. The trial court also found that the defendant paid a fair market price for the premises, and this conclusion is well supported by the evidence. In a case where there is no considerable difference between the market price of the premises conveyed and the sum which it is claimed that the deed is intended to secure, it is a significant circumstance as indicating that the intention of the parties is manifested by the

character of the conveyance. Without the aid of the plaintiff's own evidence, the plaintiff's case would be left in so much doubt and uncertainty as to the intention of the parties that her complaint would have been dismissed for failure of proof. It is enough to say that the only direct evidence of an agreement by the defendant, that the transaction be treated as a mortgage, is that of the plaintiff herself. Many of the cases hold that upon the unsupported testimony of an interested witness a decree declaring a deed absolute in terms to be only an instrument for the security of a debt cannot be sustained. In other cases it is held that where the evidence of a party rests chiefly in the testimony of one witness, and that is disputed by a witness of equal credibility, a case for relief is not made out. The plaintiff does not pretend that she was present, and heard the preliminary negotiations between the parties relative to the making of the loan, and how it was to be secured or repaid, but her evidence is confined to a mere statement made by the defendant to the decedent that she was willing to make the loan to be secured on the premises. The material part of her evidence is very brief, and is to the effect, and nothing more, that some days before the deed was executed, when she and the other parties were at the dinner table, defendant said: "Willy, [the grantor,] I will let you have the \$5,000 if you and Bell [the plaintiff] will give me security on this building. I don't care how long you have the money, and you can have it without interest, but when you pay back the money you can have a release of the property." On another occasion, before the deed was executed, the same parties being present in the house of the defendant, she said: "You know, Willy, you are to have the money. Arrangements have been made for the same. But you are to give me security on this building." Accepting this evidence as entirely truthful, it is obvious that the statements made by the defendant on the occasion to which the witness refers do not include all the negotiations had between the parties relative to the loan, and the mode and manner agreed upon for its repayment. To these remarks, evidently casually made, William J. Sidway, the grantor, made no reply, and it cannot be fairly inferred from his silence that he assented to the proposition. The plaintiff makes a very significant confession, and which cautions the court not to rely upon her evidence as disclosing all the features of the transaction, for she says the defendant and her husband had a considerable business together, which was not transacted in her presence, and that she knew nothing about their affairs, as they did not talk business in her presence, and did not want her to know anything about it. It would be very inconsiderate for a court to hold from the evidence of the plaintiff that the terms of the loan, and the mode and manner agreed upon for its repayment, were arranged between the parties upon the occasions mentioned by the witness. If we are not able to say that all the negotiations between the parties relative to this transaction have been disclosed in this item of evidence, given by an interested witness, then it cannot be said that it has been clearly and satisfactorily established that the deed was intended as a mortgage, and not as an absolute conveyance of the fee of the land. While we cannot entirely push aside the evidence of the servant, who claims to have heard some conversation between the parties relative to this subject, we think it has slight, if any, probative force, as it appears that she has made contradictory statements as to the import of the conversation which she attempted to relate. The plaintiff's evidence is to be scrutinized and received with great caution, for she is the only party interested in securing the release demanded. The defendant, as a witness in her own behalf, denies that she ever made the statements testified to by the plaintiff. As has already been stated as a general rule, a deed is never reformed into a mortgage on parol evidence where the same is disputed by other witnesses equally credible.

It is proper, in this connection, to consider another of the plaintiff's exceptions. The defendant's evidence, just referred to, was received over the plain-

tiff's objection, that she was incompetent as a witness to dispute the plaintiff's evidence under the provisions of section 829.¹ The defendant was a party to the conversation, and is also interested in the result of this action. But the defendant was a competent witness, within the exception of the statute, to testify on her own behalf, to the same conversation testified to by the plaintiff, who claimed title under and through William J. Sidway. It may be remarked that the evidence of the plaintiff, relative to the conversation between the defendant and her grantor as to the loan and the character of the conveyance, was not competent, as she claims title in fee to the land through William J. Sidway, her late husband, and can only succeed in this action by showing that the deed, to which she is herself a party, was intended as a mortgage. The defendant claims title through the same source; but as the evidence was received it must be considered competent for the purposes of this appeal. The case of *Ensign v. Ensign*, 14 N. Y. St. Rep. 181, has been referred to and commented upon as an authority in support of the appellant's contention that the evidence was sufficient to justify the court in reforming the deed. In that case we stated the rule in the precise language in which it has been stated in this, citing *Erwin v. Curtis*, *supra*, with approval. The majority of the court in that case were of the opinion that the parties to the action, both of whom were sworn as witnesses, substantially agreed in their statements as to the nature and character of the parol agreement entered into at the time the deed was executed, and sustained the judgment entered upon the report of the referee, who found as a fact that it was the intention of the parties to have the conveyance operate as a security for the money advanced and to be advanced.

The defendant called and examined as a witness Mr. Gorham, who was the general counsel for the grantor, and it is claimed that he was permitted to testify to a confidential communication made to him relative to the object and purpose of executing the deed, in violation of the provisions of section 835 of the Code of Civil Procedure. The substance of the statement made by the grantor to Mr. Gorham, as testified to by him, was that he had had a great deal of money from his mother, and that he had agreed to give her a conveyance of the property, and requested him to prepare the deed. The point of the objection is that this was proving the grantor's statement that he was to give her a deed absolute in terms, which tended to support the defendant's contention. We need not, in view of the plaintiff's position as stated in her complaint, pass upon the question whether this was a privileged communication or not, for it is her position that the deed was to be absolute in terms, but by an arrangement between themselves it should operate only as a mortgage. The plaintiff does not claim that there was any fraud or mistake in executing the deed in the form in which it was delivered, and relies wholly upon the contemporaneous parol agreement, that in its operation it should be regarded as a security only. Therefore the evidence which Mr. Gorham was permitted to give was not contradictory in any respect of the position assumed by the plaintiff, and the evidence could not have harmed her case in the least, and the exception should not prevail. All the other exceptions have been considered with attention, and we see no sufficient reason for reversing the judgment. Judgment affirmed, with costs. All concur.

¹ Code Civil Proc. N. Y. § 829, provides that a party interested in an action shall not be examined as a witness in his own behalf against a person deriving his interest or title from a deceased person concerning a transaction or communication between the witness and the deceased person, except where the person so deriving interest or title is examined on his own behalf.

LEE v. VACUUM OIL CO.

(Supreme Court, General Term, Fifth Department. October 19, 1889.)

1. NUISANCE—NAPHTHA PIPE LINE.

Defendant was engaged in the business of supplying a gas-light company with naphtha, by pumping it through pipes laid along an abandoned canal and under the streets of a city. The pipe was in good order, and safe, and there was no evidence of leakage from the pipe, or that any gas escaped therefrom. Naphtha was allowed to stand in the pipes when the pumps were not in use. A New York statute authorizes the constructing and operating, for public use, lines of pipe for conveying petroleum, etc. *Held*, that defendant's pipes did not constitute a nuisance.

2. NEGLIGENCE—INSTRUCTIONS—ERRORS CURED.

In an action for injuries caused by an explosion of the naphtha, an erroneous instruction that the jury should determine whether defendant maintained a nuisance, and also any error in a ruling of the court as to whether defendant was guilty of violating the laws regulating the storage and keeping of crude petroleum, were not prejudicial, where the jury found that defendant was guilty of actual negligence so as to entitle plaintiff to recover.

3. SAME—FACTS FOR JURY.

The evidence showed that third persons had caused a break in the pipe by which the naphtha escaped into a sewer, and caused the explosion; that one of defendant's servants attended the pumps and another the receiving tank, the exact time when the pumps should be started having been agreed on; that the latter servant waited over two hours after the time agreed on, but there was no discharge into the tank; and that he did not during that time inform the man at the pumps, though a telephone connecting the two places might have been used. *Held*, that an instruction that if, at a time when the man at the tank should reasonably have been required to give notice that there was no discharge, enough naphtha had escaped into the sewer to cause the explosion, the failure to report was not negligence such as to authorize a verdict for plaintiff, was properly refused, as the jury should determine the negligence from all other facts in evidence as well as from this one.

4. SAME.

An instruction that if the sole cause of the accident was the breaking of the pipe by third persons, without notice to defendant or any co-operating negligence on the part of defendant, plaintiff could not recover, was properly refused, as plaintiff sought to recover on the ground that defendant was negligent in not discovering the break after it was made.

Appeal from circuit court, Monroe county.

Action by Ann Lee against the Vacuum Oil Company. Plaintiff is the administratrix of the estate of John Lee: deceased, who died on the 21st day of December, 1887, in consequence of injuries he received that day by the explosion of gas in a building in which he was employed as a laborer, by the occupant. It is alleged that his death was caused by the negligence of the defendant, and it is claimed that it is liable for such damages as the next of kin of the deceased have sustained in consequence of his death, as provided in sections 1902 and 1903 of the Code of Civil Procedure. Judgment for plaintiff, and defendant appeals.

Argued before BARKER, P. J., and DWIGHT and MACOMBER, JJ.

Theodore Bacon, for appellant. William F. Cogswell, for respondent.

BARKER, P. J. The defendant is engaged in the manufacture of oils from crude petroleum. In the process there is produced a fluid substance, called "naphtha," which, at the low temperature of 13 deg. Fahrenheit, gives off vapor, or gas, which is inflammable, and explosive when confined. Its explosive power is estimated to be equal to 140 pounds to the square inch. The defendant's works are located in the city of Rochester, on or near the bank of the abandoned Genesee canal. The Municipal Gas Company is engaged in the manufacture and distribution for consumption of illuminating gas, consumed in the city of Rochester. Its works are also situated on the banks of said canal, nearly a mile and a half north of the defendant's works. The latter company use naphtha in the manufacture of gas, consuming each month about 30,000 gallons, and the defendant supplies the same. Each company stores such quantity as it may have on hand in iron tanks. The

naphtha sold by the defendant to the gas company is transported from its tanks to the gas company's tank by pumping it through a three-inch wrought-iron pipe. The grade on which the pipe is laid is such that naphtha will not flow to the gas company's receiving tank by force of gravitation. The pipe is laid in the bed of the canal, and passes under Atkinson street and under the Atkinson-Street bridge, which crosses the canal. At that point the pipe is laid within a few feet of the street sewer, which connects with other sewers, running in a northerly direction, and at some distance, and discharges into the Genesee river under the building destroyed by the explosion. The sewer passing under the building was open, so that gas could escape into and be distributed through the same. Naphtha was delivered to the gas company, for the purposes mentioned, every two weeks, and from twelve to fifteen thousand gallons at each delivery, taking from three to four hours to pump that quantity through the pipe. During the intervening time the pipe was filled with naphtha, the quantity being about 2,000 gallons. The defendant had acquired the consent of the parties owning the bed of the canal to lay the pipe therein for the uses and purposes for which it was intended. A steam railroad track was also laid along the bed of the canal, and the pipe in question was laid by the side of, and in some places under, the said track. No time will be taken to prove that the business of transporting naphtha by the means adopted, from and to the place mentioned, and on the line adopted, was a lawful business, for that proposition cannot be reasonably disputed. The means adopted to transport this substance from one point to another is practically the same as the system in use for distributing illuminating gas, produced from coal, in all cities where it is used, and the danger to life and property in the aggregate are no greater, if they cannot be said to be less. The legislature has authorized the formation of corporations for "the purpose of constructing and operating, for the public use, lines of pipe, for conveying or transporting therein petroleum, gas, liquids, or any products or property," and such corporations may lay pipes across and along public streets and highways, and institute proceedings to condemn lands, and acquire the right to lay and construct lines of pipe when they are unable to negotiate for that privilege with the owner. This law was not enacted for the purpose of making legitimate a business which prior thereto was condemned as unlawful, and contrary to public policy. The chief purpose of this act was to provide for the creation of corporations, to carry on a lawful business in a manner and by the means which theretofore were proper and lawful for any individual or company of persons to do, using due care in the management of the same.

The real question presented is, was the evidence sufficient to sustain the charge imputing negligence to the defendant in the mode and manner of laying the pipe, or in neglecting to inspect the same to see if it remained in a safe and secure condition, or in failing to detect that it was broken and unfit for use, on the day the accident occurred, in time to have prevented the escape of naphtha in such quantities as to become dangerous to life or property. The pipe was constructed from prime material by an approved process by manufacturers of experience, and had sufficient strength for the transportation of naphtha, and was well adapted for that use between the places mentioned, under the pressure applied for pumping, and was well laid and properly covered with earth. It had been in use several years, and there is no evidence that its original strength had been wasted in any perceptible degree by use. The test which was made after the accident of the section of the pipe which was broken fully sustains this statement. The last time the pipe was used before the accident was on the 7th day of December, 1887, on which day about 12,000 gallons of naphtha was successfully pumped through the pipe without any indication that the same was not in perfect order. There is no serious claim made by the plaintiff that the pipe was not in good order, and safe for use,

on that day. The question of the defendant's negligence is to be determined mainly by what occurred after the day named, in connection with the charge made, that the defendant's agents and servants in charge of the line failed, by reason of their carelessness and indifference under the circumstances, to discover that the line was broken, so that all the oil pumped was discharged and wasted. On and prior to the said 7th day of December the city was constructing a sewer in Atkinson street, which was intended to connect with the then existing sewer which passed under the bridge which carried Atkinson street over the canal. The contractors constructing the sewer in their operations exposed a section of the pipe for several feet, and in blasting rock a fragment struck the pipe, and bent it at that point, which resulted in breaking or pulling it apart at one of the joints, so as to discharge, near the sewer, all the naphtha that was in, or might be pumped into, the pipe. This occurred on the 8th of December, one day after the pipe was last used for transporting naphtha to the gas company's tank. The soil at or near where the pipe was broken was such as to permit of a ready flow of naphtha between the broken end of the pipe and the sewer. Each way from the place of fracture the pipe was laid on an ascending grade, so that its contents at once discharged, but it is not claimed that any of the naphtha which was in the pipe, and which must have escaped immediately after the break, caused the explosion. The defendant's servants made no inspection of the line between the 7th day of December and the day of the accident, which was on the 21st day of the same month, for the purpose of ascertaining if it was in good order, and suitable for use, nor had it been its custom to make an inspection for that purpose. On the day of the accident the defendant had an order from the gas company to deliver to it 15,000 gallons of naphtha. Wilson and Sweeny, two of the defendant's servants, who had charge of the pumps and the pipe line, undertook to make the delivery. As it was customary with them, they agreed upon the precise time when the pumps should be started, which, on this occasion, was 10 minutes past 12 M., and time enough was allowed to permit Sweeny to go from the defendant's works to the gas company's tank, and measure the quantity of naphtha which was then stored therein, and to open the stop-cocks before the time for starting the pumps should arrive, as agreed upon. Sweeny did reach the receiving tank and opened the stop-cocks before Wilson started the pumps, which he did at the time agreed upon, and he continued to operate the same until he had pumped into the pipe 12,000 gallons, which took about two hours and a half, before he was notified that the pipe was broken, and none of the oil reached the receiving tank. Sweeny remained at the receiving tank for two hours and twenty minutes, watching all the time to see if the naphtha came, and, as none was received, he then notified an officer of the gas company, who immediately, by telephone, notified the defendant's business office that no naphtha was being delivered, and the pumping was immediately stopped. About an hour thereafter the explosion took place. It does not distinctly appear how soon after the pumping commenced the naphtha reached the sewer, but gas was evolved from naphtha running in the sewer as early as 1 o'clock, and the several explosions took place, including the one in the building where the deceased lost his life, as early as about 3:30 o'clock in the afternoon. In view of the danger likely to arise to life and property from the use of a broken or defective pipe, in the locality where this was laid, so that naphtha in considerable quantities might escape, a case was made for the consideration of a jury, with proper instructions as to the rules of law applicable to the case. When safety of human life is in question, a very high degree of care is required in conducting a lawful business. If naphtha in large quantities should be discharged at most any point on the line of the pipe it would be highly dangerous to property situated in close proximity thereto, and also to occupants of buildings in the immediate vicinity, as well as to individuals passing on the public streets. The

learned trial judge instructed the jury in substance that the transportation of naphtha, by means of a pipe located on the line selected, was not, as matter of law, a nuisance, but it was for them to determine, from all the evidence in the case, whether it was a nuisance as a matter of fact, and, if they came to the conclusion that it was a nuisance, then the defendant was liable for any damage which came from the explosion, without regard to the question whether the defendant was negligent or not. In this connection he also instructed the jury that, if they came to the conclusion that it was not a nuisance, it did not necessarily follow that the plaintiff had failed to maintain a cause of action. We are unable to discover in the facts, about which there is really no dispute, those elements of danger which justified the court in submitting the case to the jury, for them to determine whether or not, as a matter of fact, the defendant was guilty of maintaining a nuisance by transporting naphtha through the pipe, or by leaving the pipe full of the same material when the pump was not in use. The pipe was in good order, and safe for the transportation of this substance on this line, and it was lawful for the defendant to engage in that business. There is no evidence showing that there was any leakage of naphtha from the pipe, or that gas escaped therefrom while naphtha was being pumped, or during the time the pumps were not in use. These facts being conceded, we fail to discover any fact upon which the charge of maintaining a nuisance can be founded. It is no more dangerous to life or property to convey naphtha, in a strong and secure pipe, through a populous city, than it is to distribute manufactured or natural gas by the same means. Gas thrown off from a body of naphtha is no more inflammable or explosive than coal gas, and either kind must be in some degree confined before the explosion will occur. The rule is of uniform application that while man may prosecute such business as he chooses on his own premises, he has no right to erect and maintain a nuisance, to the injury of an adjacent proprietor, or of his neighbors, even in the pursuit of a lawful trade. *Heeg v. Licht*, 80 N. Y. 579.

A private nuisance is defined to be anything done to the hurt or annoyance of the lands, tenements, or hereditaments of another. 3 Bl. 216. Any unwarrantable, unreasonable, or unlawful use by a person of his own property, real or personal, to the injury of another, comes within the definition stated, and renders the owner or possessor liable for all damages arising from such use. Wood, Nuis. § 1, and authorities cited. To constitute a nuisance for keeping in store articles in common use in a community, the substance must be of such a nature, and kept in such large quantity and under such circumstances, as to create real danger to life and property. This rule seems to be fairly deducible from the many decisions which have been made by the courts on this subject. The fears of mankind will not alone create a nuisance without the presence of real danger. "The well-founded apprehension of danger, which would alarm men of steady nerves and reasonable courage passing through the street, in the locality where the business is carried on, is enough to show that something is being done which ought to be prevented by condemning it as a misdemeanor." *Reg. v. Lister*, 8 Jur. (N. S.) 570; *People v. Sands*, 1 Johns. 78; *Myers v. Malcolm*, 6 Hill, 292; *Heeg v. Licht*, 80 N. Y. 579. In such a case, the rule which exonerates a party engaged in a lawful business, when free from negligence, has no application. In another part of his charge the learned judge instructed the jury that "if they should come to the conclusion that the defendant was in the act of carrying on a nuisance, and also that this pipe was a sufficiently good pipe, but was broken by the act of a wrong-doer, under such circumstances as that the defendant had no right to expect that it would be broken, and under such circumstances that the defendant was not guilty of any negligence in not discovering that it was broken, but that it had every reason to believe that it had taken every precaution that a reasonably prudent man would have done to make this safe, and in fact had

done so, if you come to the conclusion that this was the state of affairs, then, although the defendant was guilty of carrying on a private nuisance, it would not be liable in damages to the plaintiff." These instructions were to the effect that if the defendant was maintaining a nuisance it was not liable if the pipe was broken by the act of a wrong-doer, if the defendant was not guilty of negligence in the particulars mentioned. But it does not cure the error, or leave it to the jury for them to say whether the defendant was guilty, or not, of maintaining a nuisance, but, for a reason which will be hereafter stated, it becomes unnecessary to consider how far the last instructions qualified those as given, relative to the defendant's liability, if the jury found that it was maintaining a nuisance. As an independent ground for a recovery it was submitted to the jury whether the defendant was guilty of negligence in failing to ascertain, by an actual inspection of the line of pipe, or by some other means, that it was broken, and unfit for use, before they commenced pumping on the 21st day of December, or in that the defendant's agent, Sweeny, who was stationed at the gas company's tanks, was negligent in failing to give notice that naphtha was not passing through the pipe, in time to have prevented the escape of naphtha in sufficient quantities to be dangerous. Our comprehension of the case is that a case was made for the consideration of the jury on the question of the defendant's negligence. Every fact and circumstance must be considered and reflected upon in determining the question submitted to the consideration of the jury. As the pipe was in a reasonably safe and secure condition up to the time it was broken by the act of a third person, the charge of negligence rests mainly, if not entirely, on the omission of the defendant's agents and servants to do those things which, if done, would have disclosed the actual condition of the pipe before any considerable quantity of naphtha could have escaped. One test, for the purpose of considering whether the pipes were in order or not, was to have arranged that the pumps should have been started before the stop-cocks at the receiving end were opened, and if that had been done the broken condition of the pipe would have been disclosed to the engineer at the pumping station immediately, as the degree of resistance would have indicated that the naphtha was escaping somewhere on the line of the pipe. The failure of Sweeny to give notice to those in charge of the pumping station that no naphtha was being delivered into the receiving tank, immediately after the time agreed upon for starting the pumps, subjects him to the charge of being guilty of negligence which caused the death of the deceased. It was his duty to act upon the assumption that the pumps would be started at the time agreed upon, and that oil would be immediately discharged into the receiving tank, and, as none came through the pipe, it was an indication on which any prudent and reasonably cautious man would have concluded that the pipe was out of order. By use of the telephone in the gas company's office, which was connected with the defendant's office, he could have communicated with the engineer at the pumping station, informing him that no naphtha was being discharged into the receiving tank, in time to have averted the accident. The fact that the pipe crossed several streets, and for a portion of the way was laid under the track of a railroad which was in constant use, is a circumstance indicating that it was an act of prudence to make some sufficient tests to ascertain if the pipe was in a safe condition, immediately preceding the use of the same, for the transportation of a large quantity of naphtha. In face of all the facts and circumstances, we think the question was properly submitted to the jury for them to determine whether the defendant's agents engaged in operating the pipe line were guilty of negligence. The jury rendered a general verdict in the plaintiff's favor of \$5,000, and there was also submitted to them to answer this question, "Was the naphtha which caused the explosion on the 21st day of December, 1887, by which John Lee was killed, permitted to get into the sewer by the negligence of the defendant?" which was answered in the affirmative. As the defendant's negligence

was established in the opinion of the jury, as indicated by their special verdict, the error in submitting the question to the jury whether the defendant was maintaining a nuisance should not prevail for the purpose of reversing the judgment, for the defendant's liability was established irrespective of the question of nuisance. For the same reason, if there was any error of the court in ruling that the defendant was guilty of violating the provisions of chapter 773 of the Laws of 1865, regulating the storage and keeping of crude petroleum, or any of its products, within the corporate limits of any city within this state, should not prevail for the purpose of securing a new trial. The defendant's counsel asked the court to charge the jury that if, at a time when Sweeny should reasonably have been required to give notice that no naphtha was coming, the discharge into the sewer was so great as to cause the disaster, this failure to report was not negligence, such as to authorize a verdict for the plaintiff. If the jury could, from the evidence, have determined the quantity of naphtha which in fact had at that time been discharged into the sewer, there is no evidence which would enable them to say that the quantity was sufficient to have caused the explosion. It is manifest that a considerable quantity must have been discharged from the pipe at the break before any would have been discharged into the sewer, by reason of the character of the earth which lay about the pipe where it was broken. It is wholly conjectural as to the precise time when naphtha was first discharged into the sewer. We think that the proposition as stated was faulty, and properly rejected, for the reason that it was the duty of the jury to determine the question of negligence from all the facts and circumstances of the case, and there were others bearing upon the question besides the omission of Sweeny to give notice that naphtha was not being received at the tank. The defendant's counsel also asked the court to charge the jury that if they should find that the sole cause of the accident was the breaking of the pipe by blasting at Atkinson street, by the interference of third persons, without knowledge or notice on the part of the defendant, or any co-operating negligence on the part of the defendant, they must render a verdict for the defendant. We think it is plain that the defendant was not entitled to these instructions. It was a conceded fact in the case that the pipe became broken by reason of the interference of third parties, and without any actual knowledge or notice on the part of the defendant, at the time the pumping was commenced on the day of the accident, and the plaintiff seeks to maintain her right of action from facts and circumstances wholly independent of and distinct from those mentioned in the first part of the request. We do not need, therefore, to inquire in what sense the term "co-operative negligence" was used in the alternative part of the request. Exceptions were taken by the defendant to the reception and rejection of items of evidence which were considered by the special term, and held not to be well taken, and we concur in this part of the written opinion of the learned judge, as printed in the case. Judgment and order affirmed.

DWIGHT, J., concurs. MACOMBER, J., not voting.

NOTE BY THE EDITOR. The written opinion referred to was filed December 28, 1888, at special term, Ontario county, on a motion for a new trial, and is as follows:

"RUMSEY, J. I shall consider no exceptions on this motion except those raised and argued on the brief of the defendant's counsel, and those I will consider in the order in which he spoke of them.

"The first exception is taken to the question asked of the expert witness Peekham as to the comparative explosiveness of naphtha and gunpowder. The objection taken was that the evidence was incompetent and immaterial. This objection raised no question as to the competency of the witness to testify. *Schwander v. Brige*, 10 N. Y. St. Rep. 802. Nor is the propriety of the question to be determined by the fact that the witness, in reply to it, gave an objectionable answer which he was not asked for. The remedy in that case is by a motion to strike out the testimony. *Fowler v. Machine Co.*, 20 Wkly. Dig. 521. The ruling upon the exception must be made on the theory that

the answer would have been responsive. In this case a responsive answer would have been that naphtha gas was or was not more explosive than gunpowder. Was this evidence material or competent? The question was as to the liability of naphtha gas to explode under certain conditions, and the effect of the explosion when it occurred. The witness had stated a good many facts with regard to it, from which the jury might learn the conditions necessary to exist before an explosion would take place. Any fact which would enable them to judge of the probability of the explosion of this gas, and of the force of the explosion, was clearly material. The jury were told by another witness the pressure in pounds which would be exerted by an explosion of the gas under certain conditions. There is no doubt that it would have been proper to show them the effect of the explosion by an actual experiment; the object being in each case to enable them to judge whether the force of such an explosion was sufficient to do the damage which was done to the mills. It was proper to allow the witness to illustrate the effect of the explosion of this gas by comparing it with the explosion of any substance, of the properties and force of which the jury were aware, as well as by the number of pounds of pressure of the explosion. Indeed, the former is much more likely to convey to any person an accurate idea of the force exercised. The explosive force of gunpowder is a matter of common knowledge. Every one knows the effect produced by the explosion of a mass of that substance in a confined space. It is used as a means of comparison daily. To say that the explosion of any substance produces the same or a like effect as the explosion of gunpowder gives a more accurate idea of its power to the ordinary mind than to say that by the explosion it exerts a pressure of so many pounds to the square inch. There is a large class of cases in which language cannot give an exact idea of the fact sought, and one must resort to the comparison with things well known to enable another to form an accurate judgment. For instance, it is proper and usual, in speaking of speed, to speak of 'a moderate trot,' or 'about as fast as a man can walk;' or, in measuring height, to say that a thing is 'about the height of a man;' or, in speaking of distance, to say that it is 'about as far as from' one place known to the jury, or seen by them, to another. In all these cases the comparison with something of general knowledge is usual and proper. For the same reason it was proper to measure approximately the force of the explosion of naphtha gas by comparing it with another substance with which the jury were acquainted. There is no question as to the competency of the witness. *Stevens v. Brennan*, 79 N. Y. 254.

"It is suggested that the same class of evidence, when offered by the defendant, was excluded. The point is raised where Mr. Latimer was asked whether he would regard crude oil as more dangerous than naphtha. This stands upon a different footing. The fact itself is entirely immaterial, whether it be considered as asking for Prof. Latimer's opinion, or as to the fact of the danger of crude oil. The only question was the danger of naphtha. As a means of aiding the jury to decide whether the transmission of naphtha was or was not dangerous, the comparison was of no use, because they knew no more of crude petroleum, considered chemically, or with reference to the gases evolved by it, than they did of naphtha; and when they were told that one was more dangerous than another they would still need instruction as to the absolute danger of crude petroleum, before being able to apply the comparison, or make it available to judge of the material thing, which was the danger of the transmission of naphtha. For this reason it was not error to exclude this evidence as immaterial.

"The evidence of Mr. Kinchling was entirely immaterial. The question only asked for the knowledge of the witness,—which no one pretends was material,—and for that reason alone it was properly excluded. But, if it be construed as asking for the fact, it was properly excluded for two reasons: *First*. The question did not ask for the best evidence. That was the records of the executive board. The objection having been sustained upon a general objection, stating no grounds, it is not error, although the ground upon which the ruling might be sustained is one which could have been obviated, had it been stated. The opposite counsel is not misled if he does not ask that the grounds should be stated. *Height v. People*, 50 N. Y. 392, 395. *Second*. The fact was not material. The pipe was laid in the bottom of the Genesee Valley canal by the consent of the railroad company, which was in possession of the canal. No permission of the executive board, or of the authorities of the city of Rochester, was necessary to authorize the laying of the pipe. The defendant was not a wrong-doer by laying the pipe, but by pumping naphtha through it. There was no offer to prove that the executive board consented to that use of the pipe, but it was practically conceded that such consent was not given. No consent was required to authorize the laying, and it was not material whether it was given.

"The evidence of Neville was clearly immaterial. If it had been proposed to follow it with the proof of any fact which would have made the rejected evidence material, such offer should have been made. As it was not, there was nothing to show the materiality of the rejected evidence.

"The evidence of Moore was rejected, and the ruling is strongly attacked; but, irrespective of the question whether it was erroneous to reject the evidence, I do not think there was any harm done to the defendant. The object was to show that the pipe could only be broken by outward violence. It was not disputed that the pipe was so broken, and the charge to the jury was based entirely upon the theory that such violence caused the break. If the evidence had been admitted, its effect would have been

to authorize the jury to infer, what was not denied, and was actually proved, that the pipe was broken by the blast left off in the sewer. If the evidence had been received, the fact would have been proved no more satisfactorily.

"The questions asked of Prof. Latimer as to the effect of a break in a gas-main do not require much consideration. The counsel for the defendant concedes that the hypothesis was not based upon any facts which appeared in the case, and that disposes of the exception. There was no break in a gas-main, and the question of the flow of gas through such a break was a mere abstraction, of no importance in this case.

"The next error alleged is the refusal of the court to charge a proposition presented. As to the particular proposition, the fact which lay at the foundation of it is that, at the time when the watchman Sweeny should have given notice that the naphtha did not run into the tank of the gas company, the discharge into the sewer had already been so great as to cause the disaster. Of this there is no evidence on which the jury might have found either way. For that reason there was no error in the refusal to charge exactly as requested. *De Luce v. Kelly*, 5 Wkly. Dig. 82. After reading again what was said by the court in reply to that request, I still think that it covered all that the defendant had a right to expect on that subject, and that the exception to the refusal to charge was not well taken.

"The last exception argued is that one taken to the charge of the court with regard to the storing or keeping of the naphtha. The jury were charged that the defendant was keeping or storing naphtha in a way different from that allowed by the statute. To this, exception was taken. It is claimed that the naphtha kept in the tank, and especially that kept in the pipes, was not 'stored,' within the statute. The statute forbids, not only the 'storing,' but the 'keeping on sale,' of refined petroleum, except in a certain way. It then gives the regulations for 'storing or keeping' naphtha or benzine, of which it forbids the keeping of more than ten barrels in a place over a cellar, or more than three barrels in a cellar or basement. It then provides that 'crude or refined petroleum' may be stored in a certain way. There is a clear distinction made in the statute between crude petroleum and naphtha and benzine. The regulations for storing naphtha and benzine are express and clear, and they imply a prohibition against storing it in any other way than is therein prescribed. *Landers v. Frank St. M. E. Church*, 97 N. Y. 119, 124. The defendant says that the keeping of naphtha in the pipe was not 'storing' it. But the statute speaks of 'kept' and 'stored.' Even if the word 'stored' alone was used, this way of keeping naphtha in a pipe was within the statute. It seems that the naphtha was allowed to run into the pipe, and was there kept until it was required to be used at the gas company's tank, when it was forced into that tank. As soon as a sufficient quantity had been pumped into the tank at the gas-works, the stop-cock was turned, and the pipe left full of naphtha until a new supply was required in the gas company's tank. During the time that elapsed between the several pumpings the naphtha was left in the pipes. The word 'store' is defined by Johnson and Webster to mean, 'to stock against a future time.' It is defined in this state as 'the keeping of merchandise in safe custody, or where the keeping is the principal object of the deposit.' *O'Neil v. Insurance Co.*, 8 N. Y. 122, 127. In the case last cited it is used in distinction from keeping for consumption or sale in the course of business at the place where it is kept. The naphtha was kept in this pipe to be delivered as wanted. It was kept, as appears from the evidence, from 15 to 30 days, being pumped into the gas-tank once a month in the summer, and twice a month in winter. While so kept, it was not used for any purpose. If the keeping had been in a tank, there would have been no question that it was a 'storing,' within the statute. The fact that the receptacle, holding some 3,000 gallons, was a pipe, and not a tank, does not alter the case. The cases cited by the defendant were actions on policies of insurance in which the insurance company sought to insist upon the forfeiture because certain prohibited articles were stored in an insured building which had been burned. The articles were kept for sale or temporary use, and the court held that was not a 'storing,' within the policy. They adopt the definition of 'storing' given above, but say that the cases before them were not within it.

"But it is said that the uncontradicted evidence showed that the pipe had been empty for two weeks when the disaster occurred, and for that reason the defendant could not have been storing naphtha in it. That is just the trouble. The defendant had attempted to keep naphtha in this unauthorized way in this pipe, which broke, and the naphtha ran out and caused the explosion. The disaster was directly due to the attempt to keep naphtha in the pipe. Suppose there had been at Atkinson street a tank with a capacity of 2,885 gallons, (the capacity of this pipe,) which had been kept full of naphtha for periods of from 15 to 30 days, and that from this tank naphtha had been allowed twice a month to run into another one, the first being kept full by pumping. If a hole had been broken in the bottom of the first tank, and all the naphtha pumped in had run thence into the sewer, no one would doubt that the defendant had been violating the statute, and that such violation was the cause of the filling of the sewer with naphtha. I can see no difference between the supposed case and the one under consideration. The object of the statute was to prevent the accumulation of large quantities of naphtha within the limits of a city. That object is defeated if, as in this case, a forbidden quantity is so kept that, upon the breaking of the receptacle, it may run out and do mischief, and the statute is violated as much whether the vessel is whole or broken, if the result is

the unlawful accumulation of the dangerous fluid. But the question is whether the defendant, in keeping the pipe full of naphtha, was 'storing' it, within the statute. 2 Rev. St. (7th Ed.) 1295. For the reasons above given I think that it was, and that the charge to that effect was not error.

"The defendant alleges no other errors. I think none of those alleged are in fact erroneous rulings, and that a new trial must be denied, with costs."

CORN EXCH. BANK v. BLYE.

(*Supreme Court, General Term, First Department. November 7, 1889.*)

1. JUDGMENT—UNAUTHORIZED DIRECTION.

In replevin for bonds, where the verdict awards possession to plaintiff, and fixes their value, including damages, at a certain sum, a judgment that plaintiff have delivery of the bonds, or, in default, the sum named in the verdict, and adding a distinct amount as damages for detention, is, in respect to this addition, unauthorized.

2. SAME—MODE OF CORRECTION—EFFECT OF APPEAL.

The mode of correction of such error is by motion; and an appeal from the judgment, bringing in question only the plaintiff's right to the possession of the bonds, and in which appeal the right to the further damages was not considered, is not conclusive against defendant's right to have the additional allowance stricken from the judgment on motion.

3. SAME—LIMITATION.

The statutory limitation (Code Civil Proc. N. Y. § 1282) for setting aside a judgment for irregularity has no application, as the additional allowance was not an irregularity, but was wholly unauthorized.

Appeal from special term, New York county.

Replevin by the Corn Exchange Bank of Chicago against Alphonzo W. Blye, receiver. Defendant appeals from a refusal to correct the judgment.

Argued before VAN BRUNT, P. J., and BRADY and DANIELS, JJ.

Elihu Root, for appellant. *L. A. Gould*, for respondent.

DANIELS, J. The action was replevin for the recovery of the possession of bonds issued by the West Point Manufacturing Company, with the coupons thereto attached; and it resulted, at the trial, in the direction of a verdict for the plaintiff for the recovery of the bonds described in the complaint, except those numbered 9, 10, 11, and 12. By the verdict which in this manner was rendered, the possession of the bonds were awarded to the plaintiff, and their value, including damages, was fixed at \$25,315.18; and that appears to have followed the proof establishing the amount of the bonds, together with the coupons or interest warrants which had been attached to them, including thereby all that the plaintiff was entitled to in the action. And the judgment fully carried this verdict into effect, for it adjudged that the plaintiff should have the delivery of the chattels included in the verdict, and that the defendant should deliver the bonds to the plaintiff; and, in case a delivery should not be had, then the plaintiff should recover from the defendant this sum of \$25,315.18 as damages, together with the costs of the action. These provisions, inserted in the judgment, were fully as broad as the verdict authorized them to be entered, and it furnished authority for entering no more than these directions in the judgment. But a further provision and direction was inserted in it, adjudging "that the plaintiff have and recover from defendant the sum of \$2,315.18 damages for the detention of said chattels." That was a direction not included in the verdict, which was expressly restricted to the sum of \$25,315.18, including damages. And after providing by the judgment for the recovery of the bonds, or, in case possession of them should not be recovered, that the plaintiff should recover the amount of money mentioned in the verdict, there was legally nothing further to be added to the judgment against the defendant. The direction for the further recovery of \$2,315.18 damages was wholly unauthorized by the verdict, and it should not have been made a part of the judgment.

After the judgment had been recovered, an appeal from it was taken to the general term, where it was affirmed, and from that judgment of affirmance a further appeal was taken to the court of appeals, resulting also in its affirmance. But these appeals brought in question the right alone of the plaintiff to the possession of the bonds. They in no manner comprehended this further direction contained in the judgment. Neither was any attention devoted to this direction, in the decisions which were made. And no adjudication was made, upon the determination of either of the appeals, affecting the right of the plaintiff to this additional direction for the recovery of damages. It was not a subject upon which an appeal from the judgment could regularly be taken, but the manner in which the practice has provided for its correction was that of a special motion, for it was an entirely unauthorized addition to the judgment beyond that permitted or allowed by the verdict; and, where that addition may be made, the mode of correcting it is by a special motion. *Cayger v. Lansing*, 64 N. Y. 417; *Leonard v. Navigation Co.*, 84 N. Y. 48; *Hatch v. Bank*, 78 N. Y. 487; *Dinsmore v. Adams*, 48 How. Pr. 274; affirmed, 5 Hun, 149; *Cole v. Tyler*, 65 N. Y. 77. The time within which, by section 1282 of the Code of Civil Procedure, a motion has been required to be made to set aside a judgment for irregularity, has no application to this appeal; for the addition of this direction to the judgment was not an irregularity, but it was entirely and wholly unauthorized. For that reason the case of *Brigg v. Hilton*, 99 N. Y. 517, 3 N. E. Rep. 51, is also inapplicable. The addition in this manner made to the judgment was illegal, and without any foundation for it to rest upon; and it should be corrected by striking this provision for the recovery of damages, separately and distinctly from the amount mentioned in the verdict, from the judgment roll. The order should be reversed, with \$10 costs, and also the disbursements, and an order to this effect entered in the action. All concur.

FENLON v. DEMPSEY et al.

(Supreme Court, Special Term, New York County. October 2, 1889.)

CONTENT—POWER TO PUNISH.

Under Code Civil Proc. N. Y. § 2285, relating to contempts, which provides that, "when the misconduct proved consists of an omission of an act or duty which it is yet in the power of an offender to perform, he shall be imprisoned until he has performed it and paid the fine," defendants, who willfully disobey a subpoena and order requiring the production of certain books, cannot be imprisoned for contempt upon the production of the books before the final order committing them is made.

At chambers. Action by John T. Fenlon against John Dempsey and John D. Carroll. Plaintiff moves to punish defendants for contempt. For former report, see 2 N. Y. Supp. 763.

John McCrane and *John L. Cadwalader*, for plaintiff. *Louis P. Levy* and *Abram Kling*, for defendants.

O'BRIEN, J. The evidence in this proceeding fully sustains the conclusions reached by the referee, that it has been in the power of one or both of the respondents to produce, or cause to be produced, the books as directed at any time since they disappeared. There remains, therefore, to determine whether or not, in view of the production of the books, and the payment of the costs of the proceedings, the court has the power to inflict any additional punishment, and if so what? The *Munsell Case*, 101 N. Y. 245, 4 N. E. Rep. 259, in construing sections 8 and 14 of the Code relating to civil and criminal contempts, has, while clearly defining and pointing out the distinctions to be observed between these two kinds of contempts, decided that the private or civil contempt might go beyond the statutory enumeration, and include also what was usual or permissible at common law. But the public

or criminal contempt was precisely defined and barred in by the statute enumeration. In *King v. Barnes*, 113 N. Y. 477, 21 N. E. Rep. 182, it is said: "The main line of distinction between criminal and civil contempts is that the one is an offense against public justice, the penalty for which is essentially punitive, while the other is an invasion of private right, the penalty for which is redress or compensation to the suitor. But * * * behind criminal contempts often stood some trace of private rights, and in civil contempts was occasionally to be found the element of punishment merely as distinguished from the bare enforcement of a remedy." Here the facts would, before the production of the books, have justified the punishment of one or both of the defendants by fine or imprisonment, or both, as for a civil contempt; for, not only was it a willful disobedience of the court's orders, but such disobedience did impair, impede, and prejudice the rights of plaintiff. These acts of disobedience to the subpoena and order were involved on the motion to punish them for contempt, heard before Mr. Justice PATTERSON. After reaching the same conclusion upon the facts as herein expressed, he fixed the extent of their punishment in case they did not produce the books. Upon appeal this determination of Mr. Justice PATTERSON, to the extent of requiring them to pay the costs of the proceeding and be imprisoned for six months unless the books were produced, was affirmed by the general term, (2 N. Y. Supp. 763.) After paying the costs, had they, without waiting for the further motion to punish for contempt, produced the books, they, in view of Mr. Justice PATTERSON's decision, would no doubt be regarded as having purged themselves. It is evident that their conduct was shaped with a design to prevent the production of the books at any sacrifice short of being imprisoned. Before any final order committing them was made, they asked and obtained leave to appear and be allowed to produce the books, which they swore they had but lately found in a desk in their office. It is evident from the testimony that little credence should be given to such a story, and that the referee was justified in finding that the books were never lost, but seem to have disappeared about the time it was for Dempsey's interest that they should disappear, and they remained hidden until the respondents were adjudged guilty of contempt for not producing them.

It will be thus seen, from my view of the facts, that I regard the defendants, as did Mr. Justice PATTERSON, as having been guilty of a willful attempt to impede the course of justice.

The questions remain: Was not the punishment or penalty determined by Mr. Justice PATTERSON? and, the books having been produced, can or should they be further punished? The subpoena and order disobeyed required the production of the books. Section 2285 provides: "Where the misconduct proved consists of an omission to perform an act or duty which it is yet in the power of the offender to perform, he shall be imprisoned only until he has performed it and paid the fine." In construing this section Judge FINCH, in *King v. Barnes*, already cited at page 481, 113 N. Y., and page 183, 21 N. E. Rep., says: "This provision manifestly refers to a case in which the court has ordered an individual to perform some act or duty, to the performance of which some suitor has a right, and which is essential to his remedy." It is true in that case (*King v. Barnes*) the defendant was imprisoned for a contempt, but the ground upon which such imprisonment was sustained was, as stated at page 481, 113 N. Y., and page 183, 21 N. E. Rep., because "he was not directed to perform any act or duty at all. * * * It was not an omission to perform what the court had enjoined upon him, and which it was in his power to do, but it was an affirmative act of resistance to the process of the court,—an active effort to defeat its orders, and make its judgment nugatory,—'an unlawful interference' with an action or proceeding in the court." In that very case the officers of the company, who, under the direction of Barnes, refused to trans-

for stock, as directed by the order, seemingly escaped imprisonment by finally doing the act commanded, as in the present instance, only when confronted with the alternative of a prison; or, as stated in that opinion, (page 480, 113 N. Y., and page 183, 21 N. E. Rep.,) before the final order was made "the officers of the company had grown sufficiently fearful of the possible consequences of their contumacy to yield obedience to the judgment and orders, and by so doing escaped imprisonment."

It is much to be regretted that the right and power of the court to punish by imprisonment as for a criminal contempt in a case like the present is in doubt, and that these defendants, after having repeatedly for two years set the court at defiance, having subjected a suitor to endless trouble and expense, can, at the last moment, by a performance of the act directed, escape imprisonment. Such, however, seems to be the reading of section 2285 of the Code, and the decision of *King v. Barnes, supra*.

This doubt as to the power of the court to imprison after the production of the books, and the adjudication Mr. Justice of PATTERSON already referred to, have inclined me to think that the proper disposition to make of this motion is to compel the defendants to pay costs and expenses to be taxed before me, and pay a fine of \$250.

It is unnecessary to add that the motion to vacate the order of reference, or set aside the report of the referee, is denied, with costs.

HEYMER v. ARTHUR.

(*Supreme Court, General Term, First Department. November 7, 1889.*)

DISMISSAL FOR WANT OF PROSECUTION.

Where it appears from plaintiff's affidavits, on a motion to dismiss a complaint for want of prosecution, that the delays were partially caused by defendant, and were connived at by her or her counsel, and that defendant had showed no disposition to press the case for trial, and plaintiff offers to place the case on the day calendar or short-cause calendar immediately for trial, the complaint should not be dismissed, but plaintiff should be compelled to stipulate to try the case at the next term, and to pay costs of the motion.

Appeal from special term, New York county.

Action by Samuel W. Heymer against Mary A. Arthur, as administratrix of the estate of Thomas M. Argall, deceased. Plaintiff appeals from an order dismissing the complaint for want of prosecution.

Argued before VAN BRUNT, P. J., and DANIELS and BARRETT, JJ.

Moses R. Crow, for appellant. Francis M. Scott, for respondent.

VAN BRUNT, P. J. It appears from the affidavit of the plaintiff that the delays arising in the trial of this case were partially caused by the defendant, and seem to have been connived at by her or her counsel. Prior to the making of this motion, it does not appear that the defendant showed any disposition to press the case for trial. At the time of making this motion, the plaintiff offered to place the case on the day calendar or short-cause calendar immediately for trial, if the defendant so desired. We think, under the circumstances of this case, that it was too harsh a punishment to dismiss his action. Ample justice would have been done by compelling the plaintiff to stipulate to try the case at the next term of the court, and to pay all costs of the motion. The order appealed from should therefore be reversed, but without costs, and the motion denied, upon the giving of such a stipulation by the plaintiff, and the payment of \$10 costs of the motion. The judgment necessarily follows with the reversal of the order. All concur.

*In re Post.**(Supreme Court, General Term, Second Department. September 9, 1889.)***ATTORNEY AND CLIENT—DISBARMENT—DECEIT.**

Under Code Civil Proc. N. Y. § 67, providing that an attorney or counselor who is guilty of any deceit may be disbarred, the term "deceit" implies concealment or false suggestion while acting in a professional capacity to injure a party and mislead a court, and an attorney cannot be disbarred for acts committed as party to an action, other punishments prescribed by law therefor having been inflicted.

Proceedings for the disbarment of John H. Post from practicing as an attorney and counselor at law. For order of reference, see 5 N. Y. Supp. 949, *mem.*

Argued before BARNARD, P. J., and DYKMAN and PRATT, JJ.

Tracy, MacFarland, Boardman & Platt, for the motion. *John H. Post, pro se.*

DYKMAN, J. This is a proceeding for the disbarment of an attorney, and the complaint against him is that he has been guilty of misconduct, which should deprive him of the privileges and associations of an honorable profession. The acts and conduct of the respondent for which he is now arraigned were incited and inspired by his connection with a litigation which was precipitated upon the courts to prevent the consummation of a fraudulent conspiracy of unparalleled enormity. Yet at all stages of the controversy in the cases of *King v. Barnes*, 2 N. Y. Supp. 121, 4 N. Y. Supp. 247, 16 N. E. Rep. 332, 683, 17 N. E. Rep. 870, the defendants sustained the most signal defeat, and judgments have been entered against them all; not only so, but the respondent was more than once punished for contempt in the course of the proceedings, and one of the other defendants received similar punishment. Yet, in all these respects, he was acting and suffering as a party to a litigation, and not as a lawyer, and no malpractice as an attorney was charged against him, unless an attempt to perpetrate a fraud, and a failure to obey the mandate of a court, constitute such malpractice. Although this court and the court of appeals have found much in the conduct of the respondent to censure and condemn, and although punishment has followed such condemnation with some degree of severity, yet it has been meted out to him as a party, and not as an attorney, and he cannot be punished a second time for such offenses. Neither can an attorney be disbarred for acts committed as a party to an action, because other and different punishments are prescribed by law for the control and punishment of such parties. Malpractice as a lawyer means evil practice in a professional capacity, and the resort to methods and practices unsanctioned and prohibited by law; and the causes for which an attorney may be disbarred are now specified by the Code of Civil Procedure as follows: "An attorney or counselor who is guilty of any deceit, malpractice, crime, or misdemeanor may be suspended from practice or removed from office by the supreme court, at a general term thereof." Code, § 67. In this case there is neither proof nor claim that the respondent has been guilty of any crime or misdemeanor, and we have already seen that he has committed no malpractice as a lawyer. The term "deceit," as used in this section, implies concealment or false suggestion as an attorney or counselor to injure a party or mislead a court while acting in a professional capacity, or in the course of professional employment, and there is nothing to convict the respondent of misconduct of that character. In view of the fact, therefore, that the present proceeding is of a highly penal character, the courts should require full proof in justification of the exercise of their summary powers to suspend or disbar an attorney, and we do not find in the papers before us sufficient proof to justify the exertion of the power with which we are invested. Let it not be understood that we disapprove of these proceedings. On the contrary, we deem the pres-

entation of the case to the general term meritorious and proper; but because the disbarment of the respondent would be in some measure the infliction of double punishment, for the reasons already stated, and in view of all the circumstances, we have concluded to withhold the punishment of dismissal.

PEOPLE *ex rel.* MEEHAN v. COMMISSIONERS OF THE DEPARTMENT OF FIRE & BUILDINGS.

(*Supreme Court, General Term, Second Department. June 28, 1889.*)

MUNICIPAL CORPORATIONS—DISCHARGE OF FIREMAN—PROCEDURE.

A member of the department of fire and buildings of Brooklyn, who fails to deny the charges against him, and requests a postponement, which is denied, cannot be thereupon dismissed without trial or introduction of testimony.

Appeal from special term, Kings county.

Argued before BARNARD, P. J., and DYKMAN, J.

Edward P. O'Dwyer, for appellant. *Almet F. Jenks*, for respondents.

DYKMAN, J. This is an appeal from an order of the special term, quashing a writ of *certiorari* issued in this matter for the review of the proceedings of the respondents in removing the relator from the position of fireman in the department of fire and buildings of the city of Brooklyn. The return of the commissioners to the writ shows that the relator was a member of the department of fire and buildings, and was attached to truck No. 8. On the 4th day of October, 1879, a verbal complaint was made to the board that on the 1st day of May, 1879, the relator neglected and violated his duty as such fireman by taking the apparatus out of the house, and proceeding to station 49, western district, there being no fire, and no alarm of fire sent out for that station; that the relator was verbally directed to attend before the board on the 6th day of October, aforesaid, at the headquarters of the fire department, and answer the charge, and did so attend; thereupon the charge against him was stated, and the statement of the fireman in charge of the truck and fire company, who was the complainant, was made and read to him, and he was required to answer the same, whereupon he requested a postponement of the investigation for one week, without denying the charge. The request for a postponement was denied, and the relator was thereupon found guilty of the charge, and dismissed from the department. There was no trial and no investigation, and no testimony was introduced. We have frequently held that members of the department of fire and buildings in the city of Brooklyn could not be removed until after conviction of the offense charged upon them, and our views need not be repeated here. We have also overruled the objections to the issuance of these writs in this class of cases, arising from the delay in their prosecution, and stated our reasons therefor. The case presents no exception to the cases that have been decided by us, and the order should be reversed, with \$10 costs and disbursements.

ELDRIDGE v. ROCHESTER CITY & B. R. CO.

(*Supreme Court, General Term, Fifth Department. October 19, 1889.*)

ESTOPPEL—BY DEED—AFTER-ACQUIRED PROPERTY—EASEMENTS.

A grant by one of two tenants in common to a street-railroad company of the right to construct and operate its road in the street, on which the property held in common abuts, creates no easement; and, the grant containing no warranty, the grantor, having afterwards acquired the interest of her co-tenant in the property, is not estopped to sue to enjoin the construction of a switch in front of the property.

Appeal from special term, Monroe county.

Action by Mary S. Eldridge against the Rochester City & Brighton Railroad Company for an injunction to restrain defendant from laying down ad-

ditional tracks on Court street, city of Rochester. Judgment for plaintiff, and defendant appeals.

Argued before BARKER, P. J., and DWIGHT and MACOMBER, JJ.

Thos. Raines, for appellant. *David Hayes*, for respondent.

BARKER, P. J. The plaintiff, being the owner of the premises situate on the south side, and bounded by the center, of Court street, in the city of Rochester, brought this action to restrain the completion and use of a switch which the defendant was proceeding to construct on the southerly side of the center of that street in front of her premises. The relief sought was given by the judgment appealed from. The defendant, a street-railroad company, in 1884 constructed its road along the center line of Court street, and through several other streets of the city. With a view to procure the right to do so, the defendant had procured from property owners their assent or grant in writing, under seal, in form and to the effect that they severally, for value received of the defendant, granted and conveyed to it a right of way in and through Elm street, Chestnut street, James street, Court street, Union street, and Gardner park to Alexander street, by and in front of the lands of said streets belonging to them, wholly or in part, for the purpose of constructing and operating a horse railroad, as authorized by the common council of the city of Rochester. It was so authorized by the common council; and the road has, since its construction, been operated by the defendant. The plaintiff makes, in this action, no objection to the continued operation of the road upon the line as so constructed; but her complaint has relation to a switch which in August, 1887, it was proceeding to construct along her premises, and on the southerly side of the track as originally laid by the defendant. The fee was in the plaintiff at that place; and the defendant had no right, except through that of eminent domain, without her consent, to construct the switch there. *Craig v. Railroad Co.*, 39 N. Y. 404. The contention on the part of the defendant is that this was accomplished by the grant before mentioned made by the plaintiff. At the time that grant was made, the plaintiff had title to only one undivided half of the premises in question, as tenant in common with one Shepard, who did not join in or give any consent to the construction of defendant's road in the street. This was the situation until in January, 1887, when the plaintiff took title from Shepard to the other half, and became the sole owner of the premises. The nature of the plaintiff's grant, when made, and the legal effect of it upon her right, for the purpose of remedy and relief, at the time she brought this action, require some consideration. The plaintiff did not, and could not, by her grant, as against her cotenant, afford to the defendant any right to occupy with its road any portion of the street to which they held the fee; and the grant was void, except so far as it might operate by way of estoppel against the grantor. 3 Washb. Real Prop. marg. page 565; *Crippen v. Morss*, 49 N. Y. 63; *Marshall v. Trumbull*, 28 Conn. 183; *Adam v. Iron Co.*, 7 Cush. 361. At the time the plaintiff made it, the defendant acquired no right to construct the switch at the place in question in front of her premises.

It is, however, argued by the defendant's counsel, that, although the plaintiff may have a remedy at law for injury to the interest subsequently acquired by her, she is not entitled to relief in equity; because the denial, in her behalf, of the right of the defendant to continue to operate its railroad track there, would have the effect to destroy her grant, which she should not be permitted to do. But as the defendant took no easement by the plaintiff's grant when made, and as it contained no warranty, the interest subsequently acquired by the plaintiff in the premises did not, in support of the grant, inure to the benefit of the defendant. A party cannot grant that which he has not at the time the deed is made; but he may be denied the right to assert the invalidity of it for the protection of interests afterwards obtained in the subject

of the grant, when it has been upon the assurance of enjoyment by the grantee. This rests upon the doctrine of estoppel, which is applied to avoid circuitry of action. *McCrackin v. Wright*, 14 Johns. 193; *Jackson v. Bradford*, 4 Wend. 622; *Pelletreau v. Jackson*, 11 Wend. 110; *Mickles v. Townsend*, 18 N. Y. 575; *Blanchard v. Ellis*, 1 Gray, 195; *Clark v. Baker*, 14 Cal. 612. Inasmuch as the defendant took no easement by force of the grant, and as there is no support for estoppel against the plaintiff, upon the principle before stated, it is difficult to see how the plaintiff's grant can furnish any right to the defendant as relates to the interest acquired by her after the instrument was executed, or deny her the right to the equitable relief which she seeks in this action. There is no destruction of any grant produced by such result. The defendant never had any that was effectual to confer any right to appropriate that portion of the street to its use for a railroad. The fact that the plaintiff has since become the sole owner of the premises adds nothing to the right of the defendant in that respect. As the defendant was advised, when that paper was executed by the plaintiff, that she had title to the undivided half only, there is no opportunity to charge her by estoppel *in pais*.

Whether any benefit may result to the defendant by way of abatement of compensation by reason of the grant, in the event it should be secured *in invitum*, to acquire the easement, is not now properly the subject of consideration. That might depend upon the determination of another question, upon which, in the view taken, it is unnecessary now to express an opinion. Judgment should be affirmed, with costs. All concur.

LINDAU v. ROYAL INS. CO.

(Supreme Court, General Term, First Department. November 7, 1899.)

PLEADING—DEMURRER—AUTHORITY OF ATTORNEY AT LAW.

Where a compromise by defendant's attorney is set up as a defense to an action, plaintiff, on demurrer, cannot avail himself of the proposition that an attorney cannot compromise without special authority, where the complaint does not allege that the attorney had no authority to make such compromise.

Appeal from special term, New York county.

Action by Leopold Lindau against the Royal Insurance Company, on a policy of insurance. The court rendered an interlocutory judgment overruling a demurrer to one of the defenses set up in the answer, and plaintiff appeals. For denial of motion to dismiss appeal, see 5 N. Y. Supp. 947, *mem*.

Argued before VAN BRUNT, P. J., and BRADY and DANIELS, JJ.

Meyer J. Stein, for appellant. *Shipman, Barlow, Larocque & Choate*, (S. Hanford, of counsel,) for respondent.

BRADY, J. This is an action upon a policy of insurance brought to recover the amount of a loss by fire. The plaintiff is the assignee of the asserted claim. The answer contained, among other things, the averment that after the fire had occurred the plaintiff's assignor presented, as required by the policy, an account of the loss sustained, but which was false and fraudulent, as he well knew at the time he presented it to the defendant, and that by reason of the premises he forfeited all benefit under the policy. Then follows the defense objected to, which asserts the commencement by the assignor of various actions in the superior court of this city against companies whose policies he had obtained, and, among others, one against this defendant in that court, in which the complaint contains substantially the same allegations as those in the complaint herein, excepting only the allegation touching the alleged assignment of the policy; that the defendant in the said several actions, in due season answering, set out in substance the same matters alleged herein, and that one of the actions, namely, that against the People's Fire Insurance Company of Worcester, Mass., in which the defense was substantially the same as that

set forth in the answer of this defendant, was brought to trial in this city, and resulted in a judgment dismissing the complaint with costs; after which occurrence the complaint in the action brought against this defendant by the plaintiff's assignor, and then pending was, by consent of his attorney, dismissed, in consideration of the dismissal being allowed without costs, and that the policy of insurance was surrendered for cancellation, and has ever since remained, and still remains, in the possession of this defendant, and further that a formal order of discontinuance of the suit was duly entered. The learned justice in the court below disposed of the case in a very brief opinion, in which he said that though a portion of the answer was a useless historical recital, and did not pretend to state a defense, the material portion was contained in the final paragraph stating a settlement upon consideration and surrender of the policy, and certainly contained an averment which, if true, would defeat the claim. The only suggestion made in regard to this view of the case upon this appeal is that the authority of an attorney does not extend to a compromise. He could not, therefore, settle the suit and conclude his client in reference to the subject-matter of the litigation without the special authority of the latter, a proposition sustained by the citation of numerous authorities. It is not necessary to consider them, for the reason that while that legal proposition, if the facts warranted its application, might present a good response to the defense referred to, it could not avail the plaintiff upon demurrer, inasmuch as it does not appear from anything in the complaint stated that the attorney was not authorized to consent to the discontinuance pleaded. The judgment appealed from should be affirmed, with costs, and the plaintiff, upon payment of costs, allowed to withdraw his demurrer. All concur.

PEOPLE *ex rel.* MCLEAVY *v.* FRENCH *et al.*, Police Commissioners.

(*Supreme Court, General Term, First Department. November 7, 1889.*)

MUNICIPAL CORPORATIONS—DISCHARGE OF POLICEMAN—JURISDICTION.

Where a policeman leaves his post and falls asleep, his dereliction gives the police commissioners jurisdiction for purposes of discipline, and the supreme court cannot review their action in regard to the punishment inflicted.

Certiorari to review the action of the police commissioners in dismissing the relator, Charles McLeavy, from the police force.

Argued before VAN BRUNT, P. J., and DANIELS and BARRETT, JJ.

John M. Tierney, for relator. William H. Clark, Corp. Counsel, (*W. L. Turner*, of counsel,) for respondents.

VAN BRUNT, P. J. The relator was charged with neglect of duty, the specification being that he did not properly patrol his post upon a certain occasion during his tour of patrol duty. The relator admits that he went off his post and fell asleep, and he did not awaken until the roundsman was there. The existence of this dereliction of duty gave the respondents jurisdiction of the relator for purposes of discipline, and with the extent of the punishment inflicted we have nothing to do. The writ must be dismissed, with costs. All concur.

COLLINS *v.* BEEBE *et al.*

(*Supreme Court, General Term, First Department. November 7, 1889.*)

1. EXECUTIONS—SUPPLEMENTARY PROCEEDINGS—EXECUTORS.

The statutes regulating supplementary proceedings are not applicable to executions against executors.

2. SAME—AFFIDAVIT.

An affidavit that a third person "has property of the judgment debtor exceeding ten dollars in value, or is indebted to the judgment debtor in a sum exceeding ten dollars," is alternative, and alleges neither the one nor the other fact necessary to obtain an order for examination in supplementary proceedings.

Appeal from special term, New York county.

In an action by Maria Louisa Collins against Adeline M. Beebe, executrix, and Theodore D. Jones, executor, of Welcome R. Beebe, deceased, after judgment for plaintiff, and the issue of an execution, an order was obtained for the examination of a third person in supplemental proceedings. This order having been vacated by a subsequent order, plaintiff appeals.

Argued before VAN BRUNT, P. J., and BRADY and DANIELS, JJ.

S. W. Valentine and *A. M. Card*, for appellant. *Stephen C. Baldwin*, for respondents. *Donohue, Newcombe & Cardoso*, for Charles Donohue, third party in supplemental proceedings.

DANIELS, J. The plaintiff recovered a judgment against the defendants, as executrix and executor of the estate of Welcome R. Beebe, deceased. An execution was permitted by order of the surrogate of the county of New York to be issued upon this judgment, and it was afterwards issued against the property of the testator in the possession of his executor and executrix. While the execution remained in the hands of the sheriff an order was made upon the application of the plaintiff, directing Charles Donohue to appear before one of the justices of this court to be examined concerning his indebtedness to the testator, and as to property in his possession belonging to the estate of the testator. Upon a motion being made to vacate this order it was set aside, and from the order setting it aside this appeal has been brought.

The order for the examination of Charles Donohue might very well have been vacated for the insufficiency of the affidavit upon which it was made, for all that was stated in it as to the fact of the person directed to be examined having property, or being indebted to the estate, was that he "has personal property of the judgment debtor exceeding ten dollars in value, or is indebted to the judgment debtor in a sum exceeding ten dollars;" for it is quite evident from this statement that the person making the affidavit had no knowledge or information justifying the statement. If she had, it would not have been made in this alternative manner, for if she had knowledge or information as to either of the facts which she mentioned her affidavit would not have been left in this uncertain condition, but she would have set forth the fact coming to her knowledge, either that he did have personal property of the judgment debtors, or that he was indebted to them. The one or the other of the facts intended to be disclosed would have been so stated as to indicate its probable existence if it had been within the knowledge or information of the plaintiff, instead of the statement being made as it was that the person to be examined either had property or was indebted, etc. The affidavit was probably made in this manner, because the affiant could not state as a matter of fact either that he had personal property of the judgment debtor, or was indebted to the executors. It was a hazardous and experimental statement, which should not be accepted as the foundation of the order that was made.

But a still more substantial obstacle stood in the way of the right of the plaintiff to examine the judgment debtors, or any other person having property belonging or indebted to the estate. And that arises out of the fact that the defendants were sued as executors, and the judgment has been recovered against them alone in that capacity. It was not a judgment attended with the ordinary right of the plaintiff to issue an execution upon it, but its object was to secure the legal existence of a disputed demand, as that has been provided for by section 1822 of the Code of Civil Procedure. Upon the recovery of the judgment no right was vested in the plaintiff to issue an execution, or in any manner to interfere with the property of the testator's estate. But by section 1825 of this Code the surrogate was authorized, upon notice to the executors, to permit an execution to be issued upon the judgment. Such an application was made, and his consent was secured for the issuing of the exe-

cution, and so far it was a regular proceeding in behalf of the plaintiff. But neither this section of the Code, nor any other, authorized the plaintiff to proceed further than could be done under the authority in this manner obtained from the surrogate. The authority was to issue the execution, and in that manner to secure the payment of the judgment, if it could be so far made effectual. No authority has been provided for proceeding otherwise in the way of sequestrating or appropriating the property of the estate to the payment of the judgment, and the fact that the law has made no provision for the judgment creditor taking proceedings upon the judgment, or the execution, beyond the power to levy upon and sell the property of the estate, is a circumstance supporting the inference that it was not intended that the plaintiff should possess any additional authority beyond that which was given in this manner. If the order for the examination of the third person was regularly obtained under section 2441 of this Code, then the examination directed to be taken by it might be followed by the appointment of a receiver under section 2464, and the money or property appropriated to the payment of the judgment, even though that might constitute the bulk of the estate and defeat the right to satisfaction of all its other creditors. But the statute relating to the estate and the payment of the debts of deceased persons has not been framed so as to permit that to be done. It has, on the contrary, provided for equality in payment of recognizances, bonds, sealed instruments, notes, bills, and unliquidated demands and accounts, and it has further declared that no preferences shall be given in the payment of any debt over other debts of the same class. "Nor shall the commencement of a suit for the recovery of any debt, or the obtaining a judgment thereon against the executor or administrator, entitle such debt to any preference over others of the same class." 3 Rev. St. (6th Ed.) p. 95, §§ 27, 28. And this restraint would plainly be violated if the proceedings commenced by the plaintiff should be maintained. The surrogate has also been provided with jurisdiction to direct and control the conduct and settle the accounts of executors, administrators, and testamentary trustees, and to enforce the payment of debts, and the distribution of the estates of decedents, and to administer justice in all matters relating to their affairs. Code Civil Proc. § 2472. And this jurisdiction would be interrupted and defeated if a creditor recovering a judgment against the personal representatives could proceed by supplementary proceedings and appropriate the property of the deceased to the payment of the judgment. And it has been further provided and declared, where the validity of a debt has been established, the decree must determine to whom it is payable, the sum to be paid by reason thereof, and all other questions concerning the same. Id. § 2743. And this, as well as the other provisions which have been mentioned, are entirely inconsistent with the right of the creditor having a judgment against the personal representatives to proceed by supplementary proceedings and thereby appropriate the estate of the deceased, or any part of it, to the payment of the judgment. They have created an altogether different course of proceeding, which the creditor has been required to follow, where the judgment may not be capable of being collected by means of the execution which the surrogate allows to be issued, and that is to present the demand against the estate to receive either payment or its distributive share, as it may be entitled to that with other creditors having similar rights against the estate. The order in this case was right, and it should be affirmed, with \$10 costs, and also the disbursements.

VAN BRUNT, P. J. I concur with Mr. Justice DANIELS. The affidavit upon which the order was granted was wholly insufficient. The affidavit not only should not have been in the alternative, but it should have stated the facts upon which the affiant bases his allegation that the person to be examined either had property of the debtor or was indebted to him. An allega-

tion in the words of the statute is wholly insufficient. Facts must be stated from which a conclusion can be drawn, not the conclusion alone.

BRADY, J., concurs.

In re NEW YORK & L. I. BRIDGE CO.¹

(*Supreme Court, General Term, First Department. November 7, 1889.*)

BRIDGES—RIGHTS OF CORPORATION.

Petitioner was incorporated under Laws N. Y. 1867, c. 395, to build a bridge within a certain time or forfeit all rights under the act. Laws 1885, c. 392, extended the time for construction, and provided that the bridge should be for railway, foot, and carriage travel. *Held* that, as the legislature had no power to make the provision for railroad travel, under Const. N. Y. art. 3, § 13, providing that the legislature shall not pass a private or local bill granting to any corporation the right to lay down railroad tracks, or provide for building bridges and chartering companies for such purpose, the extension of time granted to the petitioner must fall with the condition upon which it was granted, and that an application of the petitioner to acquire certain lands must be denied.

Appeal from special term, New York county.

The petitioner, the New York & Long Island Bridge Company, made application for the appointment of commissioners to appraise the compensation to be made to the city of New York for so much of Blackwell's island as might be required for constructing and operating its proposed bridge over East river from New York city to Long island. From the order of the special term denying the application, petitioner appeals.

Argued before DANIELS and BARRETT, JJ.

Francis M. Scott, for appellant. *David J. Dean*, for respondent.

BARRETT, J. In denying the petitioner's application at special term, Presiding Justice VAN BRUNT filed a careful opinion, which, in my judgment, demonstrates the unconstitutionality of the act (Laws 1885, c. 392) under which these proceedings are instituted. But little need be added to this opinion. The original act under which the petitioner was incorporated (Laws 1867, c. 395) conferred upon it no authority to construct a bridge for railway travel. That act plainly contemplates an ordinary bridge for the passage of "persons, animals, carriages, and vehicles." In section 6 of the act provision is made for the usual toll-gates and rates of toll. In section 7 the purchase of the bridge by the counties of New York and Queens is authorized, "provided it be made free to be passed by travelers and vehicles without toll or other charges." There is not a suggestion of any other than the ordinary and well-understood use. Railroad bridges, or bridges for railway purposes, were entirely different structures, created for different purposes, governed by different rules, and requiring, as a prerequisite to their construction, legislative authority. A bridge of the latter character was never contemplated by this act, nor, indeed, by any of the numerous amendments thereto down to that of 1885. The appellant misapprehends the language of the presiding justice in this regard. He nowhere intimates that the act of 1867 authorized the building of a bridge for railway travel. On the contrary, referring to all the acts passed prior to that of 1885, he declares that in none of them does any power to build a bridge for railway travel seem to have been conferred. He does say that, but for the constitutional inhibition of 1875, there seems to be no reason why the bridge might not have been built capable of accommodating railway travel. Clearly what he means by this observation is that, but for the constitutional inhibition, the act of 1885 would be valid, and the bridge might then have been built for railway travel under its express au-

¹Affirming 5 N. Y. Supp. 77.

thority. Such is the view I take of his opinion, and this view is borne out by these various statutes. The first attempt to bring in the railway element is in this act of 1885. When it was passed the petitioner's charter had been forfeited by the failure to comply with the act of 1879, (chapter 426.) This latter act was a legislative waiver of previous forfeitures, but it provided that the construction of the bridge should be commenced, "under contract for the entire structure, within two years" from the 30th of May, 1879, (section 1.) Nothing was done by the petitioner towards the commencement of construction within the time so limited, and consequently the forfeiture declared by the original act (section 12, c. 395, Laws 1867) became operative, (*In re Railroad Co.*, 72 N. Y. 245.) This case distinctly holds that the penalty for non-compliance with such a condition, declared in the original act, attaches to non-compliance with the act enlarging or extending the term. The penalty for non-compliance, specified in the act of 1867, is that "this act, and all rights and privileges granted hereby, shall be null and void." Now, while the legislature in 1885 had power to waive the forfeiture of May, 1881, just as it had waived previous forfeitures, it had not the power, under the guise of this waiver, and under the semblance of reviving the forfeited charter, to confer a distinctly new right, never before thought of, namely, the right to build the bridge for railway travel. It is entirely apparent that this was an evasion of the constitution. The act, with this new right speciously embodied in it, was evidently applied for and obtained because of a complete change in the petitioner's original scheme.

The proofs show that the idea of a bridge for the passage of persons, animals, carriages, and vehicles, as contemplated by the original act, had been entirely abandoned. The bridge and its approaches are now designed for a double-track railway. It is simply a railway viaduct upon which both through and local trains are to be run. There are to be no carriage-ways, and even the "limited" footway is to be mostly for bridge service. I do not doubt that the power of the legislature to grant special charters for the building of bridges over the East river is limited by the constitutional prohibition against the passage of a private or local bill, granting to any corporation, association, or individual the right to lay down railroad tracks. The right conferred by the act of 1885 to build the bridge in question for railway travel plainly implies a grant of the right to lay down railroad tracks, and thus runs counter to the constitutional prohibition. The presiding justice's reasoning on this head is quite satisfactory, and needs no amplification. The same observation applies to his treatment of the petitioner's effort to sever this grant from what would otherwise have been a valid waiver of the existing forfeiture. The unauthorized grant was so interwoven with the other provisions and purposes of the act that it cannot be severed therefrom and rejected, leaving the revival of the old charter to stand. See *Cooley*, Const. Lim. 213; *In re Railway Co.*, 107 N. Y. 54, 55, 14 N. E. Rep. 187; *Allen v. Louisiana*, 103 U. S. 80.

There is still another, and an equally fatal, difficulty in the petitioner's way, and that is that it has again forfeited all its rights and privileges. I mean the very rights and privileges attempted to be conferred by the act of 1885. Section 3 of the act provides that the actual construction of the bridge shall be commenced on or before the 30th day of May, 1888. The evidence is clear and conclusive that this provision was not complied with. The petitioner's own proofs fail to show anything more than preparation prior to the 30th of May, 1888, while the affidavits read on behalf of the city give the 7th of June, 1888, as the precise date when the first cargo of stone was placed upon Blackwell's island by any representative of the petitioner. It follows, on the authority of the case previously cited, (72 N. Y. 245.) that, upon the failure of the petitioner to commence the actual construction of the bridge within the time limited by the act of 1885, the penalty attached to the origi-

nal condition, declared in the act of 1867, became operative, and all rights and privileges granted to the relator became null and void.

It is not necessary, therefore, to consider the question whether the legislature intended to appropriate any part of Blackwell's island to the use of this bridge company, nor to consider any of the other questions which were so thoroughly discussed.

The order appealed from, for the reasons assigned, as well as those furnished by the presiding justice, should be affirmed, with costs.

LASCELLES et al. v. MILLER.

(*Supreme Court, General Term, First Department. November 7, 1889.*)

SALE—ACTION FOR PRICE—DAMAGED GOODS.

Plaintiffs entered into contract to sell defendant bananas to be shipped on defendant's steamer from the West Indies, with the provision that they should not be cut until the steamer arrived. When the steamer arrived the fruit had been cut several days, but it was accepted by the captain of the steamer, and taken to New York, where it was sold by defendant at a loss, on account of its damaged condition. Held, that defendant was liable for the price of the fruit, less the amount of damages sustained by reason of its being cut before the arrival of the steamer.

Appeal from circuit court, New York county.

Action by Alfred S. Lascelles, Eliot A. De Pass, and Joseph L. Myers against John Miller. There was a judgment on a verdict for plaintiffs, and an order denying a motion for a new trial, and defendant appeals.

Argued before VAN BRUNT, P. J., and DANIELS and BARRETT, JJ.

Goodrich, Deady & Goodrich, (John A. Deady, of counsel,) for appellant.
Johnson, Gallup & Hurry, (A. Gallup, of counsel,) for respondents.

VAN BRUNT, P. J. This action was brought to recover upon a contract made by the defendant with plaintiffs for the purchase of bananas and oranges to be shipped by the steamer *Blanche Henderson*, owned by the defendant, at Jamaica, West Indies. The plaintiffs and defendant had some conversation in reference to the probabilities of procuring a cargo of bananas at Jamaica, which resulted in the plaintiffs telegraphing to their agent at Jamaica on the 8th of November, 1886, in pursuance of the instructions of the defendant to secure immediately oranges and bananas, "which must not be cut until the steamer arrives." Mr. Lascelles, one of the plaintiffs, testified that on the 19th of November he had another conversation with the defendant, who had called at the office and inquired if anything had been heard of the arrival of the *Blanche Henderson*. Mr. Lascelles states that he told him that up to that time they had no cable advice of her arrival; and he also told him at the same time that they had received a letter from their Kingston agents, dated the early part of November, in which they said that they had their telegram ordering the fruit, and that it would be next to impossible to carry out the proviso of "not cutting the fruit before the vessel arrived." Mr. Lascelles further testifies that the defendant told him to send a telegram to Jamaica to inquire whether the *Blanche Henderson* had arrived, and that he informed the defendant that his agent had written him that the proviso in regard to cutting the fruit before the vessel arrived could not be carried out. The defendant did not make any reply to Mr. Lascelles. The steamer did not arrive at Kingston until the forenoon of the 22d of November, and was not ready to load until the 23d. The bananas had been cut, and on the wharf of Kingston, several days before the steamer arrived, and the bananas which were shipped on board of the steamer at other points in Jamaica had also been cut and ready for shipment several days before the arrival of the steamer. The bananas were received on board by the captain of the steamer, and were brought to New York, and, upon their arrival, both bananas and oranges were found to be in a very bad condition,—almost worthless; realizing, upon

the sale thereof, the sum of \$1,600 only. The plaintiffs brought this action for the price agreed to be paid for the fruit, and upon the trial the only question which was submitted to the jury by the learned court below was whether or not the jury were satisfied, from the evidence, that the parties had agreed to so modify the original order that was given that the condition that the bananas should not be cut until after the arrival of the steamer was not to be insisted upon; and, if they had not, what damages the defendant had sustained by the breach of the instruction not to cut the bananas until arrival of vessel.

It is claimed upon the part of the appellant that there was no evidence whatever which justified the submission of any question as to the modification of the contract to the jury; and it would appear from the previous part of the charge of the learned judge that such was his opinion, because he states that it was undisputed that the first order for these bananas was that they should be cut after the steamer arrived, that the plaintiffs said that they would not undertake to carry that out, but that the defendant gave him another order, and he told him to telegraph such order to Jamaica. Plaintiffs said they would, but did not know that they could make an agreement on that basis. If this was the condition of the evidence, then no authority was given to the plaintiffs to give any other order than that which was contained in the telegram, namely, that the bananas should not be cut until the arrival of the steamer. It does not appear that prior to the 18th or 19th of November, and after these bananas had been cut, any communication was made to the defendant that the plaintiff had received word from his agents that this part of the order could not be complied with. We have examined the record in vain to find any other instruction given by the defendant to the plaintiffs than that the bananas must not be cut prior to the arrival of the steamer. It is true that the defendant was informed that it would be next to impossible to comply with this order; but, notwithstanding this statement, the defendant in no way altered or modified his instructions, neither was any such modification hinted at in the telegram authorized to be sent. The defendant, therefore, took the risk, in case of the impossibility of procuring the bananas under the condition which he had placed upon the order, that his ship should not receive the desired cargo; and this was a risk he had a right to assume, or not assume. There was no authorization given, as far as we can ascertain, on the part of the defendant, as to the cutting of those bananas contrary to the instructions which had been given. Under these circumstances, therefore, it would appear that, not having authorized any variation from the orders which he had given, if such variation resulted in damage the defendant had a right to recover the same from the plaintiffs. The captain of the vessel, if he knew of the instructions and circumstances under which the order was given, would have been justified in refusing to accept the cargo; but, by the acceptance of the goods, the defendant, in the first instance, became liable for the purchase price, subject, however, to his right to offset any damages which he may have sustained by reason of the failure of the plaintiffs' agent to comply with the instructions which had been given. The jury evidently found that the contract had not been modified, and that the defendant was entitled to be credited upon the purchase price with the amount of damages sustained by reason of the breach of the provision that bananas were not to be cut until after arrival of vessel; hence no harm was done to the defendant by the submission of the question of modification to the jury. Indeed, no objection seems to have been made to the submission of this question to the jury; the only point taken being that there could be no recovery at all, if the jury found that the order had not been modified. The case was thus submitted to the jury in as favorable light for the defendant as the facts proven permitted. The defendant could not accept the goods and sell them, and then, with the proceeds of sale in his pocket, refuse to pay any part of the purchase price. As has been already stated, the agent of the defendant, the captain of the vessel, might

have refused to accept the cargo because the bananas had been cut before arrival of steamer; but, having accepted them, the defendant became liable for purchase price, subject to deduction for damage sustained by reason of violation of contract. These damages have been awarded the defendant by the jury. Their amount was to be determined by them, as there was some question as to whether the whole damage was caused by the fact of cutting before arrival. The judgment and order appealed from should be affirmed, with costs. All concur.

DEAN *et al.* v. DRIGGS.

(*Supreme Court, General Term, First Department. November 7, 1889.*)

WAREHOUSEMEN—RECEIPT—DESCRIPTION OF GOODS.

Under Laws N. Y. 1853, c. 326, as amended by Laws 1866, c. 440, making warehousemen liable for damages for issuing a receipt for any article unless actually received in their store, defendant, who issued his receipts for a number of barrels, described as containing "Portland Cement," and undertook to deliver same on return of the receipts, is not liable on the delivery of the article received by him unless it is shown not to be "Portland Cement."

Appeal from circuit court, New York county.

Action by Robert J. Dean and another against Marshall S. Driggs. Judgment was entered on verdict for plaintiff, and an order was entered denying a motion for a new trial. Defendant appeals. For order denying motion to dismiss appeal, see 5 N. Y. Supp. 947, *mem.*

Argued before VAN BRUNT, P. J., and DANIELS and BRADY, JJ.

John Berry, for appellant. *Charles Blandy*, for respondents.

DANIELS, J. The action has previously been before this court upon an appeal from a judgment dismissing the complaint. As the evidence was then presented the case was regarded as one for the jury, and the judgment was directed to be reversed and a new trial had. *Dean v. Driggs*, 44 Hun, 480. The trial upon which the present judgment has been recovered took place under this direction, and to sustain the appeal the court has been urged to reconsider the point upon which the liability of the defendant has been made to depend. He was a warehouseman, and received into his warehouse upwards of 2,463 barrels, described as containing cement. For these barrels receipts were issued by him, which were afterwards surrendered. Small quantities of the article were taken from the warehouse, and two other receipts finally executed and delivered by the defendant to Max Von Angern. These receipts stated the article to be cement,—Portland in one instance, and Portland cement in the other. One of the receipts was for 963 barrels, and the other for 1,500 barrels, and each in the same form declared the property "to be delivered to his order on return of this receipt and payment of storage." Von Angern borrowed money of the Chemical National Bank, and hypothecated the receipts for the security of the loan. They were regularly indorsed for that object. The plaintiffs also guaranteed the payment of the loan, provided the security should be delivered to them upon the performance of their guaranty. The debtor failed to pay the debt, and the plaintiffs, under their guaranty, were called upon for its payment, and paid the loan, taking up these receipts for their own protection from the bank. The position taken on behalf of the defendant is the same now as it was upon the preceding appeal, that he should not be held liable for the delivery of the kind and description of property mentioned in the receipts, but that he should be exonerated from liability by delivering the packages, with their contents, which have been received by him in store. The case of *Hale v. Dock Co.*, 29 Wis. 488, has been relied upon as an authority sustaining this position. In that case the receipt was given for 54 barrels of mess pork. But it finally turned out, on examination, that this was not the contents of the barrels, but they contained

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only salt; and it was determined by the court that the defendant, delivering the receipt, performed its agreement by its readiness to deliver the barrels with the salt. In that state a statute, very similar to the laws of this state, had been enacted, and was in force at the time of the transaction forming the subject of the litigation. But the case does not appear to have been disposed of, or decided, upon the effect of the statute, but upon a very extended examination of other decided and reported authorities, and it was there concluded that the warehouseman was bound to do no more in the performance of his obligation than to deliver the article received by him. But the present case has been regarded as falling within a more rigid rule of liability on the part of the warehouseman by reason of the enactment of chapter 326 of the Laws of 1858, as that was amended by chapter 440 of the Laws of 1866. By the first section of this act warehousemen were prohibited from issuing any receipt, or other voucher, "for or upon any goods, wares, merchandise, provisions, grain, flour, or other commodity, to any person or persons purporting to be the owner or owners thereof, or entitled or claiming to receive the same, unless such goods, wares, merchandise, provisions, grain, flour, or other commodity shall have been actually delivered into the store, or upon the premises, of the person issuing the receipt." And the statute has not left the warehouseman at liberty to issue the receipt upon the articles delivered to him being apparently of the description mentioned in the receipt, but it has prohibited the receipt from being given unless the goods, wares, merchandise, provisions, grain, flour, or other commodity shall have been actually received into the store. The language is entirely plain and free from ambiguity, and seems to leave no room for construction; and where that is the case it becomes the duty of the court to follow it as it has been employed, and to carry it into effect as that has been declared by the legislature. And no more than that was done by the decision already made, holding the defendant to have violated this prohibition, if the commodity mentioned in the receipts was not of the description known as "Portland Cement." And it was regarded as following from the language of the act that the defendant became liable to parties receiving the receipts in good faith, and for value, upon the indorsement of the person in whose favor they were issued, if the commodity mentioned was not Portland cement. The law itself made the receipts negotiable by indorsement as long as they were not stamped or stated to be not negotiable by the defendant. This liability was also considered to be sanctioned and warranted by the last branch of the seventh section of the act as it was finally amended. This part of the act has not in any sense rendered the liability dependent upon the knowledge of the warehouseman that the article was not of the description mentioned in the receipt. To make it an indictable offense to issue false receipts the first branch of this section requires that the law shall be willfully violated. But this term "willfully" has not been employed in that part of it declaratory of the liability of a warehouseman to an action for damages, and it was evidently omitted, in this connection, by the design and intention of the legislature. As the law was first enacted in 1858 even a willful violation of its provisions was not in language rendered essential for the creation of a criminal liability. But any warehouseman, or other person, who should violate any of the preceding provisions of the act, was then declared to be deemed guilty of fraud, and upon his conviction liable to be fined and imprisoned; and after that followed the same clause declaratory of his liability in a civil action for damages. The section remained in this form until the enactment of the law of 1866, when this term "willfully" was added to the branch of the section declaratory of the criminal liability, and it is entirely clear that this was done as a qualification only of the act denominated a crime. As to the remaining part of the section, prescribing the civil liability of the warehouseman, no change was made, and as the attention of the legislature was in this manner directed to the section, and they changed only

the former part of it, it is no more than reasonable to infer that the term "willfully" was omitted from the latter branch of the section for the reason that it was intended that the warehouseman should remain civilly liable whenever he violated the prohibition contained in the first section of the act as it was originally enacted. And upon this ground this case is entirely distinguishable from the authorities upon which the decision in *Hale v. Dock Co.* proceeded.

The case of *Robson v. Swart*, 14 Minn. 371, (Gil. 287,) is still more inapposite to this controversy, for there the receipt in fact agreed to no more than was to be implied from its very general and descriptive words, and so it was considered by the court in the decision of the case. And what was said in *Miller v. Railroad Co.*, 90 N. Y. 430, as to the general law of the state, appears to support the effect which the statutes of the state, in force at the time when these receipts were issued, by their language, have been regarded as entitled to receive. That was an action upon a bill of lading for the value of eggs, stated in it to have been the contents of 80 packages, or barrels. The barrels contained sawdust, and the company was relieved from liability only for the reason that the printed form of the bill contained the statement "Contents and value unknown." In the decision it was stated that "the sole question is whether the description of the articles in the bill of lading was a representation by the carrier that the barrels contained eggs, because, if this is the true construction of the instrument, the right of the plaintiffs to recover is unquestionable." *Id.* 432.

In the present case the receipts were given in such form as to include the representation that the property to be returned was so many barrels of Portland cement. If it had not been intended by the defendant to create the obligation against himself to return that commodity there was not the slightest difficulty in the way of avoiding that result by adding that the contents of the barrels were unknown, or that they were described as barrels containing cement. It was entirely within the power of the defendant to avoid this liability by a simple statement excluding the obligation to return any other than the commodity contained in the packages. But he did not do that. On the other hand, he stated that he had received so many barrels of Portland cement on storage, and they were to be delivered to the order of the person named in the receipts, on the return of the receipts themselves, and the payment of the storage. He placed himself voluntarily in the position, if the commodity was not Portland cement, where the person to whom the receipts were issued could defraud others dealing upon their faith and representations, unless the defendant should be held liable for the delivery of the article stated to have been received. And the rule is where one of two innocent persons is to suffer loss from the fraud of a third, the loss shall fall upon the individual who has placed the third person in the position, and supplied him with the evidence through which the successful perpetration of the fraud could take place. The defendant is within the operation of this principle, and liable to make good the obligation expressed by the receipts, by the delivery of the commodity mentioned in them, or the payment of their value. The case was submitted by the court to the jury strictly according to this principle of liability, and they rendered a verdict in favor of the plaintiffs for the sum of \$4,054.16. This verdict is assailed as having exceeded the support afforded to it by the evidence. To recover the verdict it was incumbent upon the plaintiffs to prove the extent to which they had sustained loss by the action which had been taken upon the faith of the defendant's receipts. To entitle them to recover at all they were bound to prove that the barrels did not contain Portland cement. This article was shown to be manufactured in England, France, Germany, Belgium, and the United States. It derived its name and description from the ingredients from which it was manufactured, and its ability to set and become hardened in water. It was also stated to be of a

peculiar color, known to persons engaged in its manufacture, sale, or use. All the barrels in the defendant's warehouse were at no time examined. The extent of the examination made by the witnesses sworn on behalf of the plaintiffs did not exceed 118 of the 2,468 barrels in store. They did propose to extend the examination, but they were not permitted to do so by the defendant's attorney, for the reason that 120 barrels opened for that purpose afforded a full opportunity to ascertain the character and condition of their contents. But this statement was not supported by the evidence given on behalf of the defendant, indicating that there were barrels forming a part of the mass that has been stored in the warehouse which did contain cement denominated by the witnesses to be "Portland Cement." One of the plaintiffs, Mr. Wills, testified that he went to the warehouse within three or four days after the maturity of the note, and in October, 1885, and that he found the cement in a cellar of the defendant's warehouse, and that it had been hardened. His acquaintance with the article of Portland cement was that it was a floury substance when it was in a good condition, and that he could, by looking at it, distinguish it from some other kind of cement. His statement further was that "all I know about Portland cement is that I have seen an article in the market of a certain character, floury condition, and coming in certain packages, known as 'Portland Cement,' and I have dealt in it and sold it as such. That is all I know about Portland cement." The barrels in the cellar of the defendant's warehouse were stated by him to be tiered up three or four in height, and running back through the cellar. He further added that he did not examine closely, but he made an examination of the barrels superficially, going around and sounding them. In this examination he found barrels with staves broken, enabling him to look at the article. And he testified that he took up a stick and poked at it, and found that it was a hard substance; that it was a brown, mortar-like substance, inside of the barrels; and that was the character of all the barrels which he examined. He could not, he swore, push the stick beyond three inches in the barrels, and the color did not resemble Portland cement. This was substantially all the evidence which was given by him as to the quality of the article contained in the barrels, and the number which he examined in this manner was not stated by him. His evidence, therefore, was quite limited in the way of supporting the plaintiffs' action. The next witness examined upon this subject was Thomas R. Keator. He had formerly been a manufacturer and importer of cement, and made an examination of this article. But he testified that he could not tell whether the barrels contained Portland cement without making a test; that he took samples, and made a ball test which he considered thorough, and then added that the commodity was not Portland cement. The reasons he afterwards gave for this conclusion were that the article would not harden, but crumbled, and went to pieces. On that account he stated: "It was not a good cement. That opinion is derived from this test I spoke of." But the samples used by him were taken from two of the casks. They were obtained from the head of the casks, and he had no knowledge whether the cement would deteriorate by age. In his further evidence he stated that about 10 tests had been made of the article, and that he had known Portland cement to harden while it was confined in the packages. His experience, he said, was "that Portland cement does harden in the barrels sometimes,—quite often." This testimony given by him materially diminishes the force of that given by Mr. Wills, who placed his judgment of the article upon the fact that it was a hard substance as he found it in the barrels which he examined, and it at the same time tends to establish the fact that the sample taken by himself from the barrels, lacked the important quality of hardening under water; and to the extent of his examination it tended to prove the fact to be either that this was not Portland cement, or that it had lost this, its most valuable, quality. The witness Alexander Keeler stated that he had opened half a

dozen barrels of the cement, and bored down with a stick, and an adze, and found a substance like sand. These barrels had the trade-mark, or brand, of a manufacturing firm in France, engaged in the manufacture of cement. He found the article to have hardened; that it had not the color of Portland cement. It fell to pieces, instead of hardening, under water, and only in the appearance of the packages resembled Portland cement. The witness Thomas Keyes opened 110 barrels, and went down half way into the barrels. He testified that the substance was not like Portland cement. It was a different substance altogether, and he never saw Portland cement like it. Further testimony was given by John J. Tucker, who was sworn on behalf of the plaintiffs, and was a builder. He previously examined the cement for another party receiving 20 barrels of it, which he used in his business. His description of it was that it was very granular, more so than Portland cement, or any other cement, and of a very high color, and not comparing in substance with anything he had previously used. He did, however, use these barrels, although he found them to be solid all the way through, and he added at the close of his testimony that he would not swear that this was not Portland cement, although it was different from any he had seen before. This was all the evidence given on behalf of the plaintiffs to prove the fact that the 2,463 barrels in controversy contained a substance different from that of Portland cement.

On the part of the defendant it was proved by the importer that this article was imported by him from France, and that he had paid its purchase price, and placed it in the warehouse of the defendant. He seems to have acted in good faith, and upon the belief that the barrels contained Portland cement. Other witnesses were examined who testified to the fact that they had obtained samples from some of the barrels, and had subjected it to the process under which cement of this description was expected to harden, and that this cement had hardened, although not as thoroughly as the best quality of Portland cement. It does not appear that these persons obtained the samples used by them from the same barrels as those which were mentioned by the witnesses on behalf of the plaintiffs; and it is not probable that they did, for the reason that the action of the commodity used by them was entirely different from that obtained by the plaintiffs' witnesses. There was no substantial conflict between the witnesses sworn on behalf of the plaintiffs and those sworn on behalf of the defendant, for in the samples obtained by them, and the barrels which were examined, the article proved to have been different, indicating that the barrels in store with the defendant did, so far as the observation of his witnesses extended, contain Portland cement; and as the evidence on behalf of the plaintiffs referred to no more than from 118 to 120 barrels of the cement, and the fact was made to appear by the evidence of the defendant that some of the barrels certainly did contain Portland cement, it was not sufficient to justify the general verdict for the amount rendered by the jury. The most that the evidence tended to establish as to the quality of the article was that a part of it proved to be a different substance from that mentioned in the receipts, while the evidence given on behalf of the defendant has clearly and satisfactorily proved that another portion of the packages contained Portland cement. It is true that this was of an inferior quality, but by the receipts the defendant did not bind himself to deliver any particularly described quality of cement. What he undertook to do was to deliver, upon the return of the receipts and the payment of the storage, the article known as "Portland Cement," and if it was of that description, although inferior in quality, the delivery of that article would be a performance of his obligations. If the substance was not in fact Portland cement, (and that was for the plaintiffs to prove,) it would seem to be susceptible of very satisfactory evidence. But the examinations which were made, and the tests applied, prove no more than a probability that the article was in part only as the plaintiffs affirmed it

to be, while on the part of the defendant it was equally as well established that the packages, in part certainly, were of the quality represented by the receipts. The proof, taken together, was too loose, as a matter of fact, to sustain the large verdict rendered by the jury. The amount of the plaintiffs' demand was \$3,500, together with the interest accruing upon it from the time of the maturity of the obligation, and, so far as the action is capable of being maintained, it is required by the statute to be limited to the immediate and consequential damages which the plaintiffs sustained by reason of the commodity not conforming to or being of the description mentioned in the receipts. That they had sustained damages to the extent awarded by the jury from the brief and imperfect examinations of the article which had been made, has not been maintained. The verdict should therefore be set aside, and the judgment vacated, with costs to the defendant on the appeal from the order to abide the event, and upon payment by him of the costs of the trial already had.

BRADY, J., concurs.

VAN BRUNT, P. J. I am of the opinion that, under the facts of this case, no recovery should be had.

In re MCADAM.¹

(Supreme Court, General Term, First Department. November 7, 1889.)

1. CONTEMPT—COMMITMENT—PROCEDURE.

Under Code Civil Proc. §§ 856, 857, authorizing the judge, on proof by affidavit that a witness refuses to answer a legal question, to commit him to jail by warrant, specifying the cause of commitment, etc., the fact that notice of the application was given, and an order to show cause granted, does not require a decision evidenced by an order in writing, as the statute does not require notice or rule to show cause, and such procedure is a mere nullity.

2. CONSTITUTIONAL LAW—DUE PROCESS OF LAW.

The above sections are not unconstitutional as depriving of liberty without due process of law, in that the proceeding is *ex parte*, and no notice is required.

3. SAME—TITLES OF LAWS.

Laws N. Y. 1884, c. 516, is entitled "An act to amend chapter 410 of the Laws of 1882, entitled 'An act to consolidate into one act and to declare the special and local laws affecting public interests in the city of New York,' in relation to the commissioners of accounts, New York city." The amended act was virtually a charter of the city, being an act to consolidate all the special and local acts by which the government of the city was carried on, and from which its various departments derived their power, and the law of 1884 was simply an amendment of this. *Held*, that the title of the law of 1884 was sufficient.

Appeal from special term, New York county.

Graham McAdam appeals from an order denying a motion to vacate a commitment for contempt. For opinion delivered at special term, see 5 N. Y. Supp. 387. Laws N. Y. 1884, c. 516, is entitled: "An act to amend chapter four hundred and ten of the Laws of eighteen hundred and eighty-two, entitled 'An act to consolidate into one act and to declare the special and local laws affecting public interests in the city of New York,' in relation to the commissioners of accounts, New York city." The sections of the Code of Civil Procedure referred to in the opinion are as follows: "Section 856. If the person subpoenaed and attending or brought, as prescribed in the last section, before an officer or other person or a body, refuses, without reasonable cause, to be examined, or to answer a legal and pertinent question, * * * the person issuing the subpoena, if he is a judge of a court of record or not of record, may forthwith, or, if he is not, then any judge of such court may, upon proof by affidavit of the facts, by warrant commit the offender to jail, there to remain until he submits to do the act which he was required to do

¹ Affirming 5 N. Y. Supp. 387.

or is discharged according to law. Section 857. A warrant of commitment, issued as prescribed in the last section, must specify particularly the cause of the commitment; and, if the witness is committed for refusing to answer a question, the question must be inserted in the warrant."

Argued before VAN BRUNT, P. J., and BRADY and DANIELS, JJ.

Peter Mitchell, for appellant. *J. J. McKelvey*, for respondent.

VAN BRUNT, P. J. In March, 1889, a commitment was issued by Justice INGRAHAM committing Mr. Graham McAdam to jail, there to remain until he should answer a question named in said commitment, which had been propounded to him by the commissioners of accounts of the city of New York, or be discharged according to law. The grounds upon which the motion was made were that the proceedings to commit McAdam for contempt were initiated by an order to show cause, and therefore a decision evidenced by an order in writing was necessary. Upon the face of the commitment no such fact appears; and although, upon the papers submitted, it would seem that an order to show cause had been issued, yet, there being no authority in law for any such proceeding, all that went before the signing of the commitment was a nullity. The commitment is issued, apparently, *ex parte*, under sections 856, 857, of the Code. No notice whatever was required; and the mere fact that notice of the application was given, or an order to show cause granted, in no way impaired the right of the court to issue the commitment as though no such notice had been given. Therefore the court was entirely right in refusing to enter any order upon the return of the order to show cause; and such refusal in no way invalidated the commitment, because, as already said, the commitment appears to have been issued, not by virtue of any order to show cause, but simply *ex parte*, as provided and authorized by the Code. It is to be seen that the commitment is to be issued by a judge of the court, and not by the court; and therefore the entry of an order would simply amount to the justice directing himself to issue a warrant. It is correctly claimed by the respondent that the application is entirely *ex parte*, and does not require any notice whatever of the application to be given to the witness, and that the application must be made, not to the court, but to a judge, who alone has power to commit the offender. Therefore, under sections 856, 857, the correct practice was pursued. No notice was necessary, and no order could be entered; and the commitment was issued in pursuance of these provisions of the Code.

The claim that chapter 516 of the Laws of 1884 is unconstitutional cannot be sustained. Chapter 410 of the Laws of 1882 was virtually a charter of the city of New York. It was an act passed to consolidate into one act all the special and local acts by which the government of the city of New York was carried on, and from which its various departments derived their power, by which their rights were conferred. Chapter 516 of the Laws of 1884 was simply an amendment of this charter, and its title was certainly more explicit than that of chapter 410 of the Laws of 1882. The title fairly represents the subject-matter of the legislation contained in the chapter; and, unless the legislation itself is to be set out in the title, it was sufficiently definite to answer all the requirements of the constitution.

It is further urged that the sections of the Code under which the warrant was issued are unconstitutional because in violation of that part of the constitution of the United States which provides that "no person shall be deprived of life, liberty, and property without due process of law." Why reference should be made to the constitution of the United States it is difficult to imagine, when the same provision is found in the constitution of our state, which would be much more applicable if any violation of its terms has occurred. It is claimed that, because these sections do not require notice of the application, therefore the offender is deprived of his liberty without due

process of law. What is "due process of law" has not been clearly defined; but the practice of summary commitments has prevailed ever since the Revised Statutes were adopted, and long before the adoption of the constitution to which reference has been made. Such a procedure in the case of a witness has been recognized for a sufficient length of time to bring it within the category of "due process of law." By the Revised Statutes, (volume 2, pt. 3, c. 8, tit. 13, § 3,) in cases of proceedings to punish disobedience to any rule or order requiring the payment of money, or of disobedience to any subpoena, it is expressly provided that no notice is necessary, and the warrant to commit may issue in the first instance. This has been the practice since then, and the provisions of the Code in question are in entire harmony with the previous legislation upon the same subject. As to the relevancy of the question asked, we are unable to say that it was not relevant. The party moving to set aside the commitment has not shown its irrelevancy by bringing before the court the papers upon which the commitment was granted, or the other evidence which was taken in the proceeding. Upon the papers before him, the justice issuing the warrant has found the question to be irrelevant; and without those papers it is impossible for us to say that his conclusion was erroneous. We are of the opinion, therefore, that the order appealed from should be affirmed, with \$10 costs and disbursements. All concur.

McSWYNY v. BROADWAY & S. A. R. Co.

(*Supreme Court, General Term, First Department. November 7, 1889.*)

1. CARRIERS—HORSE RAILROADS—INJURY TO PASSENGER.

Where, in an action to recover damages for an injury received in entering defendant's car, the evidence is conflicting as to the manner in which the accident happened, it is a question of fact for the jury, and their verdict is conclusive thereon.

2. SAME—NEGLIGENCE.

A charge that plaintiff could recover only if the car had stopped when she attempted to get in, and that she would be guilty of contributory negligence if she attempted to enter by grasping the rear rail while the car was in motion, and that it was for the jury to determine whether the car started before she had a chance to get in, properly submitted the case to the jury.

3. SAME.

It was negligence in defendant if the car was started so as to throw plaintiff from the step while entering, whether by the act of the conductor or driver.

4. SAME—EVIDENCE.

Where the evidence as to the permanent nature of plaintiff's injury is conflicting, the verdict of the jury will not be disturbed.

5. SAME—DEGREE OF CARE.

Defendant was obliged to use the utmost care to carry passengers safely.

6. EVIDENCE—HARMLESS ERROR.

Where a physician was not allowed, on cross-examination, to state whether an examination of the person of plaintiff, to which he had testified, was fairly made, the error was harmless, when another physician present at the examination testified that it was accurately made.

7. SAME.

Evidence of one who saw plaintiff four months after her injury that she was then suffering great pain, is competent.

8. DAMAGES—PERMANENT INJURY.

Plaintiff was entitled to recover, not only for the injury she had suffered up to the time of the trial, but for what would probably afterwards follow.

9. TRIAL—PHYSICAL EXAMINATION OF PLAINTIFF.

Plaintiff's counsel could properly refuse to submit plaintiff to an examination of physicians, as proposed by defendant.

10. EVIDENCE—COMPETENCY.

It was competent for plaintiff to prove by her own evidence that her power of motion was not what it previously had been.

Appeal from circuit court, New York county.

Catharine McSwyny sued the Broadway & Seventh-Avenue Railroad Company for damages for personal injuries. From a judgment on the verdict of the jury, and an order denying a new trial, defendant appeals.

Argued before VAN BRUNT, P. J., and BARRETT and DANIELS, JJ.
Root & Clarke, for appellant. *Christopher Fine*, for respondent.

DANIELS, J. The verdict was recovered for the sum of \$10,000 for damages sustained by the plaintiff occasioned by a fall on Broadway, in the city of New York. As the testimony was given upon the trial, it tended to establish the fact that in the afternoon of the 30th of December, 1885, she endeavored to take passage upon a car, proceeding upon the street railway in Broadway, in a northerly direction. Her testimony was to the effect that the car had stopped, and she had placed her right foot on the lower step, and her hand on the last rail, and her left hand on the rail of the car at the dash-board, and was in the act of raising the other foot, when the car was started with a jerk, and she was thrown violently to the ground, and received the injuries for which the verdict was rendered. Other testimony was given in the case tending to confirm the correctness of her statements that the car had stopped at the time she endeavored to take passage upon it, and that she was injured by being thrown down as the car was afterwards started. This evidence was controverted by that which was given by the conductor, and other witnesses examined on the part of the defendant. But the conflict, in this manner created, presented no more than a question of fact for the jury, upon the determination of which their verdict must be accepted as conclusive. There was no such preponderance in either direction as would permit the court to interfere with their decision as to the effect of the evidence.

Further evidence was given on behalf of the plaintiff tending to establish the fact that a fracture of the upper part of the hip bone was caused by her fall; that she was disabled by the fracture, and for months confined to her bed; that she suffered great pain during the time, and continued to do so when the trial took place; and that it was probable that she would never recover from the consequences of the injury. As to this subject, there were differences between the witnesses; but, like the other, they were of such a nature as to require them to be considered and decided by the jury. As the evidence presented the case, it was clearly one of fact, to be decided by them.

At the close of the evidence, it was submitted to the jury, with a clear statement of the law applicable to the theories in this manner presented by the proof. And the jury were left without embarrassment to apply the legal rules applicable to the disposition of the case, in their investigation and decision. But requests were made on behalf of each of the parties for directions to the jury, in the main included in the charge as it was first given. They were not wholly accepted or followed as they were presented by the plaintiff's counsel, and exceptions were taken by him to the refusal of the court to accede fully to his propositions. Neither these requests, nor the exceptions themselves, should have been allowed to form any part of the case upon the appeal, for the reason that the verdict and judgment were in the plaintiff's favor; and needless additions of this description have no other effect than to confuse and obscure the points really to be presented for the decision of an appellate court. The same is true as to the rulings against the plaintiff upon objections taken by evidence. They should have formed no part of the case, and no injustice would now be done if the case should be sent back to be resettled for the purpose of having these objections excluded from it; and, if this practice is to be adopted and followed, that will undoubtedly be the remedy for its correction. But without giving that direction on this occasion, as these defects were not noticed at the time of the argument, it will be as well to consider whether either of the exceptions taken in behalf of the defendant is well founded. An exception was taken on its part to the charge "that there is no evidence from which the plaintiff might be found guilty of negligence, if the car did not entirely and fully stop."

This was explained by the court by the statement "that there is no evidence by which you could charge the plaintiff with contributory negligence, because the defendant is not guilty of negligence, unless the car stopped, and was started on again." This direction restricted the right of the plaintiff to recover to the fact that the car had stopped at the time when she endeavored to go upon the platform; and if that were the truth, and all she did was to endeavor to pass up the steps upon the platform, and she was thrown off by the sudden starting of the car, there would be no reason for imputing negligence to her in what she did. But the court proceeded further, upon the consideration of this subject, relieving the case from all possible criticism in this respect; for the further charge was given that she would be guilty of negligence contributing to the injury if she attempted to board the car, while it was in motion, by grasping the handle of the rear dash-board with her left hand, and placing her right foot on the step, and then raising her left foot to the step. If these were found to be the facts, then the charge was "that the defendant is entitled to a verdict, because there is no evidence that the defendant was negligent." Upon this subject, the further directions were given that it was for the jury to determine whether or not the car started before she had a chance to get on board; and whether started by the driver or conductor does not make any difference. And these directions placed the case under the dominion of the jury as favorably as the defendant was entitled to have that done, under the evidence given upon the trial. For it has been held by the court, and the rule appears now to be settled, that it is not, as a matter of law, always negligence, even for a person to attempt to pass upon a street-car while it is in motion. When it is proceeding at a low rate of speed, the act may safely be performed; subjecting the person performing it to no imputation whatever of carelessness or imprudence. *Eppendorf v. Railroad Co.*, 69 N. Y. 195. It was by no means a controlling circumstance whether the car was started up by the act of the conductor or the driver, if it was done, while the plaintiff was endeavoring to pass upon the platform. For, by whomsoever it may have been put in motion, it was a negligent act to perform it in such a manner as to throw the plaintiff from the step, as that was described by herself and the witnesses sworn in her behalf. The defendant also excepted to the statement made by the court that the defendant assumed the obligation to use the utmost care to carry passengers safely to their destination. But this has been so often sanctioned and repeated by the authorities as to become an elementary proposition in the law; and the plaintiff was entitled to this degree of protection in endeavoring to go upon the car of the defendant. As the case was presented to the jury, the latter was no legal ground for complaint.

Upon the cross-examination of the witness Joseph Creamer, who was a physician, he was asked whether an examination of the person of the plaintiff, to which he had testified, was in his opinion a full and fair examination. This was objected to. The objection was sustained, and the defendant excepted to the exclusion of the evidence. The question was a fair and proper inquiry addressed to the witness, and the defendant was entitled to have it answered. *Curtis v. Gano*, 26 N. Y. 426; *Laros v. Com.*, 84 Pa. St. 200-209. And, if this ruling remained as it was in this manner made, the defendant would clearly be entitled to a reversal of the judgment. But it did not, for the witness Simon J. Walch, who was another physician present at the examination, was asked the question, "Was that as accurate a measurement as it was possible to make, in your judgment?" and he answered, "I think it was." And this seems to have reference to the time concerning which the inquiry was made of the witness Creamer, for he states that Dr. Walch was there, and Dr. Kelly made the measurement. This evidence of the witness Walch was in no manner contradicted or controverted by any other testimony given upon the trial; and it consequently gave the defendant the benefit of the proof in such

a manner as to render it the duty of the jury to accept and follow it. *Lomer v. Meeker*, 25 N. Y. 361; *White v. Stillman*, Id. 541. This was substantially a correction of the error made upon the trial, and the exception to the preceding ruling was thereby deprived of its force and effect.

Another witness sworn on behalf of the plaintiff testified that she saw her about four months after the injury; that she was then lying on her back, and seemed to be suffering great pain. This was objected to by the counsel for the defendant, but the court held it to be competent, and the defendant excepted. No ground was assigned for the support of this objection; and for that reason the defendant cannot now, for the first time, sustain it by affirming it to be the opinion, only, of the witness. But evidence of this description is ordinarily more than a mere opinion, for the reason that emotions caused, either by distress or pleasure, usually exhibit themselves through the countenance; and the indications of their existence are as well defined and accepted by experience as when they may be expressed in the language of the person affected by them. It is not possible for a witness to describe either of these emotions by the employment of language in such a manner as to give the evidence of their existence to a jury; and, when that is the fact, then the conclusion of the witness from the appearance of the person has been allowed to be stated. This was done in *Adams v. People*, 63 N. Y. 621, as to the condition of a person's eye-sight; and so it was in *People v. Eastwood*, 14 N. Y. 562, as to the existence of the fact of intoxication; and this was followed in *McCarty v. Wells*, 4 N. Y. Supp. 672. And, where the appearance of an individual may be such as to indicate the suffering of great pain, no good reason exists which would justify the exclusion of a statement of the fact by a witness to whose observation the person may have been subjected.

The evidence was sufficient to present the inquiry to the jury whether the injury sustained by the plaintiff was or was not permanent in its effect. The legal rule upon this subject was considered in *Johnson v. Railway Co.*, 4 N. Y. Supp. 848. And the evidence upon the trial of this action was sufficient to place that inquiry within the deliberation of the jury; for, if the plaintiff was entitled to recover, she was not only entitled to indemnity for the injury she had sustained up to the time of the trial, but for such as would probably afterwards follow as a necessary consequence of the accident. *Filer v. Railroad Co.*, 49 N. Y. 42.

The refusal of the plaintiff's counsel to permit her to be subjected to the examination of physicians, as that was proposed at the trial by the defendant, is sustained by *Roberts v. Railroad Co.*, 29 Hun, 154. And it was entirely competent for the plaintiff to prove by her own evidence that her power of motion was not what it previously had been. And no error arose out of the rulings excluding the answers to the questions as to whether the plaintiff complained of the conduct of the driver or conductor. What she did complain of was very clearly evinced by her evidence, leaving no ground for any misunderstanding upon this subject. And whether she had anything to do with employing any particular counsel was a fact of not the slightest importance upon the trial. What should be the amount of the verdict was an inquiry committed to the good sense and experience of the jury; and in the amount awarded by them they did not transcend the rule sanctioned by any of the authorities. No sufficient reason appears for interfering, either with the judgment or the order; and both the judgment, and the order denying a new trial, should be affirmed.

BARRETT, J. I concur in the result, and also in Mr. Justice DANIELS' opinion, with a single exception. I do not think that the exclusion of the question put to Dr. Creamer was error. The examination as to which he was being interrogated was by the defendant's physicians. Dr. Creamer had al-

ready testified that he had not given a thought to the question of the fairness of this examination, that he only saw part of the measurements which were made, and that he was very indifferent to what took place. Manifestly, then, there was no foundation for an accurate opinion upon the subject; and, upon this ground, the exclusion of the question might fairly be justified. But, further, the doctor's opinion was thus asked, not as to the result of his own or of another physician's examination, but whether an examination not then in evidence, and which might never be in evidence, was full and fair. In other words, the cross-examining counsel desired in this manner to herald his forthcoming testimony with a certificate of its value from the plaintiff's witness. Still further, even if the ruling in question were erroneous, I cannot agree that after so thorough and exhaustive an examination as was given to Dr. Creamer, covering minutely every feature of the injury and of the treatment, a new trial should be awarded for an error which could not possibly have prejudiced the defendants.

VAN BRUNT, P. J., concurs.

PEOPLE *ex rel.* HOGAN *v.* FRENCH *et al.*, Police Commissioners.

(*Supreme Court, General Term, First Department.* November 7, 1899.)

MUNICIPAL CORPORATIONS—DISCHARGE OF POLICEMAN—DISCRETION OF COMMISSIONERS.

Where it is admitted that a member of the police force has been intoxicated, it is solely within the judgment of the police commissioners whether the excuse offered is such as to relieve him from the penalty of dismissal. BARRETT, J., dissenting.

Certiorari to review the action of the police commissioners in discharging the relator, Matthew Hogan, from the force.

Argued before VAN BRUNT, P. J., and DANIELS and BARRETT, JJ.

John M. Tierney, for relator. William H. Clark, Corp. Counsel, (W. L. Turner, of counsel,) for respondents.

VAN BRUNT, P. J. Although we are of the opinion that there is no evidence contained in the record before us which in the slightest degree justifies the terribly severe punishment inflicted upon the relator, yet, under the rules laid down by the court of appeals in the case of *People v. French*, 110 N. Y. 494, 18 N. E. Rep. 133, we have no power whatever to redress the wrong. The relator was concededly intoxicated, and whether an excuse was offered which relieved the relator from the effects of the fact seems to have been, under the rule above stated, a matter solely within the judgment of the police commissioners. That the excuse presented was one which should have relieved the relator, a man who had been upon the force for 16 years, and who is spoken of by his superior officer as a first-class man, and who had during all these years an excellent record, from the severe punishment inflicted upon him, cannot be questioned. The evidence in this case shows that the occurrence which led to the relator's removal occurred during the strike upon the railroads; that he had been riding on the cars for five days to protect them from the strikers; that on the day in question he had eaten nothing; that about 3 o'clock he complained of being sick, when the sergeant took him off the car at 8:30 on account of his sickness; that the sergeant advised him to report sick. But the relator replied that, in view of the trouble, it would look mean on his part to do so. The sergeant says that at 4:30 he saw the relator, and he was perfectly sober. The relator, feeling badly, then took a drink of brandy and peppermint, and it intoxicated him. The evidence further shows that the relator had not taken a drink of liquor before in 16 years, and upon this state of facts the severest punishment possible was meted out to him, and he was, for this offense, clearly excusable under the circumstances, dismissed from the force.

Notwithstanding the manifest injustice which has been done we do not see any way in which we can afford any relief. The writ must be dismissed, without costs.

DANIELS, J., concurs.

BARRETT, J., (*dissenting*.) I cannot think that this case comes within the general rule laid down for our guidance in *People v. French*, 110 N. Y. 494, 18 N. E. Rep. 133. It is an extreme case of misfortune, but not, as I humbly conceive, of guilt. Hogan frankly acknowledged that he was intoxicated, but intoxication is not necessarily, and under all circumstances, guilty. The surroundings may always be considered. We cannot, it is true, under the authority referred to, review the excuse given for a guilty act, but we may look at the attendant circumstances to ascertain whether the act was in fact guilt. Here the charge was conduct unbecoming an officer, in that the patrolman was so much intoxicated as to be unfit for duty. Would such a charge be established by proof that a brave and faithful officer, fainting under injuries received in the performance of his duty, had been given a stimulant by a physician, or even by a lay passer-by, and that he had been affected thereby? Would the intoxication thus caused be deemed conduct unbecoming an officer, and would the medical or samaritan incident be treated as a mere excuse to palliate proved guilt? It seems to me not. The officer's condition would, of course, be *prima facie* evidence that it was produced by a guilty act. But surely a man may possibly come under the influence of liquor by an innocent act. In the present case the uncontradicted testimony pointed conclusively to Hogan's innocence—not as to the effect, but as to the cause. He had no appetite for liquor. The drink in question was not even a passing indulgence. It was resorted to to sustain nature, and to enable this sick, famished, and worn-out officer to continue the struggle which even his sergeant had humanely relieved him from. Where he procured the stimulant, whether it was at an apothecary's or at a dram-shop, does not appear. It was certainly, however, but a single glass, and it affected him almost immediately. The determination that this isolated act of physical need was conduct unbecoming an officer, and should be punished by his practical destruction, ought not, in my judgment, to be sustained. It was an unjust, ruthless, and cruel sentence; just such a sentence as subdivision 5, § 2140, Code Civil Proc., was designed to give us authority to remedy. The proceedings of the commissioners should be reversed, and the relator reinstated.

BRADLEY v. LEAHY *et al.*

(*Supreme Court, General Term, First Department. November 7, 1889.*)

JUDICIAL SALE—RIGHTS OF PURCHASER—FALSE REPRESENTATIONS.

A purchaser of land at a judicial sale, on the faith of a representation in the terms of sale that a mortgage to which the land was subject would not be due until 18 months thereafter, relying on that interval to effect a sale of the land before the maturity of the mortgage, will be relieved from his purchase where it appears that proceedings for foreclosure were already in progress, and were completed before he received his deed, and he did not hear a statement of the fact of such proceedings, alleged to have been made publicly at the time of the sale.

Appeal from special term, New York county.

Action by James N. Bradley against Mary A. Leahy and others for the foreclosure of a mortgage. At the sale thereunder John J. Burchell became the purchaser of the land, and he now appeals from an order denying his motion to be relieved from the purchase, and granting plaintiff's motion to compel him to complete the same.

Argued before VAN BRUNT, P. J., and DANIELS and BARRETT, JJ.

Charles Unangst, for appellant. *William T. Morris*, (*John Brooks Leavitt*, of counsel,) for respondents.

BARRETT, J. The sale was under a decree for the foreclosure of a second mortgage. The terms of sale, as read by the auctioneer and signed by the purchaser, contained this provision: "*Seventh.* The property is sold subject to a first mortgage of \$5,000, due September, 1888." The sale took place on the 28th day of January, 1887. The property was struck down to Mr. Burchell for \$1,050 over and above and subject to the first mortgage. Mr. Burchell thereupon paid \$605 on account of the purchase money, and signed the terms of sale containing the above provision. It appears that at the time of the sale the prior mortgage was in process of foreclosure, and the decree therein was actually entered before the time fixed for Mr. Burchell to take his deed. Upon this state of facts, Mr. Burchell asked to be relieved. There is no doubt that the provision which we have quoted from the terms of sale was a substantial misrepresentation. The prior mortgage was then due, and the statement that it would not be due until September, 1888, was inaccurate, and misleading. Mr. Burchell purchased upon the faith of that statement. He purchased the premises for immediate sale or exchange, and he relied upon the margin of 18 months, which, according to the terms of sale, he would have to effect such sale or exchange before the maturity of the prior mortgage. By reason of this misrepresentation the premises were practically worthless for the purpose for which they were purchased; and Mr. Burchell really acquired nothing more substantial than a claim to the surplus moneys which might result from the impending sale under the decree of foreclosure of the prior mortgage. The plaintiff, however, claims that Mr. Burchell should be held to his purchase because of a statement said to have been made publicly and aloud at the time of the sale that the prior mortgage was then in process of foreclosure. The plaintiff's attorney testifies that this announcement was made, and he furnishes certain details tending to give probability to the statement. He is corroborated by the auctioneer. Upon the other hand, Mr. Burchell distinctly affirms that he heard no such announcement; that he heard the terms of sale read by the auctioneer, and noted the repetition of the provision therein that the property in question was "sold subject to a first mortgage of \$5,000, due September, 1888." In this he is inferentially corroborated by the referee, who makes no affidavit, but who states in his report that he attended the sale in person, and sold the premises for the sum of \$1,050 "over and above and subject to a first mortgage on said premises for \$5,000 due September 1, 1888, and on which there was stated to be due on the day of sale the sum of \$5,342.83." Mr. Burchell says that he understood this \$342.83 to refer to interest, while the plaintiff's attorney and the auctioneer say that it referred to interest and costs of foreclosure. The referee is silent upon the latter head, and also as to the alleged announcement that the prior mortgage was then in process of foreclosure. Upon the whole, then, the fact of the latter announcement is in doubt, (for the testimony is somewhat evenly balanced,) and it is, at all events, impossible to attribute negligence to the purchaser in not hearing and noting a statement which was in direct conflict with the terms of sale. He had a right to rely upon the terms of sale, and he had no reason to exercise extraordinary vigilance to see that they were not suddenly varied at the last moment. If this were a private contract between individuals, clearly the terms of sale would govern. They were carefully prepared for the purpose of embodying the contract,—the entire contract. They were carefully read and scrutinized before they were signed. A court of equity would never enforce such a contract where there is a material misrepresentation therein to the prejudice of the vendee; nor should the court compel the purchaser to take under its decree, where such a misrepresentation is made by its own officer. It is plain that, owing to this misrepresentation, Mr.

Burchell cannot get what he bargained for. It is equally plain that, had he known the true condition of things, he would have declined to bid. Under such circumstances specific performance will not be decreed. Wat. Spec. Perf. § 504; 2 Bing. Real Prop. 666; 2 Pom. Eq. Jur. §§ 889, 890. Still less will a judicial sale be enforced. The order should accordingly be reversed, with \$10 costs and disbursements, the plaintiff's motion denied, and the purchaser's motion granted, with \$10 costs. The order will also contain a provision cancelling Mr. Burchell's bid, directing the return of the sum paid by him to the referee, and in addition payment of \$102, the expense of examining the title. All concur.

NORDLINGER *et al.* v. DE MIER *et al.*

(*Supreme Court, General Term, First Department: November 7, 1889.*)

UNAUTHORIZED APPEARANCE.

Defendant, a resident of Cuba, was sued as a general partner of his co-defendant, though in fact he was a special partner. He was not served with process, and neither appeared, nor authorized an appearance. His co-defendant sent a copy of the writ served on him to attorneys without explanation, directing them to defend. Supposing themselves authorized to do so, the attorneys appeared for all the partners. *Held*, that defendant should have been allowed to set aside the appearance as to him, and leave to substitute attorneys was not sufficient relief.

Appeal from special term, New York county.

In an action by Jacob Nordlinger and others against Joaquin de Mier and others, De Mier was not served, and moved to set aside an alleged unauthorized appearance by attorney. He was denied this relief, but was allowed to substitute attorneys. Being dissatisfied therewith, he appeals.

Argued before VAN BRUNT, P. J., and BRADY and BARRETT, JJ.

L. H. Arnold, Jr., for appellant. F. W. Hinrichs, for respondents.

BARRETT, J. The defendants were sued as general partners. The summons was served upon Parraga only. He sent the summons to Messrs. Arnoux, Ritch & Woodford, responsible attorneys of this court, who appeared for all the defendants. They so appeared without authority from either De Mier or De Castro, but they acted in entire good faith, believing that Parraga was authorized to retain them for all the defendants. Parraga's authority is now denied, and the defendants all insist that the partnership was special; that Parraga was the only general partner, while De Mier and De Castro were but special partners. It is quite clear on these papers that Parraga was not authorized to bring De Mier within our jurisdiction through the instrumentality of a legal appearance, or otherwise. De Mier resided in Cuba, and he knew nothing whatever of this suit. Indeed, it is doubtful whether Parraga intended to authorize these attorneys to appear for De Mier. He simply sent them the summons without explanation, directing them to defend. They did not know that the partnership was special, and they appeared for all the defendants upon the supposition that they were authorized to do so by one member of a general partnership, acting for the firm. De Mier now comes before this court, appearing specially for the motion, and claiming that his general partner had no authority to appear for him, or to retain counsel on his behalf; that he himself never, in any manner, authorized the appearance; and thus he finds himself apparently within our jurisdiction without the service of process or authorized appearance.

The question is whether, in a direct proceeding like this, the notice of appearance should be set aside. If the circumstances were reversed, there can be no doubt of the rule in this state. We would not recognize a claim of jurisdiction, asserted over one of our citizens, by the unauthorized appearance of a foreign attorney. Whatever question there may be with regard to an unauthorized appearance in our own courts for a resident of this state, there

is none with regard to such an appearance in the courts of other states. In an action here upon a foreign judgment, the defendant may question the jurisdiction as matter of fact, may prove that he was not served with process within the foreign jurisdiction, and that he never authorized an attorney there to appear for him; and such proof will be fatal to the foreign judgment. *Kerr v. Kerr*, 41 N. Y. 272; *Hoffman v. Hoffman*, 46 N. Y. 30; *Borden v. Fitch*, 15 Johns. 121; *Starbuck v. Murray*, 5 Wend. 148. The justice of a distinction, in this respect, between domestic judgments and judgments of sister states was questioned by RAPALLO, J., in *Ferguson v. Crawford*, 70 N. Y. 261. Referring to the full faith and credit provision of the constitution, he observed that the judgments of our courts in the cases above cited could "stand on no other logical basis" than a ruling that such was the common law, and presumably, therefore, the law of the sister state. But without considering the present case from the stand-point of *Denton v. Noyes*, 6 Johns. 296, and the many critical examinations of that case with which the books abound, we think that the same rule should be applied here which we insist upon when the situation is reversed. Having adopted the rule laid down in *Borden v. Fitch*, 15 Johns. 121, and having firmly adhered to it in numerous cases, we certainly cannot question its propriety when applied to ourselves. Clearly, we had no jurisdiction over De Mier *in persona*, and we could acquire none, without an authorized appearance or personal service of process within the state. The old rule which remitted a party to an action against the attorney can have no application to non-residents of the state which licenses the attorney. The court cannot well draw non-residents within its jurisdiction through the unauthorized acts of its own officers. De Mier was therefore entitled to a cancellation of the notice of appearance, and to be left just where he was—without the jurisdiction—when the attorneys attempted to bring him in. The right to substitute other attorneys does not meet the case. We cannot say to the foreigner, "You never voluntarily submitted yourself to our jurisdiction, but still it will be convenient to keep you here, and we will permit you to choose your legal agent." The incident of De Mier's presence within the state, for a short time, since the commencement of the suit, calls for no special comment. He was not served with process while here, and he knew no more about the suit then than he did when he was in Cuba. That the plaintiffs might have served him, if they had not relied upon the appearance, is a mere speculation. Such considerations can have no bearing on the broad question of jurisdiction. The order should be reversed, with \$10 costs and disbursements, and the motion to cancel the notice of appearance granted unconditionally, with \$10 costs. All concur.

HINE v. NEW YORK EL. R. CO.

(Supreme Court, General Term, First Department. November 7, 1889.)

1. CONFLICT OF LAWS—DUTCH OCCUPATION OF NEW YORK.

The city of New York, though occupied by the Dutch, was always English territory; and hence the "Bowery," a street alleged to have been dedicated during the Dutch occupancy, is governed by the rules of the common law, and not by the civil law, as to the rights of abutting owners.

2. STREETS—RIGHTS OF ABUTTING OWNER.

An owner of land abutting on the Bowery is entitled to easements of light, air, and access, and may recover for injuries to those rights arising from the construction of an elevated railroad on the street.

Appeal from circuit court, New York county.

Action by Charles S. Hine against the New York Elevated Railroad Company to recover for injuries to plaintiff's premises by the construction and operation of an elevated railroad on a street adjacent thereto. After plaintiff's testimony was in, defendant moved to dismiss for failure of plaintiff to

"prove facts sufficient to constitute a case." The motion being granted, plaintiff appeals. For former report, see 36 Hun, 298.

Argued before BRADY and DANIELS, JJ.

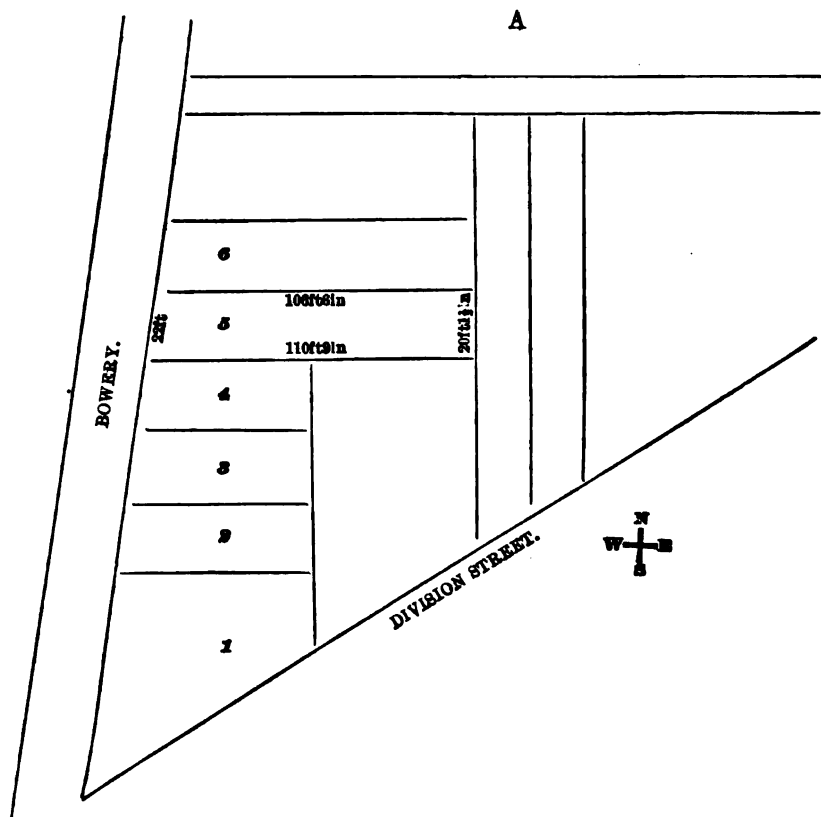
W. H. Arnoux, for appellant. Davies & Rapallo, for respondent.

BRADY, J. The plaintiff brought this action to recover damages alleged to have been sustained by reason of the manner in which the defendant built, constructed, and operated its railway. The details given in the complaint were that the engines used constantly emitted noxious gases, odors, smoke, steam, coal-dust, and cinders, which passed into and through the plaintiff's building, to the great discomfort of the occupants; and, further, that to exclude the odors and gases mentioned, and to lessen the noises occasioned by the passage of the defendant's engines and cars, it was necessary to keep the windows of the plaintiff's building shut; that he had been unable to remedy the evils stated, and, in consequence, the beneficial use and enjoyment of his property had been greatly damaged, and its value greatly reduced. The defendant denied that the plaintiff had any right, interest, easement, privileges, or benefits in the street known as the "Bowery," and in which plaintiff's property is located, other than the right of passage, and alleged that such right was not interfered with. It also denied the emission of gases, odors, smoke, steam, coal-dust, or cinders, which passed through the building of the plaintiff; denied that the plaintiff was obliged to keep the windows of the building shut, as alleged in reference to such elements; and that the plaintiff had sustained damages by their wrongful acts. The defendant then alleged that it was duly organized under the acts of the legislature set out; that it had authority to build the railway, and to equip the same with locomotives for use thereon; and that such construction and use had been made in the most skillful and careful manner in which it was possible to operate an elevated railway in the streets of this city. Upon the trial the plaintiff put in evidence a warranty deed granting the *locus in quo* to the plaintiff, and then gave evidence tending to show that the rental value of the premises was injured by the construction and operation of the defendant's railway, in their effect upon the light, air, and access to them, to the extent of \$2,500 a year, and that they were thereby injured in value to the extent of \$20,000, and rested. Defendant's counsel put in evidence Act 1866, c. 697. Also put in evidence articles of association of the West Side & Yonkers Patent Railway Company. Also put in evidence the following acts: Act 1867, c. 489, and Act 1868, c. 855. Also put in evidence appointment of commissioners by the Croton aqueduct department by the governor, pursuant to the requirements of the aforesaid acts. Also put in evidence supplemental articles of association of the West Side & Yonkers Railway Company, changing the name of the company. Also put in evidence a mortgage given by the company, and foreclosure proceedings under the mortgage given by the company, and the deeds of the property and franchises of the company to the New York Elevated Railroad Company, and the permission of the commissioners so appointed to use dummy engines. Also put in evidence approval by the commissioners of the location and the plans of the structure, stations, and so forth, of the defendant road, and the resolutions connected therewith. Also put in evidence articles of association of the New York Elevated Railroad Company; Act 1875, c. 595; also Act 1875, c. 606; also appointment of commissioners by the mayor, under chapter 606 of the Laws of 1875. Also put in evidence the plan of the route designated by the commissioners, and the conditions and requirements imposed by the commissioners, with the resolutions relating to the same. Also put in evidence proceedings in the supreme court giving consent to the construction and the operation of the New York Elevated Railroad, including the order in said proceedings. Also put in evidence resolutions of the board of aldermen, with the approval by the mayor, consenting to the route so desig-

nated. Also put in evidence the lease of the New York Elevated Railroad Company to the Manhattan Company in 1879, and the subsequent lease of 1884 by the same company to the Manhattan Company. Defendant's counsel then put in evidence a stipulation as to the description of the property taken in this case, marked "Exhibit No. 1:"

"N. Y. supreme court. Charles S. Hine against The New York Elevated Railroad Company. It is hereby stipulated by the parties to this action, for the purpose of any future trial of the same, that the diagram marked 'A,' signed by the counsel hereto, correctly represents the length and position of the boundary lines, according to survey, of the lot No. 13 Bowery, which is described in a deed made February 1st, 1855, by Thomas Ward and wife to Charles S. Hine; the figures upon said diagram correctly stating the length of the respective boundary lines in feet and inches,—the distance from the north-east corner of said lot, along the northerly boundary line, to the easterly line of the Bowery, being, by measurement, 106 feet six inches; and the distance from the south-easterly corner of said lot, along the southerly boundary line, to the easterly line of the Bowery, being, by measurement, 110 feet nine inches. Dated N. Y., March 24th, 1886. ARNOUX, RITCH & WOODFORD, Attorneys for Plaintiff. DAVIES & RAPALLO, Attorneys for Defendant.

"Supreme court. Hine v. New York Elevated R. R.



"Lot No. 5 is known as No. 13 Bowery. New York, March 23, 1888. ARNOUX, RITCH & WOODFORD, Attorneys for Plaintiff. DAVIES & RAPALLO, Attorneys for Defendant."

Also put in evidence Valentine's History of New York from 1609, vol. 1, pp. 30, 31, 69, 70. Also put in evidence Hoffman's Appendix to the Estate and the Rights of the Corporation of New York, vol. 2, the grants mentioned in pages 214, 242, 237, 226, 238, and 193. Also put in evidence Map of Ancient Bowery, being Diagram No. 14 in Hoffman's Appendix, p. 226. Also put in evidence page 236 of Hoffman's Appendix, and the grant made in 1645, by Governor Keefe to Classen; also grant dated in 1653, of the same property, from Classen to Beekman; also grant made in 1667. Also put in evidence deed dated 1784, recorded in Liber 54, p. 348, from Isaac Stoughtenburgh and others, commissioners in forfeiture, to John W. McKesson; letters of administration on the estate of John W. McKesson, recorded in the surrogate's office in Liber 5, p. 246; records of the court of common pleas, containing the proceedings in the partition of the real estate of said McKesson; order of said court, dated January 6, 1801, appointing commissioners to make partition; deed of the commissioners to Smith Hicks, recorded in Liber 79 of Conveyances, p. 39; deed from Smith Hicks to Anna Gearadt, recorded in Liber 85 of Conveyances, p. 93; deed from Anna Gearadt to Henry T. C. Feltus, recorded in Liber 180 of Conveyances, p. 52; the last will and testament of Henry T. C. Feltus, recorded in the surrogate's office in Liber 62, p. 372; letters testamentary and deed of executors, recorded in Liber 323 of Conveyances, p. 570, to Jacob Lorillard, conveying the same property; last will and testament of Jacob Lorillard, recorded in the surrogate's office in Liber 79 of Wills, p. 104; deed of Margaret Anna Lorillard, recorded in Liber 447 of Conveyances, p. 574, to Jacob Lorillard, Jr., and others; letters testamentary on the estate of Margaret Anna Lorillard, issued to Albon P. Man, dated December 3, 1846; deed recorded in Liber 486, p. 38; deed of partition, recorded in Liber 488 of Conveyances, p. 245; deed from Thomas Ward to the plaintiff. The deed from Isaac Stoughtenburgh, Liber 54, page 348, to John McKesson, conveys a portion of the land designated on Diagram No. 14, of Hoffman, supra, as "E. Bowery, No. 5;" the description being, "Bounded westerly by the Bowery lane," etc. The foregoing chain of title conveys the same property down to the plaintiff's grantors, Thomas Ward and Margaret H., his wife, except that the description in deed of partition, supra, Liber 488, p. 245, is as follows: "Bounded westerly in front by the Bowery, * * * containing in width twenty-four feet five inches in front, and twenty feet eight inches in the rear, and in length on the north side 106 feet six inches, and on the south side 111 feet, be the said several dimensions more or less." Also put in evidence terms of capitulation between the British and the Dutch government in 1664, which appear in Hoffman's Estates, etc., of the Corporation of New York, vol. 1, pp. 19, 338. Also put in evidence the treaty of Breda, 1674, by which the terms of that capitulation were affirmed. Also put in evidence patent from the British government to the Duke of York. Also put in evidence the Dongan charter of 1686, and the Montgomerie charter of 1730. And thereupon, for the purposes of the following motions, the defendants rested their case.

The testimony being thus closed, defendant's counsel moved to dismiss the complaint upon the following grounds: (1) That plaintiff has failed to prove facts sufficient to constitute a case. (2) That the plaintiff has failed to prove that he has, or that there is appurtenant to his lot, any easement to light, air, or access, or any property right in the street called "Bowery;" or that there is any right or easement to use the land forming the bed of that street, peculiar to himself or his lot, other than those he has a right to enjoy as one of the public. (3) That plaintiff has failed to prove that any property of his has been taken by defendant, by the erection or maintenance of the structure of the elevated road in said street, or the operation of trains thereon, and that there is no complaint or evidence of negligence on the part of the defendant. (4) That it appears that the land forming the bed of the Bowery in front of

plaintiff's premises is owned by the state or city of New York in fee, and free from any covenant or trust for the benefit of the abutting owner; that the state or city has, through the treaties, charters, and conveyances in evidence, acquired the absolute title to said land originally vested in the Dutch government, which by Dutch law was free from any right or easement or residuary estate in the owner of the land abutting upon the street. (5) That plaintiff has not alleged ownership of any land forming the bed of the street, but has alleged the existence of an easement over said land, which precludes the idea of ownership of said land; that he has failed to prove the ownership of any land in the street, as his deed, taken in connection with the actual measurement of his lot, only carries title to the easterly side of Bowery; and that, merely as an owner of abutting land, plaintiff has no property in the street. (6) That it appears from the pleadings and proof that the defendant has legislative authority and municipal consent to the construction and operation of its railroad through the Bowery past plaintiff's premises; that as no property of plaintiff has been taken, and no damage been done by negligence, defendant cannot be held responsible for damage or injury (if any) inflicted upon plaintiff incidental to the construction and operation of the road. Motion to dismiss complaint granted, and plaintiff excepted. Plaintiff's counsel then asked the court for permission to go to the jury on the facts of the case; but this was refused, and the plaintiff excepted. And this "memorandum," so called, was also placed before the court, as appears by the record: "Memorandum on treaties bearing upon the surrender of the province of the New Netherlands to England."

The first document we meet is the articles of capitulation, concluded on August 27, 1664, between the English government and Dutch authorities, found in 2 Colonial Documents, 250. Article 1 provides that the states-general or West India Company shall freely enjoy all farms and houses, (except such as are in the forts,) and that within six months they shall have full liberty to transport all arms and ammunition, or else they shall be paid for them; article 2 provides that all public houses shall continue for the use for which they are now used; article 3 provides that all people shall continue free denizens, and enjoy their lands, houses, goods, and ships wheresoever they are within this country, and dispose of them as they please; article 4 gives liberty to the citizens to remove themselves from the country; article 5 guarantees free transportation to England, if so desired; articles 6 and 7 provide that intercourse and emigration between Holland and the colony shall be free; article 8 guarantees liberty of conscience; article 9 provides against Dutchmen being pressed in any war whatever; article 10 provides that no soldiers shall be quartered on the inhabitants without compensation; article 11 provides that the Dutch here shall enjoy their own customs concerning their inheritances; article 12 provides for the keeping of public documents by those in whose hands they are now; article 13 provides that no judgment that has passed any judicature here shall be called in question, but an appeal is reserved to the states-general; article 14 provides for the giving of passports; article 15 provides that any public debt that has been incurred shall be paid; article 16 provides that inferior magistrates shall be kept in office until new ones are elected; article 17 provides that the Dutch law shall apply to all transactions entered into prior to this date; article 18 provides for the continuation of duties under certain circumstances; article 19 provides that the military shall march out with drums beating; article 20 provides that, if orders should come to redeliver the colony, it shall be done immediately; article 21 provides that deputies are to be chosen by the town of Manhattan; article 22 provides that those who have any property or any houses in the fort shall be allowed to slight the fortifications, and then shall enjoy all their houses as all people do where there is no fort; article 23 provides for safe-conduct to all soldiers who may want to go to Holland.

The text of the treaty of Breda, in the original Latin, is to be found in Dumont, Corps Diplomatique, vol. 7, p. 44. The date is July 21-31, 1677. The third section, after stating that all quarrels should be forgotten, goes on: "In order that this peace may rest on a firm foundation, and from this day every occasion of contention be removed, it is further agreed that each of the high contracting parties shall hold and possess, with full right of sovereignty, property, and possession, (*cum plenario jure summi imperia, proprietatis, et possessionis*,) all lands, islands, cities, forts, places, and colonies which such party may have taken from the other party by force and arms, or in any other way, either during the war or at any other time, in such mode and manner as it occupied and possessed them on the 10-20 May last; none of these places being excepted." When, afterwards, another war broke out between England and Holland, and the colony of New Netherlands had been reconquered by the Dutch, it was stipulated by the treaty which put an end to the war that the colony should be resurrendered to England. This was done by virtue of a general clause of the treaty of Westminster. Dumont, Corps Diplomatique, vol. 7, p. 253, Feb. 9-19, 1674. The sixth clause of this treaty reads: "It is agreed and understood that all places, islands, cities, harbors, castles, or forts taken by one of the contracting parties from the other, from the time that the late unfortunate war broke out, either in Europe or elsewhere, up to the time above mentioned for the cessation of hostilities, shall be surrendered to their former lord and owner in the condition in which they shall be when this peace is concluded." The seventh clause is as follows: "It is further agreed that the treaty of Breda, concluded in the year 1667, and also all other treaties confirmed by the said treaty, be renewed, and remain in full force, in so far as they are not in contradiction with the present treaty." The only treaty referred to in the treaty of Breda was a treaty of 1662. Shortly after the conclusion of the treaty, the states-general, on the 16th of April, 1674, passed a resolution requesting the king of England "that he will allow the inhabitants of New Netherlands, aforesaid, the enjoyment of their lands, bouweries, and all their goods and rights which they possess in that country, or with the same right, privilege, and freedom as the inhabitants above mentioned enjoyed previous to the aforesaid war." 2 Colonial Documents, 545.

The defendant's counsel, as his proofs and motion to dismiss foreshadowed, contends that prior to 1664 the land forming the bed of the street in front of the *locus in quo* was owned absolutely by the Dutch government; was subject to the laws of that government in determining the rights of abutting owners; and, being thus controlled, such owners had no right to the soil of the street, highway, or road, either during its use, or upon its discontinuance, except the right of passage, and therefore presented no existing right of easement or other legal element which had been invaded or disturbed. They fortify this position by elaborate briefs, historically and legally replete, and display great research; the result, no doubt, of great industry, patience, and devotion. The contention against the plaintiffs is therefore fully and ably presented; and it may be that, notwithstanding the long period that has elapsed since our Dutch ancestors surrendered the possession of this island, whether it had been rightfully or wrongfully obtained, their laws still prevail to the detriment of its citizens who reside here, and who are supposed to possess an absolute right to those incidents of ownership and possession along the line of a public thoroughfare, which are the enjoyment of light, air, and access. And it matters not whether these elements be called "easements" or "appurtenances," "rights" or "incidents." This question, however, evolved from the documents, treaties, charters, and laws arrayed against the plaintiff's right of action, has been recently examined and determined against the defendant by the superior court of this city in the case of *Mortimer v. Railroad Co.*, 6 N. Y. Supp. 898, and in which comprehensive and satisfactory opinions were delivered by Justices TRUAX and FREEDMAN. The subjects embraced

—indeed, involved—in the ancient history of this island, and its owners, by right of discovery or conquest, are very attractive, and naturally excite the desire, if not the ambition, to give them exhaustive exposition, even though it have been done by others; but nevertheless the attraction will be resisted, and reliance, as already suggested, be placed upon the opinions mentioned. They might be enlarged, although not improved, and the conclusions arrived at further sustained by discussion; but this is not deemed necessary.

It is thought proper, however, to say that the right of the adjacent owner to the advantages of a highway, while it is continued as such, does not appear to have been questioned. The absolute ownership, even, of the soil, though it be vested in the sovereign power, and revert to it when the highway is closed, does not destroy the right to the enjoyment suggested of light and air and access; and particularly as the long and uninterrupted user of the street has deprived (it may be) even the legislative of the state of the power of withdrawing it from that use. On that subject the remarks of Judge ANDREWS in the case of *Mahady v. Railroad Co.*, 91 N. Y. 153, are appropriate, namely: "The plaintiff, though an abutting owner simply, the fee of the street being in the city, was entitled to the use of the street; and neither the legislature nor the city could devote it to purposes inconsistent with street uses, without compensation, according to the principle of *Story v. Railroad Co.*, 90 N. Y. 122, (recently decided.)" The case of *Dunham v. Williams*, 37 N. Y. 251, is not in conflict with this suggestion, for the reason that there the claim was to the center of an abandoned road-bed,—a claim to the ownership thereof. The highway, it was said in that case, was ancient, and was laid out when New York was a province of the states-general, and subject to the dominion and laws of the Dutch government, which did not permit any person to claim a present or reversionary title to the soil, for the reason that he was not the owner of the lands through which it was laid. Nor is it in conflict with anything decided in *Wetmore v. Story*, 22 Barb. 440.

Assuming, therefore, that the doctrines of the civil law were controlling, and that the land or the soil of the highway belonged to the sovereign power, and reverted to it when the highway was abandoned or closed, nevertheless, while open, the public, including, of course, the adjacent owners, were entitled to all the advantages secured by its existence. Some of these already suggested were light and air, which were recognized by the principles of the civil law as belonging so much in common to the whole society of mankind that no one person can make himself master of them, or deprive others of the use of them. 1 Strahan, Civil Law, (translated from Domat,) § 115. And further, that rivers, the banks of rivers, and highways are things public, the use of which is common to all persons, according to the respective laws of comities, the sovereign power regulating the use of them. Id. § 116. There are things common to every one, (*res communes*;) as air, flowing water, the open sea, the sea-shore. These things were not appropriated even by the state. Amos, History of the Civil Law of Rome, 124. The adjacent owner gives a consideration for these benefits of light, air, and access in the payment of the taxes imposed upon his land, and which are employed, in part at least, in meeting the expenses of the pavement of the street in front of his land, and such repairs as are needed,—taxes with which it is legally and properly burdened by municipal authority conferred by legislative action. These benefits, thus paid for, could not, under any system of government less than a despotism, be denied to the adjacent owner. Nothing bearing directly upon this precise question, it is admitted, has been found in the doctrines of the civil law, though they may exist. It cannot be, however, that these rights can be swept away by the asserted supremacy of the sovereign power over the bed of a highway. This suggestion of the right to the enjoyment of the street, as such, while open, is predicate of the assumed domination of the civil law in this colony in earlier days, which was denied in a well-considered opinion,

though a dissenting one, on the ground that neither Great Britain nor the colonial government ever claimed this province by right of conquest. It was claimed by right of discovery, not as a conquered country; and no part of the civil law, except that which was derived from England, has ever been in force in this colony. The guaranty to the Dutch settlers of the peaceable enjoyment of their possessions did not alter the nature of the British claim to the country. *Commissioners v. People*, 5 Wend. 445, (opinion of the chancellor.) The judgment should for these reasons be reversed, and a new trial ordered, with costs to abide the event.

RICKHOFF v. HECKMAN.

(*Supreme Court, General Term, First Department. November 7, 1889.*)

1. MASTER AND SERVANT—NEGLIGENCE OF MASTER.

In an action for personal injuries it appeared that defendant employed plaintiff to assist in taking down old buildings; that defendant personally directed the work; that the walls were in an unsafe condition; that his attention was called to a safe method of doing the work; that he deliberately and without observing the warning, hazarded the lives of the workmen; that, without warning to the workmen, pieces of wall were torn down and thrown into the cellar; and that the shock of this fall caused the walls, which were loose and not shored up, to fall and injure plaintiff. It was shown that the building could easily have been taken down with safety. *Held*, that the jury were justified in finding that the fall was caused by the manner in which the work was conducted, and not by the negligence of co-employees, and a verdict for plaintiff would be sustained.

2. SAME.

It appearing that defendant acted as a rash and angry man, and not as a careful and prudent man, the proposition that defendant was justified in acting on his own experience and judgment, and on advice which sustained him, is inapplicable, and will not prevent a recovery.

Appeal from circuit court, New York county.

Action by Franz Rickhoff against Charles P. Heckman for personal injuries. Defendant appeals from a judgment entered on a verdict for plaintiff, and from an order denying a motion for a new trial.

Argued before VAN BRUNT, P. J., and BRADY and DANIELS, JJ.

L. S. Goebel, for appellant. *Fleischman & May*, for respondent.

VAN BRUNT, P. J. This action was brought to recover damages for injuries sustained by plaintiff by the falling in of a building upon which he was engaged, in the employ of the defendant. The defendant was taking down the building, and the injury was claimed to have been the consequence of defendant's negligence in weakening the building by the removal of beams, joists, etc., and in failing to properly support and prop up the building while plaintiff was working in the upper portion of it, and in inducing the plaintiff to do the work while it was to defendant's knowledge in a dangerous condition. The points upon which the appellant bases his appeal are that the plaintiff did not prove the exact cause of the falling of the wall, nor that it was not caused by the negligence of his co-employees, and that there was no evidence of negligence upon the part of the defendant which entitled the plaintiff to recover, because the business was of a hazardous character, and was so known to those engaged in it. The evidence in the case shows that the defendant was engaged in taking down two old buildings, known as "Nos. 4 and 5 Hall Place;" that in the morning of the day of the injury a portion of the walls fell. The remainder of the building was thereupon secured, and work was desisted from until the arrival of the defendant, who then took charge of the same, and gave the directions as to the manner in which the work should proceed. His attention was called to methods of doing the work, which were free from danger; but these methods were rejected by him. He directed that it should proceed without taking any precautions against a possible catastrophe by such a falling of the walls of the building as subsequently

occurred. The testimony of the plaintiff's witnesses seems to show that the defendant did nothing whatever to protect his workmen from disaster, although he was repeatedly warned, but deliberately set them to work, regardless of their safety, and there is sufficient evidence from which the jury might very well infer that it was because of the manner in which this work was conducted that the injury in question resulted. It appears that these walls were in an infirm and unsafe condition, and without any warning or protection to the workmen pieces of wall were torn down and thrown into the cellar, and that the shock of this fall caused the wall in question to tumble down, the walls being loose, and not in any way shored up. It further appears that while the building could easily have been torn down without danger to the workmen, the defendant, with knowledge of the danger, deliberately, and without using any caution whatever, hazarded their lives and limbs by prying down the walls of the building in the manner which has been already stated. With this evidence before them the jury had the right to infer that the falling of the walls was caused by the manner in which the work was conducted, and that, the work being conducted under the personal supervision of the defendant, and in the manner personally directed by him, there was no ground to find that the falling was caused by the negligence of his co-employees. The workmen were not advised, as seems to be assumed by the learned counsel for the appellant, to do the work in a certain manner, but were directed to do it in that particular method by the defendant, although he was remonstrated with on the ground of its danger.

It is urged that the defendant was justified in acting on his own experience and judgment, and the other advice which sustained him, and that, if a party makes a choice in good faith of several expedients, which are presented to a careful and prudent man, he is not liable, though injury results. These propositions are perhaps abstractly true, but have no application to the facts as they have been found by the jury. It appears that, instead of acting in the conduct of the work which he was doing as a careful and prudent man, the defendant acted as a rash and angry man, and as a result subjected these workmen to the injuries which they received. We see no reason for interfering with the verdict of the jury, and the judgment and order appealed from should be affirmed, with costs. All concur.

MILLER *et al.* v. FERRY.

(*Supreme Court, General Term, First Department. November 7, 1889.*)

RES ADJUDICATA—COUNTER-CLAIM.

In an action by the assignee of a contract to deliver certain stock, defendant set up a counter-claim, founded on a contract between plaintiff's assignor, defendant, and a foreign corporation. The contract provided for an accounting with respect to certain transactions, and the answer alleged full performance by defendant, and that an accounting had been had, and stated the sum due from the assignor. *Held*, that a decree in an action to which plaintiff was not a party, in a foreign court, where the corporation had its existence, which decree was passed after the assignment to plaintiff, and adjudicated that no accounting had been had on the alleged contract, was not conclusive of defendant's right to assert and prove the accounting and establish his counter-claim.

Appeal from special term, New York county.

Action by John S. Miller and others against Charles H. Ferry, on a contract assigned to plaintiffs. Judgment for plaintiffs, and defendant appeals. For former appeal from order as to plaintiffs' undertaking in attachment, see 2 N. Y. Supp. 863.

Argued before VAN BRUNT, P. J., and DANIELS and BARRETT, JJ.

Rudd & Hunt, for respondents. *Bristow, Peet & Opdyke*, for appellant.

BARRETT, J. The main question presented by this appeal arises upon the defendant's counter-claim. The plaintiffs are the assignees of one Miltimore

with respect to a certain agreement whereby the defendant covenanted, upon a contingency which has happened, to give Miltimore certain shares of stock. The plaintiffs, as such assignees, established their right to recover the value of these shares. Thereupon the defendant attempted to set off a demand which he claimed to have against Miltimore at the date of the latter's assignment to the plaintiffs. The evidence offered by the defendant in support of this set-off was ruled out, the alleged counter-claim, consequently, was not proved, and judgment against the defendant upon the assigned claim followed. This counter-claim was founded upon a contract entered into between Miltimore, the defendant, Ferry, and two Illinois corporations. The contract provided for an accounting with respect to certain transactions, (not necessary to be here enumerated,) and for the liquidation of the balance found due, as follows: Miltimore was to execute and deliver his four promissory notes for the sum of \$5,000 each, dated the 10th day of February, 1885, payable to the order of the present defendant, Ferry, one year from date, in all \$20,000. Any sum found due in excess of this \$20,000 was to be paid by Miltimore to Ferry on or before the 10th day of January, 1886. The answer set up the performance by Ferry of all the conditions of this contract upon his part, and that an accounting was had thereunder, upon which the balance due by Miltimore was ascertained to be \$24,472.92. On account of this latter sum it is further alleged that Miltimore gave his promissory note to Ferry's order for \$20,000, and also agreed to pay the balance on or before the 10th day of January, 1886,—all in accordance with the terms of the contract. Evidence offered in support of these allegations was ruled out, apparently upon two grounds: *First*, because of a decree made by an Illinois court in an action between Miltimore, Ferry, and the two corporations, in which it was held that the accounting provided for in the contract in question had never been had; and, *second*, because such an accounting could not now be had without the presence of Miltimore and the two corporations as parties. The Illinois decree was, in our judgment, inadmissible as between the parties to this action. That judgment was rendered long after the assignment (by Miltimore to these plaintiffs) of the present cause of action. The plaintiffs took the claim in suit subject to existing equities, and subject to any lawful set-off existing in favor of Ferry against Miltimore at the date of the assignment. The latter date was the 29th of October, 1886, and the defendant's contention is that Miltimore then owed him, under the contract in question, a liquidated sum largely exceeding the claim assigned to the plaintiffs. It is quite plain that Ferry had a right to prove the existence of this liquidated demand at the date when the plaintiffs acquired the cause of action set up in their complaint. It is equally plain that an adjudication, subsequent to that date, in an action to which the assignees were neither parties nor privies, was not binding upon them. *Campbell v. Hall*, 16 N. Y. 575; *Masten v. Olcott*, 101 N. Y. 161, 4 N. E. Rep. 274. They would not have been estopped or concluded thereby. And, further, the Illinois adjudication had no relation to the assigned cause of action. It follows that, as an estoppel by judgment must be mutual, (*Lawrence v. Campbell*, 32 N. Y. 455; *Moore v. City of Albany*, 98 N. Y. 409,) the defendant is not barred from setting up as against the plaintiffs an accounting had prior to the assignment, and as a result thereof the liquidated demand existing at the date of such assignment. The other ground upon which the defendant's evidence is supposed to have been excluded is also untenable. The defendant prayed, it is true, for an accounting, but he was not bound by that prayer. He had a right to prove the facts set forth in his answer, and thereupon to ask for an appropriate judgment. If he had been permitted to prove those facts, he would have been entitled to the relief afforded by subdivision 1, § 502. Code Civil Proc., for he would have proved, not merely a right to an accounting, but a liquidated demand existing in his favor, against the assignor of the agreement sued upon, at the time of the assignment of such agreement to the

plaintiffs. He could have proved this demand without the presence of Miltimore or the two corporations, for his claim and offer were to establish the accounting provided for in the contract, and the liquidation thereupon of the sum sought to be so set off as a demand against Miltimore personally. If the defendant had been permitted to proceed without regard to the Illinois judgment, and had then failed to show an accounting under the contract, and an ascertained balance due to him by Miltimore, the question whether he could have such an accounting in this action without the presence of Miltimore or the corporations would have been presented. There can be but little doubt on that head. See *Cummings v. Morris*, 25 N. Y. 625, opinion of ALLEN, J. But it need not now be decided, as the defendant is entitled to a new trial because of the admission of the Illinois judgment, and the exclusion of evidence tending to show a liquidated demand which was the proper subject of counterclaim. The judgment should be reversed, and a new trial ordered, with costs to appellant to abide the event. All concur.

PRICE v. PRICE *et al.*

(*Supreme Court, General Term, First Department. November 7, 1889.*)

1. DOWER—DAMAGES FOR WITHHOLDING.

Under Code Civil Proc. N. Y. § 1600, providing that damages for withholding dower shall, as against any other person than the heir, be computed from the time of demand until trial or application for judgment, not exceeding six years in all, the grantee of the deceased husband cannot, by conveying the land pending an action for such damages, exonerate himself from liability for the value of the use of the premises for the period after such conveyance until the trial.

2. SAME—EASEMENTS IN HEIR'S LAND.

It is improper, as part of dower, to give a right of way over land not assigned to the widow, but belonging to an heir, or to burden such land with the right of the widow to use water-pipes laid thereon.

3. SAME—CEMETERY LOT.

Dower cannot be assigned in a burial lot.

Appeal from special term, New York county.

Action by Constance B. Price, widow of Walter W. Price, deceased, against Walter J. Price and others, heirs and grantees of said decedent, for assignment of dower. At various times orders were made and judgments rendered from which appeals were taken. See 33 Hun. 76, 432; 41 Hun. 486, 2 N. Y. Supp. 796. Subsequently such proceedings were had that a referee made a report admeasuring dower, imposing easements on lands in which dower was not assigned, for the benefit of plaintiff, and fixing the damages recoverable by her for detention of her dower. This report being confirmed, the plaintiff and various defendants appealed.

Argued before VAN BRUNT, P. J., and DANIELS, J.

Starr & Hooker and Chas. Jones, for plaintiff. *Bristow, Peet & Opdyke, Hughes & Northrup, Stephen Brown, James R. Martin, De Forest & Weeks*, and *David Wilcox*, for various defendants.

VAN BRUNT, P. J. The plaintiff and one Walter W. Price were married. Price died in January, 1876, being then the owner in fee of the real property described in the complaint herein, which consisted of some houses and lots in the city of New York, 76 acres of land, called "Price Manor," at Lake George, Diamond island, in Lake George, and a plot of land in the village of Lake George. He also owned a burial plot in Greenwood cemetery. In June, 1880, the plaintiff brought this action to recover her dower in all the aforesaid lands. The action was referred to a referee for trial, who dismissed the complaint. Upon appeal this judgment was reversed and judgment absolute was given to the plaintiff that she was entitled to dower in the lands described in the complaint, and directed an interlocutory judgment to that ef-

fect to be entered, which was done, and by which it was referred to a referee to admeasure and set off the dower. 33 Hun, 76. In July, 1885, the last-named referee made his first report that it was not for the interest of all the parties to admeasure and set off any parcel of said lands. The court, at special term, refused to confirm this report, and sent the case back to the referee with directions to admeasure the dower and set it off from the manor property. Upon appeal this order was affirmed by the general term. 41 Hun, 486. The referee thereupon proceeded to the admeasurement of the dower of the plaintiff, and in June, 1887, made his report admeasuring the plaintiff's dower, and setting off to her a part of the manor-house property, upon which stood the dwelling, etc., and also attempted to impose upon other parts of the manor property easements for the benefit of that part which had been set aside for the benefit of the dowress, and also set off one-third of the burial plot in Greenwood cemetery. In December, 1887, it was on motion of the plaintiff referred to the same referee to compute the amount due to the plaintiff from the defendants, respectively, as her damages for the withholding of her dower, and to take an account of the mesne rents, issues, and profits of the several pieces of property in which the plaintiff was endowed, from the beginning of the action until entry of interlocutory judgment, and also to the filing of his report. It appeared that the defendant Josephine Little sold the premises owned by her in April 25, 1882, and delivered possession thereof to the purchaser. In January, 1889, the referee filed his report computing the amounts as directed, charging the defendant Little with the mesne profits from the time suit was brought up to August 9, 1887, the time when report was confirmed, and charged the other defendants with such profits from the commencement of the action to the filing of his report, in January, 1889. Upon motion to confirm this report the court modified the same as to the defendant Little by striking out the mesne profits after she had sold the house, and as against St. John's Church by limiting the time from the commencement of the action to the 9th of August, 1887, the date of the confirmation of the report admeasuring the dower, and as to the other defendants by limiting the time to six years. Final judgment was entered upon this basis in May, 1889. The plaintiff appealed from that part of the judgment which admeasured the dower in the manor-house property, and from that part of the judgment awarding damages against the defendant Little, so far as it fails to award damages down to August 9, 1887; the defendants St. John's Church and Josephine Little appealed from so much of the judgment as awarded dower and damages and costs; and the other defendants appealed from so much of said judgment as allowed dower, or imposed privileges or easements upon other lands, and awarded dower in the burial plot in Greenwood cemetery. The various appellants also named in their notices of appeal various orders and judgments, but, as they have all been previously before the general term, it is not thought necessary to refer to them here.

It is not necessary to consider the question as to whether dower can be actually admeasured, or as to in what property it should be set apart, as these questions have been previously before the general term, and passed upon. Upon the whole case, however, we are of the opinion that the dower has not been so admeasured as to protect the plaintiff. There is no probability that from the part of the manor-house property set off to her she will ever be able to realize the sum to which she is yearly entitled. The situation and character of the property is such that a large margin must be left for maintenance and support, which the rental of that portion set aside will not assure. We think, also, that the referee erred in attempting to create easements over other portions of the property not set aside. The dowress is entitled to the full, complete possession of the property set aside, and the owners of the other property are entitled to have their property free and clear of and from each and every claim of the dowress. The referee, therefore, had no

right to impose charges upon land not set aside for the exclusive use and benefit of the dowress during her life. It is difficult to see how dower can be set off in a burial lot. The dowress has only a life-interest in the land admeasured; the right to the use and benefit of the same during her life. Her right, then, in the burial lot would appear to be the right to be buried there as long as she lives, and, when dead, she must remove. The referee, therefore, erred in setting off dower in the burial lot.

The only remaining question to be considered is that part of the judgment which fails to charge the defendant Little with mesne profits after the sale of the property owned by her. As at the common law a widow was entitled to damages from the time only when she recovered her judgment for her dower, the statute prescribes the only rule for a recovery for withholding dower prior to judgment. Section 1600 of the Code provides that the damages for the withholding the dower are to be computed, where the claim is made against some person other than an heir, from the time when dower is demanded of the defendants, to the time of trial or application for judgment, as the case may be, but not exceeding six years in the whole. Section 1603 provides that in case the heir of the husband has aliened the real property, the dowress may recover in a separate action against him damages for withholding her dower from the time of the death of the husband to the time of alienation. This provision, clearly, has no application to the case of a grantee. A grantee becomes liable only after demand. An heir is liable from the husband's death. No demand is necessary to fix his liability; whereas no liability begins to run against a grantee until demand, and then this liability continues until judgment. After suit brought there is no provision for proceeding against subsequent purchasers. By demand upon the grantee the liability is fixed by the very terms of the statute. There is no way that a grantee, subsequent to suit brought, can be brought in. The rules in actions of ejectment have no application here. This right is a creature of the statute, derives its whole force from the statute, and when the statute provides that the dowress may also recover from a person other than the heir damages for withholding her dower, from the time of demand to the day of judgment, it did not say, unless the person in the mean time alien the land; but it does say that a defendant, withholding dower at the time of bringing suit, is liable for damages until judgment. We think, therefore, that it was erroneous to deprive the plaintiff of damages after the alienation of her land by the defendant Little. She was liable for such damages for six years prior to the application for judgment. The judgment appealed from must be reversed, with costs to the plaintiff to abide final event.

In re EXTENSION OF LAFAYETTE PLACE.

(*Supreme Court, General Term, First Department. November 7, 1889.*)

LIMITATION OF ACTIONS.

Commissioners of estimate and assessment were appointed under an act providing for the acquisition of lands for city purposes, but before completing their proceedings the resolution under which they were acting was repealed. The commissioners presented no claim for their fees and expenses until after action therefor was barred by limitation. Code Civil Proc. N. Y. § 882. They then moved to refer their claim to a referee to take proof preliminary to taxing their costs. *Held* that, as section 418 requires the statute of limitations to be taken advantage of by answer, and the proceeding of the commissioners did not admit of the defense being so presented, the order should be made; but, to avoid the possibility of prejudice to the city's rights, it should recite that it should not affect the right of the city to interpose the defense if the claim should be afterwards sued on.

Appeal from special term, New York county.

A special proceeding was begun to acquire land in New York city for the extension of Lafayette place. Commissioners of estimate and assessment were appointed, but before concluding their labors the resolution under which

they acted was rescinded by the council, and nothing further was done until, several years later, the commissioners, being desirous of being paid their fees and expenses, moved a reference to take proof concerning their claim. This order was made over the objection of the city, which appeals therefrom.

Argued before VAN BRUNT, P. J., and BRADY and DANIELS, JJ.

William H. Clark, David J. Dean, and Carroll Berry, for appellant. John C. Shaw, for respondents.

DANIELS, J. This proceeding was commenced prior to the year 1872. Its object was to take the necessary legal measures to extend Lafayette place southerly, from its termination at Great Jones street, to the northerly line of Bleeker street. In March, 1872, while the proceeding was pending and incomplete, it was brought before the common council of the city for further consideration and action, and at that time the resolution of October 11, 1869, authorizing the proceedings to be taken, was rescinded and repealed. That was a complete termination of what had previously been authorized for this object, and at that time the rights of the commissioners of estimate to their compensation became complete. There was nothing further to be done by them beyond their own act in making out and authenticating their account; but they took no measure or proceeding for that object, but allowed their claim to remain in this condition until the 30th of June, 1887, when they gave notice of the motion, which, upon its hearing, resulted in the order from which this appeal has been brought.

The objection presented to the making of the order was that the commissioners had, by their delay, deprived themselves of the right to this compensation and reimbursement; and that objection seems to be supported by the statute. According to the authorities, this was what was known in the law as a special proceeding, (*In re Central Park*, 50 N. Y. 493;) and the liability to make compensation for the services of the commissioners, and to reimburse their disbursements, arose under the statutes relating to these proceedings; and, where the object is to enforce such liability, then, by section 382 of the Code of Civil Procedure, an action for that purpose is required to be commenced within six years, (*People v. French*, 31 Hun, 617.) The fact that the claim of the commissioners has arisen out of a special proceeding, commenced prior to the time of the adoption of this part of the Code, in no way changes or extends their rights, or the liability of the city; for, by section 414 of the same Code, the provisions prescribing the time within which actions shall be commenced are made applicable also to special proceedings, and, under the provisions contained in this section, as the commissioners were entitled to commence an action for the recovery of their demand at the time when this part of the Code took effect, they were thereby allowed the period of two years after that in which to commence their action. This part of the Code, by section 3356, went into operation in 1877, after the commissioners had delayed taking any proceedings whatever for the collection of their claim for the period of five years and upwards, and it secured to them only two additional years within which they were still at liberty to take the necessary proceedings. But they failed to do that. They made no application for payment, and took no proceedings whatever to enforce it. If a demand was required to be made by them, they could not delay or intercept the effect of the statute by omitting to make it; for, by section 410 of this Code, where a demand may be necessary to entitle a person to maintain an action, the time within which it is to be commenced must be computed from the time when the right to make the demand is complete. Certain cases have been excepted from this part of the section, but they have no application to the claim of these commissioners.

Since these provisions have taken effect, a longer period of time has elapsed than that prescribed by section 382 of the Code, which, in this respect, is the

same as the preceding law, than has been allowed within which an action for the recovery of this demand could be instituted. But assuming, as appears to be justified, that the commissioners' claim has become barred by these provisions of the statute of limitations, still the objection does not appear to be available, as it has now been relied upon by the city; for, by section 413, the objection that the action is not commenced within the time limited can be taken only by answer, and this proceeding afforded no opportunity or means of presenting it in this manner. Its object is to obtain proof indicating the extent of the demand by the commissioners. The proceeding, as it has been taken, can result in no prejudice to the defendant, nor in any obligation requiring the payment of the commissioners' claim, or any part of it; but, when its extent shall be ascertained, that will then form the subject of an action in which this defense of the statute of limitations can be interposed as the law has provided that shall be done. *Blunt v. Mayor*, 9 Hun, 330. But, as the objection was taken that the order should not be made on account of this long period of delay, to avoid the possibility of any prejudice to the city in its defense, when an action to recover the amount may be commenced, the order should be so far modified as to declare that it shall in no manner affect the right of the city to rely upon the defense of the statute of limitations, and, as so modified, affirmed, without costs to either party. All concur.

LIPPUS v. COLUMBUS WATCH CO.

(Supreme Court, General Term, First Department. November 7, 1889.)

1. MASTER AND SERVANT—WRONGFUL DISCHARGE.

When a master is sued by his servant for wrongful discharge, and it appears that the contract bound plaintiff to perform his duties to the best interests of defendant, and as economically as possible, and to conform to reasonable rules made by defendant, and there is evidence that before the discharge disputes arose; that plaintiff disobeyed the instructions and refused the requests of defendant,—it is error to instruct the jury to find for plaintiff, as it is a question for their determination whether plaintiff's conduct was such as to justify his discharge.

2. SAME—WAIVER OF OBJECTION.

Defendant does not waive his right to go to the jury on the question of reasonable ground for discharging plaintiff, though he does not request the submission of that issue, when the trial judge has just announced his intention to submit nothing but the question of the amount of plaintiff's recovery.

Appeal from circuit court, New York county.

Action by William C. Lippus against the Columbus Watch Company, to recover damages for breach of contract. Verdict and judgment for plaintiff for \$949. Defendant appeals.

Argued before VAN BRUNT, P. J., and BRADY and DANIELS, JJ.

Bartlett, Wilson & Hayden, for appellant. *C. H. Machin*, for respondent.

VAN BRUNT, P. J. This action was brought to recover damages for breach of contract of employment. The defendant agreed to employ the plaintiff as a traveling salesman, upon certain terms mentioned in the agreement. He was discharged before the expiration of the contract, for alleged cause. At the close of the plaintiff's testimony defendant's counsel moved to dismiss the complaint upon the ground that the defendant had a right to discharge the plaintiff if in his judgment he was incompetent. At the close of the case the motion was renewed, and defendant's counsel requested the court to direct a verdict upon the same ground. These motions were denied, and exceptions taken. The court then instructed counsel that the only question he would allow to be presented to the jury was as to the amount of damages, and the defendant excepted. The case having been submitted to the jury, and the verdict of course being rendered for the plaintiff, from the judgment thereupon entered this appeal is taken.

It is sought to sustain this judgment upon two grounds: *First*, that there was no question in the case to submit to the jury except the amount of damages,—in other words, that the evidence showed no ground whatever for the discharge of the plaintiff; and, in the next place, that, even if there were such evidence, the defendant not having asked to go to the jury upon that issue, the conclusion reached by the trial court is conclusive. An examination of the evidence in this case shows that disputes had arisen between the plaintiff and defendant in regard to the manner in which he was performing his duties; that by the terms of the agreement the plaintiff bound himself at all times to work for the best interests of the defendant, and as economically as possible, and to represent the company and travel in such territory as might be designated by the managers, and conform to all reasonable rules the company might adopt. The evidence further shows that in respect to some portions of this agreement the plaintiff refused compliance; that requests made by the company were neglected, and rules for the plaintiff's conduct violated, and it was a question for the jury to determine, upon the facts presented by the evidence, as to whether the defendant had reasonable ground for the discharge of the plaintiff because of his conduct. They certainly had not the arbitrary power to terminate his employment; but, if reasonable grounds existed, then they would be justified, and no recovery could be had by the plaintiff by reason of his discharge. Therefore there was a question upon this point which should have been submitted to the jury.

This brings us to the consideration of the proposition that, the defendant not having asked to go to the jury upon this point, the conclusion reached by the judge presiding at the trial is conclusive. An examination of this record shows that a motion was made to direct a verdict in favor of the defendant, which motion was denied and exception taken. The court then stated that he would limit the defendant before the jury to the question of percentage, and notified the counsel that he might take an exception to such ruling. The court further stated that the only issue of fact to be presented to the jury is the one as to the amount of commissions the plaintiff might be entitled to under the proof. The defendant excepted to this ruling, as he had been invited to do by the court. This was a distinct notification to the defendant by the court that he would not submit any other question to the jury than one of commissions, and it would have been an impertinence upon the part of the counsel to have suggested to or requested the court to submit the only other question to the jury which the court had distinctly stated it would take upon itself to decide. Under such a condition of the record, the fact that the defendant did not go through the idle ceremony of asking that this particular issue should be submitted to the jury in no way deprived him of the right to claim, upon this appeal, that this question should have been submitted.

Judgment and order appealed from must therefore be reversed, and a new trial ordered, with costs to the appellant to abide the event. All concur.

WILSON v. PARSHALL.

(Supreme Court, General Term, First Department. November 7, 1889.)

1. **VENDOR AND VENDEE—BONA FIDE PURCHASE.**

Where a grantor in a deed conveys the absolute title, and the grantee conveys to a third party for a valuable consideration, the latter acquires a complete title, though the original grantor had reserved a right of redemption of which the vendee had no knowledge, and on the bankruptcy of the original grantor his assignee obtains no title as against the vendee.

2. **SAME.**

Where the land was conveyed by the original grantor under an agreement that the grantee should sell the land and pay any surplus above a debt owed by the grantor to the grantee to the former, neither the grantor nor his assignee could question the regularity of a sale made under such authority, nor disaffirm the conveyance.

Appeal from circuit court, New York county.

Andrew Wilson sued William A. Parshall. From a judgment on a verdict of a jury, and an order denying a new trial, defendant appeals.

Argued before VAN BRUNT, P. J., and BARRETT and DANIELS, JJ.

H. Aplington, for appellant. *Alfred B. Cruikshank*, for respondent.

DANIELS, J. The verdict was recovered for the sum of \$1,666, as the expenses to which the plaintiff was subjected in completing the title to a parcel of land conveyed to him by the defendant. The land had been owned by John W. Bockhorn. He had executed two mortgages upon it, one for the sum of \$6,000 and the other for the sum of \$5,100. This latter mortgage had been given to Horace K. Thurber to secure an indebtedness of the grantor in the deed to the firm of H. K. & F. B. Thurber & Co. The grantor, not being able to pay the indebtedness, executed and delivered a deed absolute in form to the defendant, who was a member of that firm, and intended for its benefit. This deed was executed and delivered in December, 1877, and on the 20th of May, 1880, the defendant conveyed the property to the plaintiff in this action. The deed by which the conveyance was made contained a covenant of seisin and the other usual covenants inserted in conveyances of land. Both these deeds were recorded in the office of the register of deeds of the county of New York, near the time when they were, respectively, executed. The grantor in the deed to the defendant, intermediate the execution and recording of these two deeds, went into bankruptcy, and among his assets he asserted a claim to this property as still held subject only to the two mortgages, adding that his interest in the property was nothing. The defendant entered into a contract to sell the premises to another person, whose attorney, upon a search into proceedings affecting the title, discovered those in the bankruptcy court, and because of the conveyance executed by the bankrupt to the assignee in bankruptcy declined to accept this title until it was perfected by a conveyance of the assignee and releases from the creditors, and it was to recover the expenses which had been paid out for that object by the plaintiff that this action was brought and the verdict was rendered. No question has been raised as to the amount of the recovery, but the appeals have been taken upon the ground that no right of action was maintained by the evidence. It was proved upon the trial that the plaintiff paid the sum of \$5,000 as the consideration of the deed executed and delivered to him by the defendant, and that he had no notice whatever of any defect or infirmity in the title, even if it was disclosed by the proceedings in bankruptcy, but that a search was made and the title considered to be satisfactory at the time when the deed was executed and delivered by the defendant. This evidence proved the fact to be that the plaintiff had been vested with the complete and absolute title to the property by the deed delivered to him by the defendant; for, even though the grantor in the deed to the defendant retained a right of redemption, that could not be asserted by him against the plaintiff, who had purchased the property upon the faith and understanding of the deed delivered to the defendant in form conveying to him the absolute and unqualified title to the land. That deed at least vested the defendant with the apparent indefeasible title. It exhibited him to persons dealing, or proposing to deal, in the land, as the owner of this property, and where a person may invest another with that apparent title, and it is afterwards acquired from him by a purchaser in good faith, and for an actual consideration, the law will not permit the grantor in the deed, which might otherwise be shown to be defeasible, to question its effect as an absolute conveyance of the title to the property. The principle upon which this substantial estoppel has been maintained is that "where the true owner holds out another, or allows him to appear, as the owner of, or as having full power of disposition over, the property, and innocent third parties are thus led into dealing with such apparent owner, they will be protected. Their rights, in such cases,

do not depend upon the actual title or authority of the party with whom they deal directly, but are derived from the act of the real owner which precludes him from disputing, as against them, the existence of the title or power which, through negligence or mistaken confidence, he caused or allowed to appear to be vested in the party making the conveyance." *McNeil v. Bank*, 46 N. Y. 325, 329. And this was afterwards approved as a general legal proposition in *Bank v. Livingston*, 74 N. Y. 223. Whatever may have been the relations existing between the defendant and Bockhorn, his grantor, the former was, as to the plaintiff, the legal and absolute owner of this estate, and conveyed it to him by the execution and delivery of the deed. *Stoddard v. Rotton*, 5 Bosw. 378; *Mills v. Comstock*, 5 Johns. Ch. 214; *Meehan v. Forrester*, 52 N. Y. 277, 280. It appeared further, both by the evidence of Bockhorn and that of Horace K. Thurber, that the agreement or arrangement was, before the deed was delivered to the defendant, that the firm of Thurber & Co. should sell the property and pay over to Bockhorn whatever surplus might be realized by them from the sale. This evidence proved the fact to be that a sale and conveyance by the defendant was actually intended to be consummated and sanctioned. That which took place was within this authority, and neither Bockhorn, nor his assignee in bankruptcy, could question its regularity, or in any manner disaffirm the conveyance, for the rights of both were limited to the surplus, if any should remain after the payment of the incumbrances upon the land. There was no conflict or contradiction in this evidence, and the defendant was entitled to a direction to the jury to find a verdict in his favor. The judgment and order should be reversed, and a new trial ordered, with costs to the defendant to abide the event. All concur.

LOCKWOOD *et al.* v. BARTLETT *et al.*

(*Supreme Court, General Term, First Department. November 7, 1899.*)

1. ACTIONS FOR TORTS—PARTIES—VERDICT.

In an action for wrongful detention of plaintiffs' goods the fact that the jury disagree as to one defendant does not affect their verdict against the others, and is not prejudicial to the latter, though the complaint alleges a conspiracy between all of the defendants.

2. CUSTOMS OFFICERS—UNLAWFUL SEIZURE OF IMPORTED GOODS.

Where the importer of articles which are not dutiable demands their entry, the collector should grant a permit for their landing, under Rev. St. U. S. § 2826, and seizure of the goods by him, and sending them to public stores to be disinfected, is unauthorized, and does not render them liable for the expenses incurred thereby.

3. SAME.

Such an act is not authorized by Rev. St. U. S. §§ 4792, 4793, which require customs officers to aid in the execution of the health laws of the state, and authorize collectors, in case a vessel is prevented by the health laws from coming to the port of entry, to grant a permit for unloading the cargo at some other place where the health laws permit, where the goods were discharged at the regular port of entry.

4. SAME.

Where the health officer had not ordered the goods to be seized and disinfected, the collector, and all persons detaining the goods for the payment of the unauthorized charges, are liable therefor in damages.

5. SAME.

Defendants, who detained the goods, claiming a lien for disinfecting them, after permits for their delivery had been issued, cannot allege, in an action for such detention, that they had no control of the goods because they were in bonded warehouses, especially as the goods, not being dutiable, were not held as bonded goods.

6. SAME—TORT OF PARTNER.

Where one partner acted for the firm in demanding and collecting the illegal charges, every member of the firm is liable for the damage.

7. SAME—DAMAGES.

Only actual damages can be recovered for such detention.

Appeal from circuit court, New York county.

v. 7 N. Y. S. no. 10—31

Action by William Lockwood and another against Edward B. Bartlett and others. Judgment for plaintiffs, and defendants appeal.

Argued before VAN BRUNT, P. J., and BRADY and DANIELS, JJ.

William W. Goodrich, for appellants. *W. Bourke Cochrane*, for respondents.

VAN BRUNT, P. J. The complaint in this action in brief alleged that the defendants entered into a conspiracy to have certain of the plaintiffs' rags which they had imported declared infectious so that they might be disinfected under a process used by the defendants E. B. Bartlett & Co.; that the rags were taken possession of by the defendants Smith and Bartlett & Co., and were by Bartlett & Co. partially subjected to a pretended process of disinfection, and who refused to deliver the rags to the plaintiffs until their charges were paid, and which the plaintiffs were compelled to pay to get possession of the rags. The defendants, by their answers, denied any conspiracy, and the firm of Bartlett & Co. alleged that they simply held the rags until their charges were paid. The facts developed upon the trial seem to be substantially these: The plaintiffs, doing business under the firm name of Lockwood & McClintock, imported in the ship *Vigilant*, from Japan, 2,920 bales of rags, which arrived in the port of New York about May 30, 1885, and upon the same day the vessel was passed by the health officer, and allowed to proceed to the cities of New York or Brooklyn for the purpose of discharging her cargo. It is claimed by the counsel for the appellants that this permit allowed the vessel to proceed to New York, rags excepted. It is difficult to see how this construction can be put upon the permits, because there is no intention manifested that the ship should discharge the rags before proceeding, and consequently it must have been intended that the vessel should take up to the city the rags. An inspection of the permits shows that this is the case. The words "rags excepted" are used in that part of the permits which describes the nature of the cargo. The words are "cargo general (rags excepted.)" It would appear that rags did not come under the definition of "general cargo," and hence was put upon the permit the fact that the cargo was general, except the rags. On June 1st a permit was granted by the health authorities of the city of New York to land these rags. The plaintiffs then went to the custom-house to enter the rags pursuant to the law regulating the importation of goods, and although they were free goods, not liable to any duty, the collector declined to receive the entry. On the 3d of June the collector directed all goods upon this vessel for which no permit shall have been received to be sent to the Baltic stores, kept by E. B. Bartlett & Co. In the mean time the health officer of the port appears to have come to the conclusion that the rags should be disinfected, and on the 9th of June the collector directed the rags to be taken for disinfection to the Baltic stores, being the stores of defendants Bartlett & Co., to which stores they were lightered, and where, it is claimed, they were disinfected. The plaintiffs demanded their rags, but Bartlett & Co. refused to deliver the rags to the plaintiffs unless the lighterage, storage, and disinfecting charges should be paid. The plaintiffs also imported by the ship *Baltaglia* 150 bales of rags, which arrived at the port of New York, June 6, 1885. The health officer having certified that these rags might be disinfected at Robbins' reef, where the same parties who ran the disinfection at the Baltic stores had established themselves, unless it could be done at the Baltic stores, the collector ordered their transfer to Robbins' reef for disinfection, where, it is claimed, they were disinfected and there transferred to the Baltic stores, where Bartlett & Co. claimed to hold them until charges for lighterage, storage, and disinfection were paid. To get possession of these rags the plaintiffs were compelled to pay these charges, and they then brought this action to recover the damages which they had sustained by the unauthorized acts of the defendants. Upon the trial the

jury found a verdict against Bartlett & Co. for \$8,000, but disagreed as to the defendant Smith. A judgment was thereupon entered against Bartlett & Co., and from such judgment this appeal is taken.

It is urged as one of the grounds of appeal that the court erred in taking the verdict in the form which it did; that the jury might have found a verdict against Bartlett & Co. and in favor of Smith, or until they either found for or against Smith no verdict could be received. There is no question but that the plaintiffs could have submitted to a nonsuit, and proceeded against Bartlett & Co. alone. It is true that there are allegations in the complaint of a conspiracy between Smith and Bartlett & Co., but these allegations were mere surplusage. The defendants were proceeded against as wrong-doers, and they could have been proceeded against severally as well as jointly. If Bartlett & Co. had been sued upon the same allegations as those contained in the complaints, and Smith had not been made a party, they could not have objected. This being the case as far as Bartlett & Co. are concerned, it is immaterial whether Smith is or not charged, and because the jury have disagreed as to Smith they are deprived of no rights because they cannot claim that Smith should contribute. The plaintiffs, by their action, may have released Smith from any further claim in this action, but, if they have, it is of no consequence to Bartlett & Co., as has been seen.

The main question, then, which is presented by this appeal is, were all the proceedings by which the charges claimed by Bartlett & Co. were incurred, without the authority of law? It is sought to justify the action of the collector because of the provisions of the Revised Statutes of the United States, which authorize the collector to take possession of unclaimed merchandise, and store the same in any private bonded warehouse, such as the Baltic stores. But the difficulty with this claim of the defendants is that this merchandise was not only not unclaimed, but very much claimed. The plaintiffs demanded its entry. It was not liable to the payment of any duties, and it was the duty of the collector, under section 2826, to grant a permit for the landing thereof. Where the owner was claiming possession of his property, demanding a permit for the landing, it being confessedly free and not liable to duty, it seems to have been the duty of the collector to have granted the necessary permits, and his seizure of the goods, and the causing them to be lightered to the Baltic stores, was an unauthorized act, and for the expenses incurred in the performance of that act certainly no person could be allowed to hold the goods from their owner.

Neither can the acts of the collector be justified by sections 4792 and 4793 of the statutes. By section 4792 officers of the customs are requested to observe the health laws of any state, and are required to aid in their execution, and by section 4793, in case a vessel by such laws is prevented from coming to the port of entry or delivery by law established in any collection district, the collector may grant his permit for the unloading of the cargo at some other place, where such health laws permit. In these sections no power is found to do anything except in aid of the health authorities in the performance of their duties, and to authorize unloading at some other place in the collection district other than the regular port of entry. The goods in question were discharged at the port of entry, and no power under this last section is pretended to have been exercised.

The question seems, therefore, to resolve itself into this: Did the health officer direct the seizure of these goods, their conveyance to the Baltic stores, in the one case, and to Robbins' reef in the other, and their disinfection by the disinfecting company? If so, had he the power so to do, and to make the goods liable for the expenses so incurred? In view of the evidence in this case it is not at all necessary to discuss the power of the health officer, or as to whether he had or had not the power to do these various things, because it does not appear that the health officer directly ordered any one of these things

to be done, and it was for the want of this direct evidence, probably, that the jury, under the instructions of the court, did not find a verdict against the health officer. The learned court directly charged this proposition, and no exception was taken to it, and the only reason that the case could be allowed to go to the jury against the health officer was that there was some evidence from which the jury might have found collusion between Bartlett & Co. and such health officer. This evidence was not deemed sufficient by the jury, and so no verdict was rendered against the defendant Smith. This fact, however, in no way relieves Bartlett & Co. from the position in which they find themselves. The health officer not having directed this procedure, no shelter can be obtained from any supposed power which the health officer might possess. The collector, having no power to send any but unclaimed goods to the public stores, as has been seen, could not refuse a permit for these goods to land, and cause them to be sent to the public stores to be disinfected at the expense of the owner, and, if he did so, he as well as all other persons who detained the goods because of the non-payment of these unauthorized charges, became liable in damages for such unauthorized detention. This principle seems to be clearly established by the case of *Badger v. Gutierrez*, 111 U. S. 734, 4 Sup. Ct. Rep. 563. In that case a vessel had incurred a penalty for taking out improper papers. An application being made for proper papers, acting under instructions from the secretary of the treasury, the collector of the port, to whom application was made, seized and detained the papers submitted to him on the application for proper papers, and withheld from the vessel the papers to which it was lawfully entitled, and the court held that the collector was liable for the damages sustained. The act of the collector was entirely unauthorized, and hence his official character was no shield. The act of the collector in the case at bar being without authority, such act could confer no authority upon Bartlett & Co. to hold the goods until the charges incurred because of the unauthorized acts of the collector were paid.

It cannot be said that Bartlett & Co. did not have control of these rags because goods in bonded warehouses are in the custody and control of the collector. These goods were not held as bonded goods, no duties were to be collected upon them, and even after permits had been issued for delivery, Bartlett & Co. held the goods because of their alleged liens upon them. It was then Bartlett & Co. who were detaining the goods, and not the collector, and at any rate they then became responsible, and in fact they never did deliver the goods until these illegal demands were paid to them.

The claim that Bartlett alone was responsible, and not the other members of the firm, is untenable. Bartlett was acting for the firm, in the business of the firm, protecting its interest, and demanded and collected for the firm these illegal charges. Therefore every member of the firm became liable for the wrongs suffered by the plaintiffs.

The verdict, however, seems to have been excessive. It would seem that punitive damages could not be recovered, and simply damages of detention. The evidence showed a payment for alleged charges of \$5,314.15, which the plaintiffs were entitled to recover back, with interest. The interest on this sum to the date of trial, April 29, 1887, was \$491.45, making a total of \$5,805.50. The verdict was for \$8,000, leaving \$2,194.40 as damages of detention. As there was no fall in the market price of the rags, the damages for detention could only be interest on the value of the rags detained. This value being \$30,000, and the goods being detained from June 1st to October 9th, the interest for that period would be about \$675, which alone could be recovered as damages of detention, and the verdict, therefore, must be reduced by \$1,519.40.

It has not become necessary to consider the various exceptions to the evidence, as under the conceded facts the plaintiffs would be entitled to recover from Bartlett & Co. the amount for which this judgment is sustained, upon the plaintiffs stipulating to reduce the judgment by \$1,519.40. The judgment

for the balance will be affirmed, without costs to either party. In case such stipulation is not given, the judgment must be reversed, and a new trial had, with costs to the appellants to abide the final event. All concur.

BUNING v. KITTELL.

(*Supreme Court, General Term, First Department. November 7, 1889.*)

1. MASTER AND SERVANT—COMPENSATION—CONTRACT OF HIRING.

Where plaintiff agrees to work at a certain salary, and, if a certain proportion of the net profits of the business exceed that sum, he is to be paid such excess, *held*, the amount of his salary should be deducted as an expense of the business, in order to determine the net profits in an action for an alleged excess.

2. SAME.

But interest which, by the partnership contract, was allowed to one of the partners on part of his investment in the business, of which plaintiff knew nothing when he entered into the contract, and to which he objected when informed of it, should not be deducted as an expense.

Appeal from judgment on report of referee.

Action by Frederick W. Buning against Joseph J. Kittell. The following statement of facts made by the appellant was adopted by the court as correct:

On the 4th day of January, 1886, plaintiff entered into a written agreement with the defendants, the latter constituting the firm of J. Kittell & Co., whereby the latter employed appellant as clerk and salesman for one year from January 1, 1886, at a salary of \$2,500 for the year, and, if one-sixth of the net profits of the business of the firm during the year should exceed \$2,500, the appellant was to receive, as additional compensation, whatever such excess might amount to. He was to be allowed to draw \$50 a week until the expiration of the term mentioned in said agreement, when he was to receive the balance that might be due. The copartnership between the defendants commenced January 1, 1886, and was to continue, and did continue, for one year from that date. The written contract between the defendants was not signed until March, 1886, but related back to January 1, 1886, and the agreement between the defendants was in most respects made verbally before January 1, 1886. Its terms were discussed frequently between appellant and Loewe and the respondent, and the question of how much capital stock Kittell was to contribute, and how much Loewe, was particularly discussed, and Loewe always informed appellant that Kittell's contribution was to be \$150,000, and his (Loewe's) whatever stood to his credit on the books of the preceding firm, and appellant's agreement of hiring was executed upon this representation, and all parties had in contemplation at that time that Kittell was to have 6 per cent. on \$150,000 only. Appellant entered upon the performance of his duties under the agreement of hiring, and performed his obligations thereunder fully. During the year he drew \$50 per week, amounting in all to \$2,600. In March, 1886, three months after plaintiff's agreement was made and executed, the defendants agreed between themselves that certain fixtures and rights and the good-will of the firm all belonged to Kittell individually, and were not a part of his \$150,000 capital stock, and were worth \$25,000, and that he should be allowed 6 per cent. interest upon that sum in addition to interest on \$150,000, and this item was inserted in the copartnership articles. Kittell had never been allowed anything in previous copartnership with Loewe for his ownership of such property, although it had been in use by the previous firm. When appellant was informed of the foregoing arrangement between the partners as to the 6 per cent. interest on the \$25,000, he immediately refused to be bound by it. After the expiration of the year during which the copartnership continued, the defendants had a settlement together, and Loewe withdrew his interest, and Kittell continued the business. The settlement between the partners was reached by arbitration, in which arbitration the appellant took no part, and

was not in any way represented. The defendant Kittell was continuing the business of the copartnership alone at the time of the commencement of this action, and, as he had assumed all the firm's liabilities, he is practically, though not formally, the sole defendant.

The defendant Kittell now seeks to have the settlement reached by the arbitration between the partners declared binding upon the appellant, or, at least, to have the court hold the appellant to that settlement as a proper basis for estimating the profits; and the referee, although he expresses the opinion that the plaintiff is not bound by that arbitration, nevertheless decides that the settlement reached by the arbitration is the correct basis for determining plaintiff's interest, and, as their settlement showed of profits only the sum of \$14,644.88, one-sixth of which is less than \$2,500, judgment has been rendered dismissing the complaint, and also in favor of the defendants for \$100 and interest, the appellant having drawn \$2,600, or \$50 per week, during his year of employment. The appellant, on the trial of this cause, objected to the following items, which were charged to profit and loss account, and credited to the defendant Kittell: Interest on \$25,000 at 6 per cent., \$1,500; guaranty account, \$3,651.19. He also objected to the item, charged to expense account in diminution of the profits, of appellant's salary, \$2,500. He also objected to two items of expense of \$400 and \$778.28, respectively, which, as a fair man, he is bound to admit the defendants sufficiently explained on the trial; so that the items in the account, as stated by the referee, which are in controversy on this appeal, are interest, \$1,500; guaranty, \$3,651.19; salary, \$2,500,—the appellant claiming that his salary was not an expense, but was a part of the profits of the concern, just as the share of each partner was a part of the profits and not an item of expense. The appellant also objects to the referee's ruling in directing judgment against him on defendants' counter-claim for \$100, that sum having been paid in excess of the salary agreed upon. Plaintiff appeals.

Argued before VAN BRUNT, P. J., and BRADY and DANIELS, JJ.

Beltz & Large, for appellant. *B. G. Hitchcock*, for respondent.

BRADY, J. The opinion of the learned referee in this case covers, undoubtedly, the respective items objected to; and the reasons assigned by him for overruling the objections mentioned, except the sum of \$1,500 (the interest on \$25,000) for what is called the good-will, are entirely satisfactory. The appellant relies for success upon the case of *Rishton v. Grissell*, L. R. 5 Eq. 326, and *Paine v. Howells*, 90 N. Y. 660.

The first of these cases has no application whatever to the facts developed in this case. The appellant doubtless thinks it an authority showing the impropriety of deducting his salary as a part of the expenses of the business; but this is an erroneous view. By the agreement there, it was distinctly understood that, though the plaintiff was to receive 7 per cent. of the profits of the business, it was to be made up to \$500 in any year in which the share of the profits should be less than that sum; and the decision that the \$500 could not be deducted from the profits rested upon that feature of the agreement, the learned vice-chancellor saying: "But he has undertaken [speaking of the defendant's obligation] that the 7 per cent. should always amount to at least \$500, and he cannot deduct the \$500 before he takes the percentage." There is no other element in the case applicable to the facts here disclosed.

The second case is advantageous, inasmuch as it was there held that, when the salesman was to receive for his services a share of the net profits of the business, the interest on capital invested by the principal was not an expense to be deducted in ascertaining the profits; but in that case there is nothing to show that the plaintiff knew that by the arrangement between the partners interest was to be allowed on the capital. It is conceded by the plaintiff's counsel that the plaintiff knew that interest upon the sum of \$150,000 was

to be allowed upon the capital of the defendant herein, and also interest upon the amount of capital which Mr. Loewe, the other partner, had invested; but the principle declared in that case is evidently applicable to any sum upon which interest is allowed of which he had no knowledge, and with reference to which, therefore, his contract could not have been made. It appears herein that after the plaintiff's agreement was made with Kittell & Loewe it was agreed between them that Kittell should have interest in addition to the sum of \$150,000, upon what was said to be the good-will of the business, which interest amounted to and was allowed at \$1,500. The plaintiff, not knowing of that, and objecting to it, and refusing to be bound by it, when advised in reference thereto, is entitled, under the decision of *Paine v. Howells*, to a deduction of that amount from the expenses of the business; or, in other words, to its addition to the profits, which were found to be \$14,644.88.

The item of \$3,651.19 arose in this way: At the close of the copartnership the defendants, for the purposes of liquidation, called in two disinterested merchants in the same line of business to determine the value of the goods on hand and accounts receivable, which consisted largely of the renewed notes of customers. These arbitrators fixed the value of the stock and merchandise on hand, and reduced the value of the bills receivable by that sum, and upon that basis the accounts were liquidated and settled and the profits determined at \$14,644.88. The arbitration was made without consultation with the plaintiff, but in entire good faith, without collusion, and without reference to any claim or right of the plaintiff's. Indeed the defendant took no part in it, leaving the disposition of it entirely to the arbitrators.

It may be assumed, for the purposes of this appeal, that the plaintiff was not bound by the determination of the arbitrators; but the fact would then be that the liquidation was incomplete, and that the exact profits could not be determined unless the result of the arbitration is accepted. If the plaintiff rejects the arbitration, then his action is not maintainable until he can show what the one-sixth of the actual profits were, and that they exceeded the amount of his salary. There does not seem to be any doubt that the salary paid to the plaintiff was a legitimate expense of the business, which should be allowed in estimating the amount of the profits. The result is that the sum of \$1,500 was improperly allowed as interest upon the good-will, and should be added to the profits, making a total of \$16,144.88, one-sixth of which is \$2,690.81. This conclusion necessarily disposes of the counter-claim interposed, which amounts to only \$100, and renders it necessary to reverse the judgment, and order a new trial, with costs to appellant to abide the event, unless the parties consent to the modification herein suggested. All concur.

LUHRS v. SUPREME LODGE KNIGHTS AND LADIES OF HONOR.

(*Supreme Court, General Term, First Department. November 7, 1889.*)

1. MUTUAL BENEFIT INSURANCE—CHANGE OF BENEFICIARY—VESTED RIGHT.

The laws of the mutual benefit association of which deceased was a member provided that the member might change the beneficiary of the relief fund certificate, and a new certificate be issued on surrender of the old one. By Laws N. Y. 1883, c. 175, § 18, the right to effect such a change is made obligatory on the association, and the right is given to make such change without consent of the beneficiary. *Held*, that plaintiff, who was named in the first certificate issued to decedent, which was afterwards annulled and a new one issued, had no vested right in the certificate.

2. SAME.

The fact that the decedent attempted to name a beneficiary in the second certificate, who was not entitled to take under the rules and regulations of the association, conferred no right on plaintiff.

Appeal from circuit court, New York county.

Action by Sophia Luhrs against the Supreme Lodge Knights and Ladies of Honor. Verdict was directed in favor of defendant, and plaintiff appeals.

Argued before VAN BRUNT, P. J., and BRADY and DANIELS, JJ.
Alfred Steckler, for appellant. *Henry F. Lippold*, for respondent.

VAN BRUNT, P. J. The defendant is a charitable and benevolent association, organized under the laws of the state of Kentucky, having a subordinate association in the county of Kings and state of New York known as "Teutonia Lodge No. 794." In 1883 one John Luhrs became a member of said Teutonia lodge, and remained such member until the time of his death. In May, 1886, the defendant issued its certificate to said John Luhrs, entitling the beneficiary named therein to participate in its relief fund to the amount of \$1,000 at his death, such beneficiary being Sophia Luhrs. In November, 1886, John Luhrs, being desirous to change the beneficiary named in the certificate, caused the same to be surrendered, and a new certificate was issued in lieu thereof to John Luhrs in which the beneficiary named was his niece Annie M. Meyer. The rules and regulations of the corporation required the beneficiary to be some member of the family of the assured, or person dependent upon him. The proof in the action tended to show that Annie M. Meyer was not the niece of the assured, and there is no evidence that she was in any way dependent upon him. John Luhrs having died, the plaintiff, the beneficiary named in the first certificate, brought this action to recover the \$1,000 provided to be paid by the first certificate. The learned judge who presided at the trial directed a verdict for the defendant upon the ground that, no matter what might be the claim of Annie M. Meyer, the plaintiff had none because the certificate in pursuance of which she claimed had been surrendered and canceled, and from the judgment thereupon entered this appeal is taken. The foundation of the plaintiff's claim is the proposition that John Luhrs, at the time of the taking out of the first certificate, having designated the plaintiff as his beneficiary, could not by any act of his deprive her of the money due upon the policy, as her counsel calls the certificate. That this has been the policy of the law in this state in respect to policies of life insurance is undoubtedly true, and if the same rules are to apply to the certificate in question which have obtained in respect to such policies the point would be well taken. But there are two differences in the case at bar which seem to show that the point taken cannot obtain. In the first place, by the laws of the defendant the right to change a relief fund certificate after its issuance is expressly recognized where provision is made for such change, and the issuance of a new certificate upon the surrender of the old one; and in the second place, by the express provisions of section 18 of chapter 175 of the Laws of 1883, which by section 16 is made applicable to associations organized in another state, but doing business in this, the right to effect such a change is made obligatory upon such association, and the right is given to make such change without the consent of the beneficiary. These circumstances take the case out of the ordinary rule governing the construction of life insurance policies, in respect to which such features have not existed, and the legislation referred to shows that the policy of this state in respect to the certificates of benefit issued by associations similar to the defendant is that the beneficiary shall take no vested right by the issuance of the certificate. The fact that the assured attempted to name a beneficiary who was not entitled to take under the rules and regulations of the defendant confers no right upon the plaintiff. If the assured named a beneficiary who is not entitled to claim under the laws governing the association, then the benefit either goes to his personal representative, or reverts back to the relief fund; but the certificate under which the former beneficiary could claim is not thereby reinstated; that has been surrendered and canceled, has ceased to exist, and all rights under it are ended. The association only can raise the question as to whether the beneficiary named in the certificate is entitled to claim, and this defense cannot be interposed by a person in whose favor no certificate exists and who has no other claim. Even

if the personal representative of the assured might have a claim in case the beneficiary named in the second certificate could not take, such claim is not represented by the plaintiff. We have not considered it necessary to notice the objections to the testimony of the witness Koch, as without his evidence the fact appears that the old certificate was surrendered, and the new one issued to John Luhrs, the assured. The judgment appealed from must therefore be affirmed, with costs. All concur.

PEOPLE *ex rel.* SULLIVAN v. FRENCH *et al.*, Police Commissioners.

(*Supreme Court, General Term, First Department. November 7, 1889.*)

MUNICIPAL CORPORATIONS—DISCHARGE OF POLICEMAN—EVIDENCE.

On *certiorari* to review the decision of the police commissioners of New York city in dismissing relator from the police force for drunkenness while on duty, the testimony of a roundsman was that he found relator about 9 p. m., under the influence of liquor; that he staggered, and witness took him to the station-house; and that relator was incoherent in his talk, like a man under the influence of liquor. This was corroborated by the testimony of the sergeant, who observed the condition of the relator after he was taken to the station-house. The relator's testimony tended directly to exonerate him from the charge of drunkenness. *Held*, that the action of the commissioners in dismissing relator was proper.

On *certiorari* to review the dismissal of Philip O'Sullivan from the police force of the city of New York by Stephen B. French and others, police commissioners.

Argued before VAN BRUNT, P. J., and BARRETT and DANIELS, JJ.
Louis J. Grant, for relator. *Edward J. Hawke*, for respondents.

DANIELS, J. The charge made against the relator was that he had been so much under the influence of liquor during his tour of patrol duty on December 30, 1888, as to be unfit for that duty. The evidence of roundsman William Cruise, who saw him about 9 o'clock in the evening of that day, is positive and direct that the relator was then under the influence of liquor. He spoke to him concerning his condition, but received no answer, and his testimony is that he staggered, and the witness took him to the station-house, and he thought he was drunk. He also testified that he seemed to be incoherent in his speech, like a man under the influence of liquor. This evidence tended very directly to prove the truth of the charge contained in the specification. It certainly was not diminished in its force by that of Sergeant Cornelius Weston, who inspected and observed the condition of the relator after he had been taken to the station-house. His testimony is that there was a faint odor of liquor from his breath, and he did not think he was fit to be on his post, although he could walk substantially straight, when he was called upon to make that endeavor. His opinion was that the relator was suffering from the effects of liquor at the time. The evidence of the physician did not materially change that given by these two witnesses; for he did not observe him until some hours after he had been taken to the station-house. That given by the relator himself tended directly and fully to his own exoneration, but whether it should be accepted and followed in the disposition of the charge was a question, under this state of the evidence, which was addressed wholly to the commissioners themselves. They were not legally bound to adopt or follow his statement, but they were authorized to reject it as unworthy of reliance, if they believe the evidence of the roundsman, sustained so far as it was by the further testimony which the sergeant gave; and with the view which they considered they were from the evidence required to adopt, this court, under the writ of *certiorari*, has no authority to interfere. As that has been declared by section 2140 of the Code of Civil Procedure, the court is only authorized to relieve the party complaining of the decision, either when it may not be sustained by competent proof, or when there may be such a preponderance of proof as will justify an order setting aside the verdict of a jury as

against the weight of evidence. Neither of these conditions is presented by the proof which was taken before the commissioners, and, as the power of the court has in this manner been defined, no reason is disclosed for interfering with their determination. But under the authority of this section, as well as under the case of *People v. French*, 110 N. Y. 494, 18 N. E. Rep. 133, these proceedings are required to be affirmed. All concur.

WYGANT v. BROWN.

(*Supreme Court, General Term, First Department. November 7, 1889.*)

JUDGMENT—DEFAULT—MOTION TO SET ASIDE—DILIGENCE.

Where judgment by default was entered in December, 1886, and notice of application to set it aside was not given till July, 1888, no satisfactory reason excusing the delay being presented, the application was not made with reasonable diligence, and it was properly denied.

Appeal from special term, New York county.

Argued before VAN BRUNT, P. J., and BARRETT and DANIELS, JJ.
Robert Christy, for appellant. *E. A. S. Man*, for respondent.

DANIELS, J. The judgment was entered in the action by default in December, 1886, and it was not until July, 1888, that notice was given of the application to set aside the default and permit an answer to be served. No satisfactory reason excusing this delay has been presented by the papers. For the purpose of securing the success of such an application, the law is explicit that it must be made with reasonable diligence after the default shall have become known to the party affected by it. This application was not made as this rule requires that it should have been made to entitle it to succeed. The defendant delayed taking the necessary proceedings for this purpose for too long a period of time. She thereby lost her right to the interference of the court in her behalf, and the order from which the appeal has been taken should be affirmed, with \$10 costs and the disbursements. All concur.

THOMPSON *et al.* v. HAWKE *et al.*

(*Supreme Court, General Term, First Department. November 7, 1889.*)

ACTION—WHEN MAINTAINABLE.

Plaintiff's testator, as a condition for substituting an attorney in a pending suit, was required to enter into a bond to pay the former attorney any sum he might recover in a suit for fees. He obtained one D. to furnish the bond, giving him certain railroad bonds as security. Two years and a half after testator's death, the attorney not having filed his claim against testator's estate, his executors sued him and the surety, seeking to compel the attorney to file his claim within three months or be debarred from a suit on the bond, in order that the estate might be settled. *Held*, that the action would not lie.

Appeal from special term.

Jennie M. Thompson and another, as executors of the will of John B. Thompson, deceased, sued Edward H. Hawke and one Danziger. From a judgment sustaining a demurrer to the complaint plaintiff appeals.

Argued before VAN BRUNT, P. J., and BRADY and DANIELS, JJ.

Lewis Sanders, for appellants. *Lawton & New*, for respondent Hawke.

VAN BRUNT, P. J. In April, 1886, John B. Thompson, plaintiffs' testator, as a condition for substituting another attorney in place of his attorney, the defendant Edward H. Hawke, in a suit then pending in the court of common pleas brought by Richard J. Capron and another, was required to give a bond, with a real-estate surety, in the penal sum of \$10,000, to well and truly pay said Hawke, his heirs or assigns, such sum of money as said Hawke may recover in any action which may be brought by him against the said Thompson for professional services and disbursements in the suit of Capron and Merriam

against Thompson. Thompson gave the bond, with the defendant Danziger as his surety, on the 21st of May, 1886. To secure Danziger, Thompson pledged with him \$10,000 in the bonds of the Columbus & Indianapolis Central Railroad Company. Thompson died on the 12th of November, 1886, and plaintiffs were appointed his executors. In March, 1889, two years and a half after Thompson's death, and nearly three after giving the bond, plaintiffs requested the defendant Hawke to present his claim against their testator's estate; and on the 26th of March, 1889, plaintiffs commenced advertising the usual executor's notice for the presentation of claims; and on the 11th of April they commenced this action to require the defendant Hawke, within three months from the entry of the decree herein, to present his claim for services in the Capron and Merriam case, or to be debarred from bringing suit on the bond; because, as plaintiffs allege, unless Hawke should present his claim or bring an action to recover the amount thereof they will be unable to distribute the assets of the estate in accordance with the will, or to obtain from said Danziger the railway bonds pledged to him as security. It seems to be conceded by the learned counsel for the appellant that, Thompson living, this action could not be maintained; but, Thompson dead, that equities arise in the plaintiffs' favor out of their trust relation to the property of the deceased and the statutes governing claims against executors. But it is difficult to see how the court can step in and add additional or other provisions to the contract between Thompson and Hawke simply because Thompson has died. Simply because Thompson indemnified his surety upon the bond in no way affected the right of Hawke under his contract. He was not a party to such indemnification, and had nothing to do with it. That was a private arrangement between Thompson and his surety. The statutes have fixed Hawke's right under his contract, and certainly this court cannot intervene and impose new conditions, which the court under whose ruling the contract was given has not imposed. Thompson having accepted a favor upon the condition of making this contract, simply because he has died his estate cannot claim exemption from the full liability assumed by him. The judgment appealed from should be affirmed, with costs. All concur.

THOMPSON *et al.* v. ST. NICHOLAS NAT. BANK.

(*Supreme Court, General Term, First Department. November 7, 1889.*)

TAXATION OF COSTS.

It is within the discretion of the court to have a taxation of costs opened in order that an application for an extra allowance may be made.

Appeal from special term, New York county.

Application for retaxation of costs.

Argued before VAN BRUNT, P. J., and DANIELS and BRADY, JJ.
Lewis Sanders, for appellants. *John A. Taylor*, for respondent.

VAN BRUNT, P. J. It is undoubtedly true that applications for additional allowance can only be made before final costs are adjusted, but it is also true that the court may set aside a taxation of costs upon a proper application, for the purpose of allowing a motion for an extra allowance to be made. This is what was done in the case at bar. The defendant, having been mistaken in his view that he was entitled to tax the allowance which had been previously granted, asked to have the taxation opened in order that he might make a new application for an allowance, which request was granted, and we see no reason to interfere with the discretion thus exercised. The order appealed from should be affirmed, with \$10 costs and disbursements. All concur.

RECK v. PHENIX INS. CO.

(Supreme Court, General Term, First Department. November 7, 1889.)

1. MARINE INSURANCE—REGISTERED TONNAGE.

A warranty not to load a vessel more than her "registered tonnage" is a warranty not to load more tons of weight than the ship could carry, as entered upon the official record as the ship's tonnage.

2. SAME.

An American ship was registered at the custom-house at 916 71-96 tons. She was transferred to the Hanoverian flag, and then was registered at 792 tons. *Held*, that a vessel's registered tonnage is that of her home port, and a warranty made after such transfer, not to load above her registered tonnage, was broken by loading her with 901 tons.

Motion for new trial on exceptions.

Frederick Reck sued the Phoenix Insurance Company on a policy of insurance. Judgment was rendered for plaintiff. For opinion on former motion in the case, see 5 N. Y. Supp. 543.

Argued before VAN BRUNT, P. J., and DANIELS and BARRETT, JJ.
George A. Black, for the motion. *Joseph A. Shoudy*, opposed.

VAN BRUNT, P. J. The only exception which it is necessary to consider on this motion is that which was taken by the defendant to the direction of a verdict in favor of the plaintiff by the court. Neither party asked to go to the jury upon any question of fact, and both asked the court to direct a verdict. Under this state of the record the only question presented by the exception to be mentioned is whether there is any evidence to sustain the direction given. This case has been four times tried at the circuit. Upon each of the three trials preceding the one now under consideration the complaint was dismissed, and such dismissal was declared by the general term to be erroneous, and all the questions raised upon this appeal, except the one of overloading, have been settled against the defendant, and even this it is claimed by the plaintiff was also determined upon the last appeal adversely to the defendant. This action is brought to recover for a loss upon a policy of insurance issued in the year 1865 upon the ship *Elise Ruger*. Among the other provisions of the policy is one whereby the assured warranted that the ship should not be loaded more than her registered tonnage with lead, marble, coal, or iron on any one voyage. The evidence showed that the ship sailed with a cargo of coal of 901 tons, each ton weighing 2,240 pounds, and the question presented is whether thus laden there was a breach of the warranty above mentioned.

What is meant by "registered tonnage" in the policy? "Tonnage" is defined to be "the cubical contents or burden of a ship in tons, or the amount of weight which one or several ships will carry." "Ton" is defined to be "a certain weight in pounds," or "a certain weight or space by which the burden of a ship is estimated." "To register" is "to enter in a register; to record formally and distinctly; to enroll; to enter in a list." A "register" is defined to be "an official record." The "registered tonnage" of a ship, then, appears to be the cubical contents of the ship expressed in tons, or the amount of weight which she will carry as entered upon some official record. That cubical contents could not have been intended by the parties in the clause in question seems to be apparent from the language of the warranty: "Warranted not to load more than her registered tonnage with lead, marble, coal, or iron on any one passage." A cube of lead would weigh very much more than the same cube of coal, therefore it was not space to be filled which was referred to, but weight, and by "registered tonnage" the parties understood to be meant the number of tons of weight which the ship could carry as entered upon the official record as the ship's tonnage.

This brings us to the real question in the case,—what was the official record of this vessel's carrying capacity at the time of the issuance of this policy? The *Elise Ruger* was formerly an American ship, built at Mystic, Conn., and appears to have been registered at the New York custom-house by the laws of the United States, and a certificate of registry issued to her. Her tonnage as then registered was 916 71-96 tons. Prior to the time of the issuance of the policy of insurance in question the ship was not remeasured here, nor did she ever receive any other certificate of American registry. In 1862 or 1863 the ship was placed under the flag of Hanover, and was sailing under such flag at the time of this insurance. When placed under the Hanoverian flag, the ship received a new register, which was lost with the vessel. In the ships' register book kept at Stade (the county-seat of the port of Geesumunde, the home port of the vessel) the tonnage of the vessel is stated to be 351.97 commercial lasts, which appear to equal 792 tons. It is true that the plaintiff claims that there is evidence showing that 351.97 commercial lasts are the equivalent of 1,056 tons, but an examination of the evidence upon which this claim is founded shows that this apparent difference arises from a change in the rules for measurements adopted by the German Empire, July 5, 1872, long after the loss of the vessel in question. If the record of the vessel's carrying capacity as found in the New York custom-house at the time of the issuing the policy is to be considered as the one referred to, then there was no breach of the warranty. If, however, her Hanoverian register is to control, then there seems to have been a breach.

At the former trial, there being no evidence of any other registry, the New York custom-house registry was deemed to have been referred to; but upon this trial it has been made to appear that the vessel was not then sailing under that registry; that she had abandoned her character as an American vessel; that she was sailing under a foreign flag; had procured a new registry, upon which her tonnage or carrying capacity was stated as 351.97 commercial lasts, the equivalent of 792 tons. It seems to us that this evidence has entirely changed the effect of the proof as it appeared upon the previous trial. The parties, in speaking of the "registered" tonnage of a vessel, must have referred to that tonnage which appeared upon the papers under which the ship was then sailing, and not to the tonnage as contained in a register which had been abandoned, and for which a new one had been substituted. A ship's register is a well-understood paper or document. It is a license from the government whose flag she flies and sails under, and contains particulars for her identification. It is the ship's passport, issued by the government whose citizen she is. Among the items stated in this register is her carrying capacity or tonnage, and this is taken from the entry upon the official record of her home port, and hence is her registered carrying capacity or tonnage. The ship's then registered tonnage, therefore, seems to be that which is entered upon the official record of her home port, and applying this rule the warranty seems to have been broken, she being loaded with 901 tons, when her register allowed only 792 tons. The judgment appealed from must be reversed, and a new trial ordered, with costs to appellant to abide event. All concur.

In re PLUMB.

(*Supreme Court, General Term, First Department. November 7, 1889.*)

REFERENCE—OBJECTIONS WAIVED.

On motion to appoint a referee in place of a deceased referee, whose appointment has been affirmed on appeal, objections to the merits of the original application cannot be considered.

Appeal from surrogate's court, New York county.

Application by Sarah Lenita Plumb, a minor, for the removal of James Neale Plumb as general guardian of her person and estate. For former re-

ports of different phases of the litigation, see 4 N. Y. Supp. 135, 831. From an order appointing a referee in place of a deceased referee, James N. Plumb appeals.

Argued before VAN BRUNT, P. J., and BARRETT and DANIELS, JJ.

Vanderpoel, Cuming & Goodwin, (Henry Thompson, of counsel,) for appellant. *Turner, McClure & Ralston*, (David McClure, of counsel,) for respondent.

VAN BRUNT, P. J. This general term decided upon an appeal from the order directing a reference, and appointing the referee, who has since died, that the surrogate had the power to make the order appealed from. 4 N. Y. Supp. 135. The referee named in that order having died, this motion was made to appoint some suitable person as referee in the place of the deceased referee. Upon the hearing of this motion the counsel for the appellants attempted to raise objections to the sufficiency of the petition which, upon the previous appeal, this court held would have been fatal to the original application had they been made before answer was filed to the petition. It seems to be clear that such objections cannot avail upon this motion. The proceeding was before the surrogate. He had determined that a reference was necessary to take proof, and this determination has been affirmed upon appeal. The referee originally named having died, the only question before the surrogate was the naming of another in his place. The determination to refer having been upheld and being finally determined to be proper, no objection going to the merits of the application can be entertained. As was stated upon the previous appeal, this objection comes too late. The order appealed from should be affirmed, with \$10 costs and disbursements. All concur.

JAMES v. MCCREERY.

(Supreme Court, General Term, First Department. November 7, 1889.)

DEFAULT JUDGMENTS—OPENING—LACHES.

A default will not be opened on motion, when the party making the motion has been guilty of great laches therein.

Appeal from circuit court, New York county.

Action by Edward F. James against James McCreery. Plaintiff was defaulted. From an order denying his motion to open the default he appeals.

Argued before VAN BRUNT, P. J., and BRADY and DANIELS, JJ.

E. F. James, pro se. Dunning & Fowler, (W. F. Dunning, of counsel,) for respondent.

VAN BRUNT, P. J. The appeal in this case seems to have been based upon the idea that a default is to be opened in every case as a matter of course. The motion is, we think, a mistaken one, and such motions should not be granted where the party applying has been guilty of laches, or where the denial of the motion will not do, under all the circumstances, an irreparable injury to the party in default. There is no good reason why all the damages arising from the negligence of a party or his attorney should be visited upon the opposing party to the action, as would be the case if defaults were to be opened as a matter of course. The plaintiff in this case has been guilty of great laches in the making of this motion, and should be remitted to a new action for the enforcement of his rights, if he has any. The order appealed from should be affirmed, with \$10 costs and disbursements. All concur.

UNITED STATES LAND & INVESTMENT CO. v. BUSSEY.

(Supreme Court, General Term, First Department. November 7, 1889.)

INTERPLEADER—LACHES.

Where an action of replevin was brought in January, 1889, and defendant appeared and made a motion in the case, February 4th, and knew at the time that a non-resident was the real party in interest, a motion by defendant to interplead, and substitute the non-resident as defendant, made in June, was too late.

Appeal from special term, New York county.

The United States Land & Investment Company sued W. G. Bussey in replevin, to recover possession of a mortgage bond. From an order of interpleader substituting H. A. Herbert, a non-resident, as defendant, plaintiff appeals.

Argued before VAN BRUNT, P. J., and BRADY and DANIELS, JJ.

Waller S. Corvoles, for appellant. W. G. Bussey, for respondent.

VAN BRUNT, P. J. We are of the opinion that this motion should not have been granted because of the laches of the defendant. The defendant was bound to move with diligence if he desired to withdraw himself from the contest upon the ground of no interest. In the case at bar the action was commenced January, 1889, and the property in dispute was taken possession of by the sheriff. The defendant duly appeared, and excepted to the sufficiency of the securities named in the undertaking given in behalf of the plaintiff, and as early as February 4, 1889, made his motion requiring the plaintiff to file additional or larger security. Even motion to interplead was not made until June, 1889. During all this time the defendant was as well aware as he now is that Herbert was the party really interested, and yet he made no move to have Mr. Herbert substituted as defendant, although he announced his intention so to do in his affidavit made February 4, 1889. It is true that the defendant states in his affidavit at the time of the commencement of this action the said Herbert was absent in Europe, but it is nowhere stated how long prior to the making of this motion to interplead he had returned. From the statements contained in the affidavits presented by the plaintiff upon this motion it would appear that such return had taken place at a period long anterior to the motion, and yet no effort to obtain this substitution seems to have been made, but the defendant went on litigating the action in his own name. It is true that there appears among the moving papers a written demand made by Herbert upon the defendants for the property in question, dated June 4, 1889, but it is apparent that this paper came into existence for the purpose of this motion, and conveyed no information to the defendant of any claim of which he had not been fully aware at the time of the commencement of this action. The order appealed from should be reversed, with \$10 costs and disbursements, and the motion denied. All concur.

CLAPP v. CLAPP *et al.*¹

(Supreme Court, General Term, First Department. November 7, 1889.)

RECEIVERS—REMOVAL—LIABILITY TO SUCCESSOR.

A receiver who, by failure to properly discharge the duties of his office, has become liable to account for the loss resulting from his neglect, been removed, and the entire estate has passed into the hands of his successor, is accountable to his successor, and not to the creditors.

Appeal from special term, New York county.

On reargument. For former opinion, see 1 N. Y. Supp. 919.

Argued before BRADY, P. J., and DANIELS, J.

¹ Affirming 1 N. Y. Supp. 919.

Wheeler H. Peckham, for appellant. *A. C. Brown, William Mitchell, and George C. Holt*, for respondents.

DANIELS, J. This case was very fully considered when it was before this court on the first hearing of the appeal. *Clapp v. Clapp*, 1 N. Y. Supp. 919. And a re-examination of the evidence contained in it fails to entitle the respondents to any greater measure of relief than that which has already been allowed. The property in the hands of the receiver was directed to be transferred and delivered over to his successor. This was done under an order of the court, before which the parties to the action had an opportunity to be heard. And having been made in that manner it protected the receiver who was removed in the delivery of the assets of the estate, so far as they remained under his control, to the person who succeeded him in the same office. This subject was examined in *Herring v. Railroad Co.*, 105 N. Y. 340, 12 N. E. Rep. 763, and in *Sullivan v. Miller*, 106 N. Y. 635, 13 N. E. Rep. 772, and that effect was given to orders obtained from the court in this manner. After the property was delivered over pursuant to this direction, it was in the hands of the succeeding receiver for the benefit of the creditors of the estate. They were entitled to resort to it for the payment of their debts, or so much of them as the assets would be able to pay. What was left against the appellant, who was the preceding receiver, was a liability to account for and pay over to his successor so much as the estate had been diminished or lost by his inattention, carelessness, or misconduct. And no authority has been found or cited imposing any greater degree of liability than this upon him. To that extent he should, as has already been held, account and indemnify this estate for the loss it has sustained through his mismanagement and misconduct. But before any further direction can be made for the payment of the loss so sustained, it must be ascertained by proof showing how far the assets diminished in value, or were lost, owing to the misconduct of the appellant as receiver. The proceeding in the end, so far as he may be liable in case of his non-payment of the amount in this manner to be proved against him, will be one for his punishment by way of contempt. And that never is permitted in a civil proceeding without the fact being first established that the party has become liable to such punishment, and the extent to which it may be inflicted upon him. The directions which have already been given for the ascertainment of the extent of the loss, and of the liability of the receiver to respond, are as favorable as the circumstances in the case will justify. He can very obviously not be held liable for the assets, or their value, as they passed into the hands of his successor under the order of the court. Their full benefit was secured to the creditors by this transfer to his successor. And all that remains to complete the proceeding is to ascertain the loss occasioned to the estate through the misconduct of this receiver; and, when that has been ascertained, to provide, in the manner the law will allow that to be done, for its payment. The extent of the liability is reasonably free from doubt, and the proceedings by which it is to be enforced and completed seem to be free from all reasonable ground of uncertainty. No change can be made in the direction which has already been given, and an order should be entered reaffirming that direction, with costs.

SHEA v. MANHATTAN RY. Co.

(City Court of New York, General Term. November 14, 1889.)

1. FALSE IMPRISONMENT—PROBABLE CAUSE.

In an action for false imprisonment, where it appears that the arrest was caused by defendant's employe, who had authority to cause arrests in case of disturbance, it is for the jury to say whether the employe was justified by the circumstances in causing the arrest.

2. SAME—EVIDENCE.

It was not error to admit in evidence police court records to show that plaintiff was arrested on the charge of the employe, and was discharged by the justice.

Appeal from trial term.

Action by Thomas J. Shea against the Manhattan Railway Company for false imprisonment. Judgment was entered on verdict in favor of plaintiff, and defendant appeals.

Argued before MCADAM, C. J., and HOLME and EHRLICH, JJ.

Davies & Rapallo, for appellant. Wm. King Hall, for respondent.

HOLME, J. The plaintiff made out a clear case of false imprisonment against the defendant. If the plaintiff was making a disturbance, as was claimed by the defendant on the trial, it was certainly within the scope of Clements' employment to suppress it, and, if necessary for that purpose, to cause the arrest of the plaintiff. He had the charge for the defendant of the platform where the trouble arose. It was his duty to see that the business of the company was transacted there with comfort and safety to the passengers, and the company, having intrusted him with that duty, was liable for a misuse of the authority which it gave him; hence it was properly left to the jury to say, on the facts presented before them, whether the action of Clements in causing the arrest was justified by the circumstances. It is the duty of the defendant to treat its passengers with courtesy and kindness; and where one of its employes, while engaged in the business of the company, whether willfully and maliciously, or in consequence of what he considered a duty, ill-treats a passenger, so far as to wrongfully cause his arrest, the company is liable for it. *Stewart v. Railway Co.*, 90 N. Y. 588.

The court did not refuse to charge that the credibility of the plaintiff as a witness in his own behalf was a question for the jury; but expressly left them to say whether the plaintiff's testimony was to be believed. The court plainly told the jury that they might believe or reject his testimony, and find a verdict accordingly. That was the most that the defendant was entitled to ask. The plaintiff was corroborated as to all the material facts in the case by the witness Fuller.

I do not think the court erred in admitting in evidence the records of the police court, as they showed that the plaintiff was arrested on a charge made by Clements at the time and place as testified to by the plaintiff, and that he was discharged by the police justice.

I find no errors prejudicial to the defendant in the admission or exclusion of evidence, and I think the judgment should be affirmed.

MCADAM, C. J., (*concurring*.) The defendant's request to charge "that the jury were at liberty wholly to reject the plaintiff's testimony, so far as it is not corroborated by other evidence," was, as an abstract proposition of law, literally correct, but inapplicable to this case, because the plaintiff's companion and friend, Mr. Fuller, who shared the assault and arrest complained of, was the principal witness for the plaintiff, and corroborated him fully in regard to every material matter about which he testified. *Priebe v. Bridge Co.*, 77 N. Y. 597. With this brief reference to that which might, on first impression,

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be regarded as an error in the charge of the trial judge, I concur with Judge HOLME that the judgment appealed from should be affirmed, with costs.

EHRlich, J., concurs.

YOUNGS v. KLUNDER.

ALLEN v. SAME.

(City Court of New York, General Term. November 7, 1889.)

SUPPLEMENTARY PROCEEDINGS—TITLE OF RECEIVER—PRIORITY.

After an order for the examination of a judgment debtor was made and served in supplementary proceedings, a junior judgment creditor procured an order for the examination of the debtor, to which the latter submitted without service of the order, and a receiver was appointed. The receivership was afterwards extended to plaintiff's judgment. *Held*, under Code Civil Proc. N. Y. § 2469, providing that the title of a receiver shall relate back, for the benefit of the judgment creditor in whose behalf the proceedings were instituted, to the service of the order for examination, that plaintiff's judgment was a prior lien on the funds in the receiver's hands.

Appeal from special term.

Thomas Youngs, Jr., a judgment creditor of Marie C. Klunder, moved that his judgment have priority of payment from funds in the hands of a receiver appointed of the defendant's property in proceedings supplementary to execution founded on a subsequent judgment recovered by William S. Allen. From an order denying the motion the plaintiff Youngs appeals.

Argued before MCADAM, C. J., and MCGOWN and HOLME, JJ.

W. MacFarlane, for appellant. *Ingraham & Allen*, for receiver, and for Allen.

MCADAM, C. J. The appellant, Thomas Youngs, Jr., recovered judgment against the defendant June 22, 1889, for \$1,025. On August 30, 1889, an order was made thereon for the defendant's examination as a judgment debtor. The order was returnable September 10, 1889, and was personally served upon her September 6, 1889. On September 10, 1889, the defendant was examined under said order, and on her examination it then appeared that one Allen had recovered a subsequent judgment against her, and that on September 9, 1889, she had voluntarily submitted to an examination as a debtor under Allen's judgment,—no order for examination having been served,—and that a receiver had been appointed in the Allen suit, on the application of his attorney, immediately upon the close of her examination. The receivership was thereupon extended to the Youngs judgment. Youngs thereupon applied to have the Allen judgment subordinated to his, that his priority of judgment, of proceeding, and of right might be preserved unimpaired by the subsequent proceeding had on the Allen judgment, before referred to. The application was denied. This was error. Code, § 2469; *Guggenheimer v. Stevens*, 26 N. Y. St. Rep. 245; *Bevans v. Pierce*, 1 City Ct. R. 260; Throop's note to section 2469 of his edition of the Code; *Rid. & B. Supp. Proc.* 427, 431. The extension of the receivership made the title of the receiver relate back to the time when the order on the Youngs judgment was served for the benefit of the creditor in that proceeding. Code, § 2469. The fund in the hands of the receiver is not there for the benefit of Mr. Allen, or any particular judgment creditor. It is *in custodia legis*, for those creditors who establish a right to it, according to the respective priorities of their judgments; and these, in respect to personality, are determined by the dates when the respective proceedings were commenced. To hold otherwise would lead to collusive preferences by judgment debtors, and the appointment of friendly receivers to suit their convenience and further their interests. The judgment creditor Youngs was, in everything but the appointment of the receiver, prior in time, and is legally and equitably prior in right. Technically speaking, no receiver should have been

appointed without notice to Youngs, (Code, § 2465,) one object of which Code requirement is to prevent collusive applications. Upon the entire record, it is evident that Youngs was prosecuting his proceeding with diligence, and that his efforts should not be superseded by a proceeding founded on a subsequent judgment. It follows that the order appealed from must be reversed with costs, and the application made below granted. All concur.

CLAFFY v. O'BRIEN *et al.*

(City Court of New York, General Term. November 1, 1889.)

PLEADING—ANSWER—ADMISSIONS.

In an action for the value of specific merchandise sold and delivered, an answer which denies each and every allegation of the complaint, but admits that at the time alleged plaintiff furnished "certain" goods, but not of the value alleged, does not admit the purchase of the goods referred to in the complaint.

Appeal from special term.

Action by John Claffy against John O'Brien and others. Judgment was entered on a verdict in favor of defendants, and plaintiff appeals.

Argued before MCADAM, C. J., and EHRLICH and HOLME, JJ.

L. Laflin Kellogg, for appellant. *E. T. Lovatt*, for respondents.

PER CURIAM. This action was to recover \$582.06 for specific merchandise alleged to have been sold and delivered to the defendants. In their answer they deny each and every allegation contained in the complaint, except that they were copartners. In the second paragraph of their answer the defendants admit that between the dates alleged in the complaint the plaintiff furnished "certain" goods, wares, and merchandise to the defendants, but not to the value of \$582.06. Properly construed, this answer must be held to mean that, while the defendants did not purchase the goods referred to in the complaint, they nevertheless purchased "certain" other goods of the plaintiff, but not of the value charged in the complaint. The plaintiff evidently did not construe the pleading into an admission of indebtedness for the goods referred to in the complaint; for he did not move for judgment on it, and did not ask the trial judge to direct the jury that it contained an admission of liability for the debt.

The theory of the defense was that the goods were sold to one Flanagan, a subcontractor, on his individual credit, and that they were purchased without their authority; that Flanagan subsequently threw up his contract, and became their superintendent on the job he had thrown up; that they had settled with him as subcontractor, without any knowledge that the bill in suit was owing. The defendants swore substantially to this state of facts. The plaintiff made no request for a direction in his favor, and the case went to the jury without objection. The trial judge charged them that if Flanagan was the superintendent of the defendants when the goods were ordered, and had authority to order them, they should find for the plaintiff, but if, on the other hand, they found that Flanagan was not superintendent, or had no authority to purchase the goods, to find for the defendants. There was no exception to the charge, and no request for more specific instructions. The jury found for the defendants. Upon the conflict, we cannot say that the finding was wrong. There was no reason why the jury should sympathize with the defendants or have any prejudice against the plaintiff, and the verdict was, no doubt, the result of the conscientious conviction of the jury. We might have reached a different result, but this does not prove that the jury reached an improper one. The trial judge was evidently satisfied with the verdict, for he denied a motion to set it aside. Upon the entire case, the judgment and order appealed from must be affirmed, with costs.

METROPOLITAN MANUF'G CO. v. McDONALD.

(City Court of New York, Trial Term. October 11, 1889.)

1. GUARANTY—ESTOPPEL.

Defendant, who has represented to plaintiff that he signed a guaranty, bearing defendant's name, on which representation plaintiff acts, is estopped to deny his liability on the guaranty, though he did not in fact sign it.

2. SAME—EVIDENCE.

Testimony by defendant that he does not recollect making the representation is not evidence that he did not make it, where a disinterested witness contradicts him.

Action by the Metropolitan Manufacturing Company against James McDonald, on a written guaranty of the faithful performance of his duties by James McCloskey as an employe of plaintiff, given for a recited consideration of one dollar, and the employment by plaintiff of McCloskey. Defendant admitted to plaintiff's representative that he signed the guaranty, and, relying thereon, plaintiff employed McCloskey, who afterwards defaulted.

A. H. Berrick, for plaintiff. T. Darlington, for defendant.

MCADAM, C. J. The evidence proves that the guaranty was not signed by the defendant, but by his son, James K. McDonald. The plaintiff supposed it was signed by the defendant, and, having satisfied itself as to his responsibility, its representative called upon him to ascertain if all was right. The instrument bore the name of defendant; and, on his declaration that he had signed it, the plaintiff acted upon the faith of the representation, and the defendant cannot now deny its truth. *Bank v. Bank*, 50 N. Y. 575; *Bouv. Law Dict.* tit. "Estoppel;" *And. Law Dict.* tit. "Estoppel in Pais." The defendant testifies that he had no recollection of making the representation, but his want of memory cannot be accepted as evidence that the representation was not made, in the face of the positive proof by the disinterested witness called by the plaintiff that he did make it, particularly as the defendant refused to make his denial positive, although urged to do so. He evidently felt that he may have made the representation, and did not want to take the responsibility of denying it under oath. The proof of McCloskey's default having been sufficiently established by the proofs, it follows that the plaintiff is entitled to judgment for \$204.95, with interest, aggregating \$221.72, with costs.

STUBING v. STUBING *et al.*

(City Court of Brooklyn, General Term. November 15, 1889.)

GIFTS—CAUSA MORTIS.

A man 70 years old, and in poor health, gave money, which was his only means of support, to his children. The evidence of the children, as to the circumstances of the gift, was conflicting, and was contradicted by the father. No substantial reasons were given for such a gift, and it appeared that after the alleged gift the children agreed among themselves to pay their father interest thereon. *Held a donatio causa mortis.*

Appeal from special term.

Action by Conrad Stubing against John Stubing and Mary Nimmo, to recover money given them under apprehension of death. Judgment for plaintiff, and defendants appeal.

Argued before OSBORNE and VAN WYCK, JJ.

Leow & Leo, for appellants. F. Solinger, for respondent.

OSBORNE, J. In the year 1885 the plaintiff, a man of upwards of 70 years of age, had on deposit in the Williamsburgh Savings Bank the sum of \$700. Being then in feeble health, and in expectation of death, as he testifies, he gave his bank-book and a check on the bank to his daughter, the defendant Mary Nimmo, to enable her to draw money for him as he wanted it. Sub-

sequently, at plaintiff's request, she returned the book to him, and he then gave it to his son, the defendant John Stubing, with the direction that in case the plaintiff died John was to attend to his burial, and in case of his recovery John was to return the book to him. On the other hand, the contention of the defendants is that plaintiff gave them the book with instructions that \$600 of the sum on deposit was to be equally divided between the defendants and another daughter, a Mrs. Behkamp, \$200 to each, and the remaining \$100 they were to pay to the plaintiff, which last-mentioned sum plaintiff has received. Here, then, we have a direct issue of fact; the plaintiff claiming that the money was a *donatio causa mortis*, and the defendants claiming that the amount in dispute was an absolute gift.

Under circumstances such as are briefly detailed above, it is well settled that the burden of proof is upon the defendants to show clearly and unequivocally that the alleged absolute gift was made without restraint or inducement; that no advantage was taken by them of their father at a time when he was advanced in years, in a sickly and enfeebled condition, and substantially without other means of support than the fund in dispute. We have carefully examined the evidence adduced on the part of the defendants, and we are of the opinion that it fails to sustain the contention of the defendants. The testimony of the defendants is, in many respects, conflicting as to the details of the transaction surrounding the alleged absolute gift, and is flatly contradicted by the testimony of the plaintiff. No substantial reasons are given why the plaintiff should make such a gift as is claimed by the defendants, and it would almost seem from the fact testified to by them that, after the alleged gift, they voluntarily agreed among themselves to pay their father the interest on the fund as long as he lived, as if they themselves felt as though it was an unconscionable act for them to take their father's money, and that they sought to in some measure atone for it, by voluntarily paying him the interest on it as it accrued. We think that the findings of the learned trial judge were supported by the evidence, and that the judgment is correct. Judgment affirmed, with costs.

CITY OF BUFFALO v. CHADEAYNE.

(Superior Court of Buffalo, General Term. November 19, 1889.)

CONSTITUTIONAL LAW—DUE PROCESS OF LAW—REVOCATION OF BUILDING PERMIT.

Where a city council has granted a permit to build frame buildings within the fire limits, and excavations for the cellars have been made, and materials contracted for, and partly delivered, and the work of building is in progress, a resolution of the council, rescinding its former action, without notice to defendant or opportunity given him to be heard, is, in the absence of any public necessity for such action, void, as taking property without due process of law.

Appeal from trial term.

Argued before TITUS and HATCH, JJ.

Frank C. Laughlin, for respondent. Giles E. Stilwell, for appellant.

HATCH, J. In 1887 the common council of Buffalo granted to defendant a permit to erect seven frame houses within the fire limits of the city. Under this permit the defendant made excavations for the cellars, and contracted for the materials entering into said structures. A portion of the materials so contracted for were delivered, the walls were partially or wholly laid in some of the cellars, some of the timbers were framed and partly up, and defendant was actively prosecuting the work of building, when, without notice to defendant or opportunity given him for being heard, said council rescinded its former action granting the permit, and defendant was notified to desist from the erection of his buildings. Upon a failure to comply with such notice defendant was arrested upon a civil warrant to answer for a violation of the city ordinances. A trial was had, and judgment passed against defend-

ant for a penalty of \$100. Appeal was taken to the trial term, where, by direction of the court, the judgment was affirmed, when an appeal was taken to this court. It is conceded that defendant could not lawfully erect his buildings where they were without a permit from the plaintiff so to do. It needs no argument to show that defendant had acquired by virtue of the permit valuable property rights and assumed contract obligations. Under the plainest principles of justice, then, he became entitled to protection therein. Such right to protection has become the fundamental law of the land, which may not be overridden by arbitrary legislation. In *City of Detroit v. Plank-Road Co.*, 48 Mich. 140, 5 N. W. Rep. 275, Judge COOLEY says: "It cannot be necessary at this day to enter upon a discussion in denial of the right of the government to take from either individuals or corporations any property which they may rightfully have acquired. In the most arbitrary times such an act was recognized as pure tyranny, and it has been forbidden in England ever since *Magna Charta*, and in this country always. It is immaterial in what way the property was lawfully acquired, whether by labor in the ordinary avocations of life, by gift or descent, or by making a profitable use of a franchise granted by the state; it is enough that it has become private property, and it is then protected by the 'law of the land.'" While it is undoubtedly the rule that all rights of property are held subject to reasonable regulation and control, in its manner of keeping and use, and while the legislature may, under the police power, pass or repeal laws regulating such control, as the public welfare may from time to time require, yet its powers in this respect must be exercised with a due regard to the rights of the individual as guarantied by the constitution, and the legislation must have reference to the safety, comfort, and welfare of the public. Dwar. St. 458. Courts will interfere to protect the individual when it appears that property rights have been invaded, under the guise of the police power, and it is apparent that such is not the object and purpose of the regulation. In *re Jacobs*, 98 N. Y. 98. The evidence here fails to show, in any aspect, that the contemplated structures were in any sense a nuisance, or that any public necessity existed to arrest the completion of the work begun. *Datness v. Cooke*, 91 U.S. 580. While it is true that courts are ordinarily bound to assume that good reasons exist for the action of a municipal body, vested with discretion to legislate with respect to the public welfare, yet it is limited to such acts as are necessary for public protection; and, when it appears that such is not its real object and purpose, then courts are not only bound, but it is their duty, to interfere.

It is urged that the action of the council does not take private property, but simply limits its use, and that, therefore, it is not in violation of the constitutional prohibition against taking private property without just compensation or due process of law. The contract which defendant has entered into is for furnishing materials for the erection of seven houses. It has been, at least, partially fulfilled by the delivery of the materials, and the frame work of the structures is partially completed. If he is now compelled to abandon the structures, the materials are rendered valueless for the purpose intended. He is stripped of his right to use them, and it may not be assumed that he could use them for any other purpose. Instead, therefore, of its being a limitation of the right to use, it is an absolute prohibition of their use, and therefore a destruction for that purpose. It was said by Judge ANDREWS in *People v. Otis*, 90 N. Y. 52: "Depriving an owner of property of one of its essential attributes is depriving him of his property within the constitutional provision." This property being purchased for a specific purpose, when its use is prohibited for that purpose, and he is unable to use it, the distinction between limitation of use and destruction or deprivation is not apparent. *Wynehamer v. People*, 13 N. Y. 398; *Pumpelly v. Green Bay Co.*, 13 Wall. 177. The right to make the erections increased the value of defendant's land, and when this right was taken away, not only was there a destruction of all that had been

done, but the property itself was diminished in value. The law will not stop to measure the extent of the deprivation, if it be substantial. We do not deem it necessary at this time to determine whether the second resolution is repugnant to defendant's constitutional right that compensation must be made for private property taken for the benefit of the public good. It leads us, however, to the discussion of another principle, upon which we choose to rest our decision. It is the guaranty of both the federal and state constitution that property shall not be taken for the public good without "due process of law." It is this clause which furnishes protection against arbitrary legislation. Judge EARL in *Stuart v. Palmer*, 74 N. Y. 183, says: "Due process of law is not confined to judicial proceedings, but extends to every case which may deprive a citizen of life, liberty, or property, whether the proceeding be judicial or administrative or executive in its nature." Judge Cooley says, in his work on Constitutional Limitations, (page 355:) "'Due process of law,' is not confined to ordinary judicial proceedings, but extends to all cases when property is sought to be taken or interfered with." Cited with approval in *Stuart v. Palmer*, *supra*, 191. It is not overlooked that an exception exists to this rule, in the exercise of the police power in a case of actual necessity, like the spread of a fire, the ravages of an epidemic, or the advance of a hostile army, when all private property becomes subservient to the public welfare, and is subordinate to that higher law, which is above constitutions, resides in the principle of self-preservation, and finds expression in the phrase, "necessity knows no law." But in no aspect of this case is there room to invoke this power. In *Stuart v. Palmer*, *supra*, at page 191, Judge EARL further says: "It may, however, be stated generally that due process of law requires an orderly proceeding, adapted to the nature of the case, in which the citizen has an opportunity to be heard, and to defend, enforce, and protect his rights. A hearing or an opportunity to be heard is absolutely essential. We cannot conceive of due process of law without this." This language is cited with approval in *Re Railroad Co.*, 112 N. Y. 75, 19 N. E. Rep. 664, and *People v. O'Brien*, 111 N. Y. 62, 18 N. E. Rep. 692. In the case last cited the common council granted right to a corporation to lay tracks of a surface street railroad in Broadway, New York. The company accepted the grant, and laid its tracks. Subsequently the legislature passed an act dissolving the corporation, and assumed the right to take therefrom all its franchises and property, and bestow them upon the state. The court held the law to be in violation of the constitution, in that it assumed to take property without due process of law, and impaired the obligation of contracts. We think the principle applicable here. Defendant had acquired under his permit valuable property rights, and was obligated by contracts entered into upon the faith of the grant conferred. There existed no grave public exigency which called for summary action. Under such circumstances his rights and property could not be taken from him or destroyed without due process of law. This required that notice should have been given, and an opportunity provided for his being heard. This it is not pretended was done, and consequently the resolution rescinding the permit was void. As the judgment pronounced rested upon this resolution, it follows that there remains no basis to support a recovery, in any view of the case. The judgment is therefore reversed, with costs.

LONGRILL v. DOWNEY.

(Superior Court of Buffalo, General Term. November 19, 1899.)

1. APPEALS FROM JUSTICES—AMENDMENT—TRIAL DE NOVO.

On an appeal from a justice of the peace the court cannot allow an amendment demanding judgment for more than \$50, so as to entitle appellant to a new trial,

as allowed by Code Civil Proc. N. Y. § 3068, where more than that sum is demanded by the pleadings of either party, as the case must be disposed of on the pleadings as they left the trial court.

2. SECURITY FOR COSTS—MUNICIPAL COURT OF BUFFALO.

As the municipal court of Buffalo is not a court of record, it cannot, under Code Civil Proc. N. Y. § 3068, require non-resident plaintiffs to give security for costs.

Appeal from municipal court.

John A. Longrill brought an action and recovered judgment against John Downey, in the municipal court of Buffalo, for \$25. The latter appealed, and moved the superior court to allow him to amend his answer to claim judgment for a sum exceeding \$50, that he might have a trial *de novo*, as provided in cases of appeals from justices, by Code Civil Proc. N. Y. § 3068. Acts N. Y. 1880, c. 344, § 6, makes the practice in justices' courts applicable to the municipal court of Buffalo.

Argued before BECKWITH, C. J., and TITUS and HATCH, JJ.

O. C. De Witt, for appellant. *John M. Chipman*, for respondent.

PER CURIAM. In the court below the plaintiff demanded in his complaint, and obtained a judgment for, \$33.48 damages. In his notice of appeal the defendant demands a new trial in this court, and on the argument asks to be allowed to amend his answer by setting up a demand for judgment for a sum exceeding \$50, to enable him to have a new trial in this court. We do not think this court has the power to allow an amendment to his answer, demanding judgment for more than \$50, so as to entitle him to a new trial here. His right to a new trial depends upon the demand for judgment in the court below, and was fixed by the pleadings as they left that court. Section 3068, Code Civil Proc.; *Kimball v. Rich*, 8 N. Y. Supp. 248.

Although he is not entitled to a new trial, we may look at the return to see if any error was committed for which the judgment should be set aside. *Kimball v. Rich*, *supra*.

The only question raised by the defendant on the argument is that the municipal court should have ordered the plaintiff, who is a non-resident, to give security for costs. It is not the law, in courts not of record, to require the plaintiff in such cases to give security for costs. The counsel refers to no authority in support of his claim, and in the absence of any statutory provision declaring the municipal court a court of record, so as to bring it within section 3268 of the Code, we do not think the legislature so intended it. The judgment must therefore be affirmed, with costs.

PEOPLE v. FLOSS.

(Superior Court of Buffalo, General Term. November 19, 1889.)

PRIZE-FIGHTING.

A conviction under Pen. Code N. Y. § 458, for encouraging a prize-fight, is unwarranted when the contest was intended only as an advertisement for one of the participants, to secure notoriety, and thus a better salary as an exhibition boxer, and no prize was to be gained by the successful person.

Appeal from trial term.

John Floss and others were indicted under Pen. Code N. Y. § 458, which prohibits any person from engaging in, instigating, or furthering a contention or fight between two or more persons, or a fight commonly known as a ring or prize fight. Defendant was charged with instigating and encouraging a fight between two women, Libbie Spann, *alias* Hattie Leslie, and Barbara Dillon, *alias* Alice Leary, and the affair, though arranged in New York, occurred in Canada. It appeared on the trial that the woman Spann was a professional boxer, giving exhibitions on the stage, and that the contest was intended as an advertisement for her. Soft gloves were used, no injury was effected or intended, and no prize or reward was offered. Defendant was

not present at the fight, though he had been when some of the details were arranged. He was convicted, and appeals.

Argued before BECKWITH, C. J., and TITUS, J.

Tracey C. Becker, for appellant. *George T. Quimby*, for the People.

PER CURIAM. We think, in this case, that the undisputed facts do not authorize the conviction of the defendant for the offense charged in the indictment. It is evident that no prize-fight was intended by the parties to it; that it was a scheme intended to advertise one of the principals, that she might demand a better salary in her profession. We are also of the opinion that the defendant is not connected with the offense with such certainty as is required in criminal actions, to effect a conviction. The judgment should be reversed.

HENRY *et al.* v. DIETRICH.

(Superior Court of Buffalo, General Term. November 12, 1889.)

1. APPLICATION OF PAYMENTS.

A bill of particulars for goods sold set out items of the account from May 12, 1887, to June 21, 1887, with items of payments made during that time. It appeared that plaintiffs were a firm to which a third partner was added June 1st without the knowledge of defendant, who thought he was dealing with the old firm. Nothing was said by either plaintiffs or defendant as to the application of payments made by defendant after June 1st. Plaintiffs applied them on the account from June 1st, and recovered a judgment for balance due on the account from May 18th to June 1st. *Held*, that plaintiffs the old firm were entitled to so apply them.

2. PLEADING AND PROOF—VARIANCE.

Plaintiffs were not bound by the demand of the complaint nor the statement in the bill of particulars, where the question litigated was the amount due the old firm, and no suggestion of variance between the evidence and the statement was raised.

BECKWITH, C. J., dissenting.

Appeal from municipal court.

Action by Rudolph Henry and another, trading as Henry Bros., against Nicholas F. Dietrich, for goods sold and delivered. There was a judgment for plaintiffs and defendant appeals.

Argued before BECKWITH, C. J., HATCH and TITUS, JJ.

E. B. Vedder, for appellant. *John R. Hazel*, for respondent.

HATCH, J. The complaint is for meat sold defendant on account and demanded judgment for \$154.18. Accompanying the complaint is a verified bill of particulars, filed by plaintiff, which sets out items of the account commencing May 13, 1887, and ending June 21st in the same year, amounting in the aggregate to the sum of \$270.74. Commencing with May 31, 1887, and ending on June 21st, same year, defendant was credited with four items of payments, amounting in the aggregate to \$115.56. This sum is in the bill of particulars deducted from the \$270.74, leaving a balance, as therein stated, of \$154.18. It should be, when correctly subtracted, \$155.18. The answer, as appears from the statement of the return, was a general denial; but the answer, as returned, not only denies, but alleges a portion of the meat sold to be bad, on account of which no liability arose, also a counter-claim for over-payments. No testimony was offered to show payments beyond such as were admitted, and no attempt was made to show any of the meat bad. On the trial it appeared by the testimony of Rudolph Henry that he and his brother composed the firm of Henry Bros.; that such firm was so continued down to and including the 31st day of May, 1887. On June 1st following one Swain became a member of the firm, and so remained during all subsequent dealings between the parties. No formal change was made in the heading of the account kept between the parties hereto after Swain's entry into the firm. On said 31st day of May defendant was indebted to plaintiffs upon the account in

the sum of \$97.50, and on that day paid, to apply thereon, \$25. Commencing with June 3, and ending June 21, 1887, defendant obtained from time to time various quantities of meat, aggregating in amount \$173.24, the first item of which amounted to \$40.04; and he thereafter paid, according to the testimony of plaintiff, \$90.56, and, according to the testimony of defendant, \$80.56. This was the *status* of the accounts when this action was brought. Plaintiff testified upon the trial to the sales of the meat, the payment of the \$25 and also the subsequent sums, and says: "At the time he paid these last payments he owed me for the [first] items above stated. I don't know whether I ever told Dietrich that Swain had come in. The only payments he ever paid before Swain went into copartnership was \$25. He owes plaintiff a balance of \$72.50. *Cross-Examined.* I made up the \$72.50 by adding up the items before read,—\$97.50,—and deducting \$25." The defendant testified that he knew nothing about Swain's being a partner until the trial; that he made all the payments upon the whole account, and had no talk as to what account they should be applied on; and that he owed no money for meats bought since the 31st of May, when he made the payment of June 3d, of \$15.56. *Cross-Examined.* "At that time, May 31st, I paid \$25 on this account, and owed the balance,—\$72.50. I had nothing more until June 3d. Then they struck a new account. What I paid on June 3d—\$15.56—was on the new account. *Redirect.* I continued right on as I began. They never told me any different. I knew of no new account. I kept it in one account." The plaintiff then gave evidence of the meats sold after the formation of the new firm as hereinbefore stated. With an exception, to be hereafter noted, this constitutes all the evidence. The claim is now made that this action cannot be maintained, for the reason that it clearly appears that the payments made should have been and were applied upon the earlier items of the account, and that they were more than sufficient to extinguish them; that, if a right of action exists, it is in favor of the members constituting the new firm. The doctrine respecting the application of payments is reasonably well settled. A debtor has the right, when making a payment, to dictate, when there are separate accounts, upon which account the money so paid shall be applied. If, however, he omits to make such direction, but pays generally, the creditor may apply it, as he wills. *Bank v. Bigler*, 83 N. Y. 63, 64. If, however, neither party makes the application, the law will apply it in accordance with the justice of the case. *Bank v. Webb*, 94 N. Y. 472. We are of opinion, upon the facts in this case, that the court below correctly applied the payments.

Plaintiffs were not concluded by the demand of their complaint, or upon the proceedings, by the statement in the bill of particulars. If in strictness they were bound by the latter, yet the parties appeared and litigated the question upon a claim that defendant was only indebted to plaintiffs in the sum due the old firm, and no objection to the evidence or suggestion was made of any variance between such position and the statement of the bill, but the evidence was all received and submitted to the judge for his determination. Upon the evidence it was quite competent for him to find that not only was it the intention of plaintiff to apply the payments upon the sales made by the new firm, as testified to by him, but he was authorized to find that defendant knew and so understood it, as defendant stated in terms that the first payment made after the formation of the new firm was made to apply upon the new account, which could only have been the account of the new firm. It is true that upon his re-examination he stated that he knew of but one account, and no new one at all; but this simply presented conflicting statements upon the same subject, and it was clearly within the province of the court to say which statement it would credit. In addition to this, the court was also authorized to find from the testimony of defendant that in any event there was something due plaintiffs from defendant. The claim of plaintiffs is

\$72 50 and interest. The whole amount of payments credited by plaintiff to defendant, less the first \$25, is \$90.56,—as stated by defendant, \$80.56. As already stated, the first of these items is \$40.04, paid for a bill of meat purchased June 3d, as to which defendant testified: "I paid for the purchase of June 3d, \$40.04 in cash." This was clearly for the item due the new firm, and, if paid as stated, reduced the aggregate of payments to \$50.56, leaving due \$21.94 upon plaintiffs' account, for which they would be clearly entitled to judgment. But, aside from this, we think that it satisfactorily appears that the meats sold by the new firm, upon which payments were made, were their property, for which they were entitled to pay, and that no injustice is done in so applying them. On the contrary, we think the court was authorized to find from the evidence and the circumstances that it was equitable so to do. *Thurber v. McIntire*, 9 N. Y. St. Rep. 816. We have no hesitancy in arriving at this result, for the reason that upon the trial no evidence was given or claim made but that defendant was indebted for all the meat sold, less payments. The judgment is therefore affirmed, with costs.

TITUS, J., concurs.

BECKWITH, C. J., (*dissenting*.) I will state my reasons for dissenting from the conclusion reached by a majority of the court. The plaintiffs, Henry Bros., were dealers in meats, and the defendant was a customer. The defendant testified that he had traded with them for three years. This action was brought in the municipal court of Buffalo upon an account for meats sold and delivered to the defendant in the months of May and June, 1887. The plaintiffs filed a verified bill of particulars in amplification of their complaint, setting forth their account of sales to the defendant in the months of May and June, 1887, showing several sales in each month, and in the same bill of particulars crediting the defendant with payments from time to time in the same months of May and June, and demanded judgment for the balance of the account. On the trial it came to light that one Swain was taken into partnership with the plaintiffs on the 1st day of June, 1887; but it is undisputed that the defendant knew nothing of that change in the firm until the coming on of the trial. On the trial Rudolph Henry testified to the sales of meat made in the month of May, and to a payment of \$25 the last day of May, but omitted to make proof of the sales in June; thus making a claim for the meats sold in May only. On cross-examination he admitted the several payments made in June, and then made proof of the several sales made in June; that Swain had become a member of the firm June 1st, and that the sales were made by the new firm. The defendant testified that he knew nothing of anybody except the original firm of Henry Bros., and that he kept his account as with them. The judge of the municipal court in his return states that it was conceded by both parties on the trial, although no direct evidence thereof was given and no formal admissions made, that the account which the plaintiffs opened against the defendant when he commenced buying of them was continued without change as to the heading against him after Swain became a partner, as the same appears on the bill of particulars filed in the action. The defendant testified that when he made the payments nothing was said by either party as to how the money should be appropriated, and that in his dealings he knew only Rudolph Henry. This is the substance of the evidence, as, in my opinion, it should be looked at for the purposes of this review. There was some testimony obtained from the defendant respecting a new account in June which I will notice later; and the defendant testified that on a certain day in June he made a purchase of meats amounting to \$40.04, and that at the same time he paid \$40.04, in full of the same purchase. I regard this item of evidence of no consequence. If the defendant is not mistaken, but, as he says, made specific purchase and paid the purchase price, then the payment left no debt, and

that purchase was an isolated transaction, and is out of the case. If, on the other hand, the \$40.04 was not paid on a particular purchase, then the money was to be applied as the other payments were applied. The evidence and the bill of particulars show that after the payment of \$25 on the 31st day of May there was a considerable balance due the plaintiffs upon the sales made in that month, which the trial court refused to reduce by applying thereon the payments made in June. In my opinion, those payments ought to have been allowed in reduction of the plaintiffs' account. In the first place, both the plaintiffs and defendant treated them as so applied. The complaint and bill of particulars show that in fact the plaintiffs had so actually applied them, and the defendant kept his account in a way to show he considered them so applied. It is well settled that a plaintiff in an action should not be permitted to change the application of payments after suit brought. In the second place, where there is a running account of that kind upon which payments are from time to time made, the creditor and debtor usually understand that there is to be such an application, and that the purchaser's indebtedness at any time is the balance of the account after setting off the payments against the sales in the order of priorities. And that is the way the law treats the subject by applying payments in discharge *pro tanto* of the items of debit in the creditor's account in the order of the priority of date. This rule of law is founded, I apprehend, on the presumption that such was the intention of the debtor, and the plain understanding of the debtor and creditor, dealing together. *Clayton's Case*, 1 Mer. 579; *Bank v. Bank*, 44 Hun, 54; 2 Pars. Cont. 638; *U. S. v. Kirkpatrick*, 9 Wheat. 720; 2 Greenl. Ev. § 538; *Truscott v. King*, 6 N. Y. 147. Where the only dealings between persons consist of a running account of sales on one side and payments on the other, it is quite clear that they understand that the payments go in reduction of the earliest items in the creditor's account. And in a case where a new party is taken into the firm of the creditors, and nothing is said about it, and the debtor has no knowledge of the change, and continues to deal with the firm as before, buying and making payments from time to time, and the sellers continue to enter and blend the sales in the same account, under such circumstances the conduct of the members of the firm would seem to be an assurance to the customer that their dealings go on in the same manner, without change, and that his payments are applied in the ordinary and customary manner. Otherwise, the debtor would be deprived of his right to distinguish the debt he would pay, to say nothing of his possible unwillingness to make a debt with the new firm. Where there is a change of partners, especially without the knowledge of the debtor, and the dealings are carried on as before, and the sales are blended and continued in the same account, there the authorities seem to hold that payments are to be applied as though no change of partners had taken place, (1 Story Eq. Jur. § 459e;) and the rule is the same on the accession of a new partner as on the retirement of a member of a firm, (Will. Eq. Jur. 113.) Especially must this be the rule where from the conduct of all the members of the firm, including the new one, the presumption exists and continues that the dealings are continued upon the same account with the consent of all the partners. *Hooper v. Keay*, L. R. 1 Q. B. Div. 178, 16 Moak. Eng. R. 269.

It is undoubtedly true that in the case of the payment of a sum of money by a debtor to a creditor who holds two distinct and independent claims against him that are due, and the debtor gives no direction, expressed or implied, as to which debt he means to make the payment upon, the creditor may apply the payment on either of his demands. In such connection the doctrine has grown up and become a favorite one that he may do so because after payment, without any direction from the debtor, he becomes the owner of the sum of money, and may do what he pleases with his own at any time before trial. This does not seem to me just a proper doctrine of the law of payment, although the fact is indisputable that a man may do what he pleases with his own. The idea of

payment is not that of the transfer of the title of property, but the solution or extinguishment of a debt, and when the object of the act of payment is not expressed by the debtor, nor susceptible of being inferred from the circumstances, the payee may be deemed to be authorized to complete the act according to his own wishes; and some authorities hold that he may do that at any time before an action is commenced. Where a tradesman opens a running account with a customer who from time to time pays sums of money, it would seem that there could be no doubt about what passes in their minds, nor that what transpires is that the debtor supposes that he is making a payment on the general account, and that the creditor knows that the customer so understands it, and accepts the money with that knowledge, and therefore the agreement between them becomes complete that the application of the money will be in accordance with the debtor's intention. When such are the circumstances, there being nothing more in the case, the law, according to a long-established rule,—the principle of which is not always clearly elucidated,—applies the payment to the reduction of the earliest debts of the account. To my view, the circumstances of this case and the evidence show that the plaintiffs herein actually made such application of the defendant's payments; that, whether they did or not, they ought so to have done; that the law, upon the circumstances, made such application; that the coming in of Swain as a partner without the knowledge of the defendant,—the plaintiffs' account being continued in the same manner, sales and payments being made upon the same account without any knowledge of a change being acquired by the defendant,—did not deprive the defendant of his right to say that he made his payments upon the assumption that the ordinary application would be made, and that the plaintiffs, after taking in the new member, accepted the payments with knowledge of the defendant's understanding. The evidence shows no objection on the part of Swain, and the fact that he was interested in the sales made in June, the defendant remaining ignorant of his connection with the firm, raised no equity which required the moneys which the defendant was able from time to time to pay to be applied on the claim in which he was interested rather than the older claim of the plaintiffs; and, the two claims existing, the defendant had the right, had he known of the change in the firm, to direct his payments to be applied to the account of the original firm. My notions of the case are that the plaintiffs actually applied the June payments on their account. (1) They recognized such application even after the commencement of the action by their bill of particulars. (2) That such application was according to the understanding of the parties. The circumstances show there could have been no other intention on the part of the defendant. (3) That such application was required by the established rule of law. (4) The change in the partners being without the knowledge of the defendant,—the account being continued in the same manner as before,—the rule of law still operated as to the payments in June, and the same presumption as to the intent of the debtor and understanding of the parties continued. Accordingly, I think that after the action was commenced the court ought not to have allowed the plaintiffs to change the application of the payments. It looks to me as though the plaintiffs sought to make the change to save judgment going against them, with costs. It is stated in the brief of defendant's counsel that the defense of bad meat applied to the sales made after the 1st day of June.

But there is another piece of evidence which I have so far excluded from consideration. On cross-examination the defendant testified: "At that time, May 31st, I paid \$25 on this account, and owed the balance,—\$72.50. I had nothing more until June 3d. Then they struck a new account. What I paid on June 3d—\$15.56—was on the new account." On redirect examination he said: "I continued right on as I began. They never told me any different. I knew of no new account. I kept it in one account." It appears conclusively that the defendant knew nothing about Swain having become a part.

ner, and what he meant by saying "they struck a new account" is not clear, unless it was that the balance due upon the dealings in May was ascertained and carried over to the account for June, upon which he considered he made his payments. Finding the balance at the end of each month, but continuing the account and dealings in the same way, would not, as I conceive, make any difference as to the intended application of the payments or the rule of law to be applied. The defendant proved the payments in June under the circumstances mentioned. I think they were payments on the plaintiffs' account, and that the judge of the municipal court erred in depriving the defendant of the results of the proof, and therefore I think the judgment appealed from should be reversed. Code Civil Proc. § 3063.

PULLUTRO v. DELAWARE, L. & W. R. CO.

(*Superior Court of Buffalo, General Term. November 19, 1889.*)

1. MASTER AND SERVANT—DEFECTIVE APPLIANCES—PROVINCE OF JURY.

In an action against a railroad company for personal injuries, where it appears that plaintiff's leg was crushed between two cars while he was swinging between them for the purpose of boarding a train,—there being no other way of boarding it,—as required by the course of his employment, and the cars having no appliances to prevent their coming into immediate contact, the question of defendant's negligence in regard to safe and suitable machinery is for the jury, and its negligence is not excused by the concurring negligence of a fellow-servant.

2. SAME—RISKS OF EMPLOYMENT.

It is likewise a question for the jury whether plaintiff's injury resulted from a risk which he assumed on entering defendant's service, he having no knowledge, so far as appears, of appliances such as were lacking on the cars, and never having seen cars come together as those did.

3. SAME—CONTRIBUTORY NEGLIGENCE.

Where plaintiff was employed under the direction of a foreman, and was required to board the train by order from him, which was almost simultaneous with the starting of the train, it is a question for the jury whether he was guilty of contributory negligence in boarding the train while it was in motion.

Motion for new trial on exceptions.

Action by Giovanni Pullutro against the Delaware, Lackawanna & Western Railroad Company for personal injuries. Plaintiff was nonsuited, and moves for a new trial.

Argued before BECKWITH, C. J., and HATCH, J.

Emory P. Closs, for plaintiff. *John G. Milburn*, for defendant.

HATCH, J. The action is brought by plaintiff to recover damages for personal injuries alleged to have been occasioned by the negligence of the defendant. It appeared upon the trial that plaintiff was employed as a laborer upon defendant's gravel train, and entered such employ on the 26th day of August, 1888, continuing therein until noon of the following day, when he sustained the injury complained of. The course of plaintiff's employment required him, in company with some 30 other co-laborers, to unload cars of gravel, and then reload the same with ties which lay by the side of the track. On the day of the injury the train consisted of 10 or 12 flat-bottom gravel-cars, with an engine attached. It had gone out at 7 o'clock in the morning, and had loaded and unloaded the cars at different places for a distance of five or six miles, the train running back and forth several times for that purpose, the men being required to get on and off the cars at the several times. The method of conducting the business was for the gravel to be unloaded, and then some of the men got down from the cars, picked up the ties, and placed them upon the cars. Others remained thereon to arrange them. During this time the train would sometimes move very slowly, and sometimes stop from two to five minutes. When the time arrived for the train to leave an order would be given by one of the foremen to "hurry up," when the men would quickly get upon the cars, the train starting immedi-

ately upon giving the order. These cars stood "about six feet high from the track,—the top of it about the height of a man's shoulders." On some of the cars there was a hook or iron step on the side, a little ways from the wheel, for the men to get up by. When the cars were standing, the men got up by placing their feet on the side. "When the train was moving, the men, in order to get up onto the car, put one hand on the edge of the car, and the other hand on the car next to it; that is, on the edge of each car, and jumped up. * * * That the men always got aboard in the same way." The car upon which plaintiff worked was not supplied with a hook or step, or other appliance by which to get upon the car. This car, as well as the one next it, was not supplied with bumpers or dead-woods, or any other appliance to prevent them from coming immediately together. On the occasion of the injury plaintiff was upon the ground, loading ties, when he, with the others, saw that the engine was about to start. The order came from the foreman to "hurry up," and plaintiff started to get on the car. Some had gotten up,—more than half; others were following. "The engine had started very slowly at the time the plaintiff began to get up; * * * the train was in motion, * * * was running just nice." Plaintiff placed his hands on the ends of the two cars, they being apart, and jumped up. As he jumped, and before he cleared the cars, the two ends came together; caught and crushed one leg, necessitating amputation. He had never before seen cars come together in that way. No instruction or warning was given by defendant to plaintiff as to getting upon or between the cars. Plaintiff was a foreigner; came to this country on May 7, 1888; could not speak English, but understood the phrase "hurry up," which the men were obliged to obey when given. At the close of the proof defendant moved for a nonsuit upon three grounds: *First*, that there was an absence of evidence showing negligence on the part of defendant; *second*, that, if there was negligence, it was that of a co-employee; *third*, that the plaintiff was guilty of contributory negligence. The court granted the motion upon two grounds: *First*, that there was no evidence to show that defendant had failed to discharge its duty; and, *second*, that the plaintiff had assumed the risk of such an injury as the one complained of.

In the orderly disposition of this appeal it becomes necessary to determine, first, whether the defendant discharged the obligation it was under to the servant. The general rule of law is that the master owes a duty to provide for the servant safe and suitable tools, machinery, and appliances for use in and about his employment; also, a safe and secure place in which to perform his duties, and, where necessary, to provide competent and skillful workmen to direct the servant and assist him in the performance of his duties. *Pantzar v. Mining Co.*, 99 N. Y. 372, 2 N. E. Rep. 24. Has this duty been here performed? The plaintiff was but recently employed, and there is nothing showing, or tending to show, that he was possessed of more information with respect to the cars and the methods of performing the work than such as he may have gathered during the period of his employment. The car upon which he was placed at work was provided with no appliances or means to aid him in alighting therefrom or getting thereon. It must be presumed that defendant knew the common mode adopted by the plaintiff and others, in the course of their employment, in performing these acts, as duty required them, and acquiesced therein. *Benzing v. Steinway*, 101 N. Y. 552, 5 N. E. Rep. 449. It consequently became its duty to take all reasonable precautions to make the dangers as small as possible. That the master would so do might be prudently relied upon by the plaintiff. *Kain v. Smith*, 89 N. Y. 375; *Hawley v. Railroad Co.*, 82 N. Y. 370. It is conceded that the car upon which plaintiff worked, and the one adjoining, was unprovided with bumpers or dead-woods, or other appliance to prevent the cars from coming in immediate contact. Taking into consideration the

course of business, the manner in which the cars were used, would not a due regard for the safety of the workmen require that the cars be supplied with this or a similar appliance for protection? In *Ellis v. Railroad Co.*, 95 N. Y. 546, plaintiff's intestate was a brakeman, riding in the caboose, when he noticed the approach of a train in the rear; and, fearing a collision, he stepped from the caboose to its front platform. The car immediately in front was a coal-dump, and the bumpers overlapped, so as to be useless. The collision occurred in the rear, and the dump was forced past the bumpers, upon the steps coming in contact with the front part of the caboose, inflicting death. Judge DANFORTH, in delivering the opinion of the court, says: "Here it was the duty of the defendant to provide a car properly fitted, not only with running apparatus, as wheels, stopping apparatus, as a brake, but with buffers of some kind, to protect the car and its servants necessarily or lawfully thereon from the effect of a collision. Ordinary and usual care in the equipment and running of a road requires this last appliance, or some equivalent contrivance, as much as it does either of the others. There was, in effect, no buffer, or anything to take its place, on the car upon which the intestate was employed. Upon the evidence it may be said that its absence was the proximate cause of the injury." In *Gottlieb v. Railroad Co.*, 100 N. Y. 462, 3 N. E. Rep. 344, it was held that the evidence tended strongly to show that the main purpose of bumpers on the ends of freight-cars was for protection of brakemen in the discharge of their duties. It seems quite clear from these authorities that bumpers are a necessary appliance upon any car, for its safety, and also the safety of persons required to be employed upon it. It is quite as necessary that this appliance should be present to prevent cars from coming together as it is for a brake to stop them when upon a down grade; and when, in the course of employment by servants engaged thereon they are or may be required to go between them, to the knowledge of the master, it would seem to be a gross neglect of duty not to provide them. Under the evidence in this case, we think it a fair question for the jury to say whether or not the defendant has discharged the obligations it owed in this regard to plaintiff.

It is, however, said that plaintiff assumed the risk of such injury as he had sustained. It is the rule that upon entering into employment the servant assumes the usual risks and perils of the service, and also such as are incident to the use of machinery and property of the defendant as it then exists, so far as such risks are apparent. *Gibson v. Railway Co.*, 63 N. Y. 452. But this rule is subject to the qualifications that the master must first have performed those duties which the law enjoins upon him. *Benzing v. Steinway*, 101 N. Y. 551, 552, 5 N. E. Rep. 449; *Ellis v. Railroad Co.*, 95 N. Y. 552. Here, as we have seen, the defendant disregarded its duty in furnishing bumpers to the cars. At least, the question as to whether they did or not should have been submitted to the jury. It is true that when the servant accepts employment, and at that time the machinery and implements are of a certain kind or condition, and the servant knows it, he can make no claim upon the master to furnish another or different machine or safeguards, and if he is injured thereby no liability attaches. *Sweeney v. Envelope Co.*, 101 N. Y. 520, 5 N. E. Rep. 358. But this rule presupposes knowledge, or opportunities for obtaining which charge the servant with it, equally with the master. In this respect, however, regard must be had to the knowledge of the employe as to the machinery and structures on which he is employed; also, to his capacity and intelligence, and his opportunities for information; and in addition thereto the servant has a right to rely upon the master to protect him from danger and injury. *Powers v. Railroad Co.*, 98 N. Y. 280; *Marsh v. Chickering*, 101 N. Y. 999, 5 N. E. Rep. 56; *Sullivan v. Manufacturing Co.*, 113 Mass. 396. It was also said by Judge FOLGER in *Laning v. Railroad Co.*, 49 N. Y. 535: "It is at his option, ordinarily, to accept or to re-

main in the service or to leave it; and, if he remains without promise of a change, or other like inducement, it is for the jury to say whether or not he voluntarily assumes the risks of defective machinery and of incompetent servants, whereof he has full and equal knowledge." The plaintiff here had been in the employ of the defendant a day and a half; had been but a short time in the country. He could not speak our language, and was, presumably, in a large degree unacquainted with the methods of the defendant in the transaction of its business. He had never seen cars come together as these cars came. There is no proof that his attention had ever been called to the lack of proper buffers, or that he had the slightest knowledge upon the subject, or that he had received any instructions in respect thereto. Under such circumstances, we think it proper to submit both questions here discussed to the jury, for their determination. *Fredenburg v. Railroad Co.*, 114 N. Y. 582, 21 N. E. Rep. 1049.

The defendant further insists that the injuries here sustained were, in any event, the result of the negligence of a co-employee, and also that plaintiff was clearly guilty of contributory negligence. As to the first claim, it may be said—assuming the injury was caused in part by the negligence of a co-servant—that, if we are right in holding that it was a question for the jury to consider whether the defendant had discharged its obligation in furnishing suitable machinery and appliances, and whether such failure was the proximate cause of the injury, then the authorities already cited dispose of this claim, as it is held that where the negligence of the master concurs with that of a fellow-servant in producing the injury the master is not thereby excused. The second ground is predicated upon the fact that plaintiff boarded the train while in motion, and the claim is made that this is *per se* negligence which contributed to the injury. Defendant relies upon *Hunter v. Railroad Co.*, 112 N. Y. 876, 19 N. E. Rep. 820, and *Solomon v. Railway Co.*, 103 N. Y. 443, 9 N. E. Rep. 430. In the first of these cases, plaintiff attempted to board a train moving at the rate of from four to six miles an hour. He was charged as matter of law with a negligent act. In the second, plaintiff was nonsuited for attempting to board an elevated railway train, with the movement of which he was perfectly familiar, after the same had started, and when the gates guarding the platform were partly or wholly closed. It was held that he was properly nonsuited. Judge PECKHAM, in the case first cited, delivering the prevailing opinion of the court, says: "There may, undoubtedly, be circumstances under which an attempt to get on or off a moving train would not be regarded as negligence, as matter of law, and where the question of negligence, under all the circumstances of the case, should be submitted to the jury." 112 N. Y. 876, 19 N. E. Rep. 822, citing *Filer v. Railroad Co.*, 49 N. Y. 47. Under this rule, which we believe is the latest expression of the court of last resort upon this subject, it is not in all cases *per se* negligence to board or alight from a moving train. As applied to the facts here, we think it a question for the jury. The plaintiff was employed subject to the direction of a foreman. The demands of the business evidently required that the work of loading and unloading should be done with as much rapidity as possible. The order to board the train and the signal for it to move were almost simultaneous acts. The order came from the foreman to "hurry up." The plaintiff started for the train. "The engine had started very slowly at the time the plaintiff began to get up. * * * The train was in motion, * * * was running just nice,"—are the various expressions of the witnesses. From this evidence the jury would be authorized in finding that the train was barely moving when the attempt was made to board it, and that there was but very little if any more danger than when standing. This was the only means furnished by defendant to get aboard, or, at least, it was the usual way in which it was done. He was obliged to get aboard then, or be left; and he then had his orders. Under similar circumstances it

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is said: "The law should not be too exacting." *Hawley v. Railroad Co.*, 82 N. Y. 372. See *Terry v. Jewett*, 17 Hun, 400. Under all the circumstances, we think it presented a question for the jury to say whether such act was negligent or not. It is not entirely certain, if we assume the act negligent, that such negligence was the cause of, or contributed to, the injury. Plaintiff had placed his hands upon each car to swing himself up. He must have succeeded in placing one leg above the car, as only one was caught. The movement of the train did not, so far as the evidence discloses, interfere with his ability to board the car, or prevent him from so doing. What did interfere with such attempt was the absence of an appliance to prevent the cars from closing up. With such protection there, it leaves nothing to show but that the plaintiff could have safely got on board; so that it may not be said with certainty that this action produced the injury. On the contrary, the jury would be authorized to find that the proximate cause of the accident was the closing of the cars permitted by the absence of the bumpers, and that to this cause the accident was solely due. We are of opinion therefore that the exceptions taken should be sustained and a new trial ordered, with costs to abide the event.

BROWN v. NIAGARA MACHINE CO.

(Superior Court of Buffalo, General Term. November 19, 1889.)

1. JUDGMENT—BY DEFAULT—MUNICIPAL COURT OF BUFFALO.

Section 9 of the Buffalo municipal court act (Laws N. Y. 1880, c. 844) provides that, in case defendant fails to answer the complaint, he shall be deemed to have admitted the allegations, and the court, on the filing of the summons and complaint, with proof of due service, shall forthwith enter judgment, without further proof. *Held*, that where defendant fails to answer, but appears and asks an adjournment, the judge is bound to enter judgment for plaintiff.

2. SAME—OPENING JUDGMENT—APPEARANCE.

Section 16, authorizing the court to open defaults on such terms as may be just, where defendant shall fail to appear on the return-day or on any adjourned day, does not authorize a default to be opened, where defendant appeared on the return-day and asked an adjournment, but failed to answer.

3. SAME—JURISDICTION.

Section 16 also provides that when a transcript of a judgment has been taken from the court, and filed in the office of the clerk of Erie county, the superior court of Buffalo may open the default. The practice is the same as in the municipal court, except that a judge of the superior court may at chambers issue an order to show cause, returnable to a special term, where the application is to be heard and determined. *Held*, that the general term could not entertain the motion.

4. SAME—AFFIDAVIT.

The section also requires defendant to show to the superior court that no application was made to the municipal court. *Held*, that the moving papers are fatally defective unless they show such fact.

5. SAME.

Nor is defendant entitled to the relief, under Code Civil Proc. § 8064, providing that a default may be opened for manifest injustice, as it also conditions the relief on defendant's failure to appear.

Appeal from municipal court.

Action by Frank H. Brown against the Niagara Machine Company. Judgment by default was entered, and defendant appeals, and moves that the default be opened, and a new trial be granted.

Argued before BECKWITH, C. J., and TITUS and HATCH, JJ.

Frank E. Stickles, for appellant. Clinton B. Gibbs, for respondent.

HATCH, J. The summons, together with a verified complaint setting up an account and demanding judgment, was served upon the defendant herein on April 4, 1889. On the return-day, April 12, 1889, defendant appeared before the municipal court, and asked for an adjournment, which was objected to by plaintiff, and denied by the court; and thereupon, no answer being put in, the plaintiff was awarded judgment by the court for the amount demanded

in the complaint. The defendant thereupon appealed from the judgment, and also served a notice of motion, based upon accompanying affidavits, asking to be relieved from the default, and for an order granting a new trial in the court below. By section 7 of the municipal court act, so called, (Laws, 1880, c. 344,) it is provided that in an action brought therein, arising on contract for the recovery of money only, or upon an account, the plaintiff, at the time of the issuing of the summons, may file with the clerk of the court a written complaint, setting forth, in a plain and concise manner, the facts or items of account constituting the cause of action, specifying the amount due, and for which the plaintiff will demand judgment. The complaint is to be subscribed by the plaintiff or his attorney, and verified as prescribed by the Code of Civil Procedure. The summons and complaint are to be served by delivering defendant copies thereof. Section 8 provides that if defendant appears and answers the complaint such answer must be in writing, subscribed by the defendant or his attorney, and verified like the complaint; then provides what the answer shall contain. Section 9 provides, in case the defendant fails to answer the complaint, he shall be deemed to have admitted the allegations thereof; and the court, upon filing the summons and complaint with proof of due service, shall forthwith enter judgment for the plaintiff for the sum demanded in the complaint, with costs and disbursements, without further proof. The return upon this appeal shows that the summons and complaint, as required by the sections referred to, were properly served; that upon the return-day thereof the defendant appeared and asked for an adjournment; but did not put in an answer as provided by section 8. The plaintiff thereupon became entitled to judgment for the amount demanded, and the judge, by section 9, was bound to render judgment in conformity with the demand of the complaint. This he did. It is not pretended but that the judgment so entered was in all respect regular. It follows that no error was committed in this respect, and the judgment appealed from should therefore stand.

But the defendant applies to the court upon affidavits to set aside this judgment upon the ground that manifest injustice has been done. The act heretofore cited also provides for opening defaults. By section 16 it is provided that the municipal court shall have power to open defaults and set aside judgments upon such terms as may be just, in a case where a defendant shall fail to appear on the return-day of process, or on any adjourned day, when it is shown that manifest injustice has been done, and the defendant satisfactorily excuses his default. It then provides upon what papers the application shall be founded, within what time the motion shall be made, the method of procedure, and the terms upon which the motion will be granted. It further provides that when a transcript of the judgment has been taken from the municipal court, and filed in the office of the clerk of the county of Erie, that this court shall then be vested with power and authority to open the default, and order a new trial upon such terms as may be just. The practice upon such motion is the same as in the municipal court, except that a judge of this court may at chambers issue an order to show cause returnable at a special term of said court, and such application is to be heard and determined at a special term. The defendant must also show to this court that prior to the filing of the transcript no application was made to the municipal court for like relief.

It is thus seen that the primary fact which must exist before the court can take cognizance of a motion to open a default is the non-appearance of the defendant upon the return-day of the summons, or upon any adjourned day. The moving papers herein, as well as the return, show upon their face that the defendant appeared upon the return-day of the summons and asked an adjournment, but put in no answer. The adjournment the court had no power to grant, as the statute is mandatory, directing it to enter judgment on such failure. There is no default such as the statute confers power upon this court

to open, as its power is limited to a failure to appear, while here defendant did appear. It is not, as counsel claims, a default for failure to answer that the court can grant relief, as the language of the statute is, "shall fail to appear on the return-day of process, or on any adjourned day." The defendant has also mistaken the court to which he should apply for relief. The statute does not, in terms, authorize an application for such relief to be made at general term, but, as already seen, expressly directs that the application shall be made upon an order to show cause returnable at special term. This is the proper practice, and should be pursued. The moving papers are also defective, in that they fail to state that no application was made to the municipal court for relief prior to filing the transcript in the county clerk's office. This is an essential fact to appear, as it may be controlling upon the court in the disposition of the application, and the court should always be informed of the action taken by other courts with respect to the subject-matter upon which it is called to act. It is quite clear, therefore, that defendant has not presented a case under this statute entitling him to the relief sought.

Defendant, however, claims that the statute, § 16, is not controlling, and that he is entitled to relief under the general law applicable to justices' courts and appeals therefrom. This claim is based upon the last clause of section 16 of the statute cited, viz.: "The provisions of this section are in addition to the right of appeal now provided by law from judgments obtained in justices' courts in the city of Buffalo." It was undoubtedly the intention of the legislature by the adoption of this clause to save any and all rights that might arise, and to leave intact such remedies as exist in the general law when not inconsistent with the act establishing the municipal court. Without at this time determining whether this motion can be entertained as falling within the provisions of the former statutes, it is a sufficient answer to say that the defendant does not show himself entitled to relief under the general law. The defendant invokes the aid of section 3064, Code Civil Proc.; but this, like the other statute, provides that a default may not be opened for manifest injustice, except in case of "a defendant who failed to appear before the justice, either upon the return of the summons or at the time to which the trial of the action was adjourned." Abundance of authority has firmly established this rule. *Armstrong v. Craig*, 18 Barb. 887; *Tanner v. March*, 53 Barb. 438. The same reasons apply here as apply to the statute first cited. It follows that the judgment appealed from should be affirmed, with costs, and the motion to open the default denied. All concur.

REMING *et al.* v. NEW YORK, L. & W. RY. CO.

(*Superior Court of Buffalo, General Term.* November 19, 1889.)

RAILROAD COMPANIES—TRACKS IN STREET—ABUTTING OWNERS—MEASURE OF DAMAGES.

Where a railroad company has built a railroad track in a street on which plaintiff's property abuts, permanent depreciation in the value of plaintiff's property cannot be recovered in a common-law action, but he must be limited to a recovery of such temporary damages as have accrued up to the time of the commencement of the action. Following *Pond v. Railway Co.*, 19 N. E. Rep. 487; *Hussner v. Railroad Co.*, 21 N. E. Rep. 1003.

Appeal from trial term.

Argued before TITUS and HATCH, JJ.

Rogers, Locke & Milburn, for appellant. *Day & Parker*, for respondents.

TITUS, J. This case comes before us presenting but a single question. On the trial this court held that if the jury should determine that the structure erected by the defendant in and along Water street, in front of the plaintiffs' lands abutting on that street, was permanent in character, the measure of damages would be the depreciation in value of the plaintiffs' property by reason of such structure. This was in accord with the decision of the general

term of this court when the case was before us the first time. 1 N. Y. St. Rep. 733. We then endeavored to show that the facts of the case did not bring it within the rule laid down by the court of appeals in *Uline v. Railroad Co.*, 101 N. Y. 98, 4 N. E. Rep. 536; that inasmuch as the defendant in that case had only raised the grade of the street, and had not appropriated it to purposes inconsistent with its use by the public as a thoroughfare, the rule did not apply. But in a case like the one now under consideration, when the street is occupied by an embankment permanent in its character, and devoted wholly to railroad purposes, to the exclusion of the public, it was thought that all the damages which the plaintiff had sustained had accrued, and was capable of being ascertained and determined, and could be recovered in a single action. Since that decision was made, the precise question has been passed upon by the court of appeals so as to leave no doubt of the intention of our highest court to apply the rule in the *Uline Case* to all cases of this character, whether the obstruction is permanent or temporary. *Pond v. Railroad Co.*, 112 N. Y. 186, 19 N. E. Rep. 487; *Hussner v. Railroad Co.*, 114 N. Y. 433, 21 N. E. Rep. 1002. We are therefore constrained to hold that permanent depreciation in the value of the plaintiff's property cannot be recovered in a common-law action, but he must be limited to a recovery of such temporary damages as have accrued up to the time of the commencement of the action. The judgment must therefore be reversed, and a new trial ordered, with costs to abide the event.

In re VINOT'S ESTATE.

(Surrogate's Court, New York County. July 18, 1889.)

1. DESCENT AND DISTRIBUTION—LEGACY TAX—NON-RESIDENT DECEDENT.

Both real and personal property within this state, devised by a non-resident decedent, dying after the enactment of Laws N. Y. 1887, c. 713, § 1, extending the collateral inheritance tax to all property within this state which shall pass by the will of a non-resident, are subject to the tax.

2. SAME—REMAINDER.

A vested remainder, limited on a life-estate, is subject to the tax.

3. SAME—EXEMPTIONS—FUNERAL EXPENSES.

A bequest for maintenance of decedent's burial plot is exempt as funeral expenses.

On motion to confirm report of the appraiser of the estate of Julius T. Vinot, deceased.

Gibson & Davis, for comptroller.

RANSOM, S. The decedent in this case died after the passage of the amendatory act of 1887, and therefore comes within the purview of chapter 713 of the Laws of 1887. Section 1 of that chapter provides: "After the passage of this act all property which shall pass by will, * * * or, if such decedent was not a resident of this state at the time of death, which property, or any part thereof, shall be within this state, * * * shall be, and is, subject to a tax of five dollars on every hundred dollars. * * *" The decedent, though a resident of New Jersey, left both real and personal property within this state; and Justice ANDREWS, in delivering the opinion of the court of appeals in *Re Enston*, 21 N. E. Rep. 87, holding that, under the collateral inheritance tax act of 1885, neither real nor personal property of a non-resident is taxable in this state, says: "By chapter 713 of the Laws of 1887, section 1 of the act of 1885 was so amended as to subject to its operation the property within this state of a non-resident decedent. * * *" The appraiser was therefore right in reporting the property as subject to the tax.

A further objection is made to the report because a remainder, after a life-estate, was reported as subject to the tax. The remainder is a vested one, there being a party in being who would take should the life-estate terminate,

and the value of the remainder is also ascertainable. The appraiser was right in so reporting.

I think the bequest of one-half of the income of \$2,000 to be applied to maintenance of the burial plot, etc., of decedent should not have been reported as subject to tax. It should, so to speak, be looked upon as a personal expenditure for the benefit of the decedent, and as part of the funeral expenses, and therefore exempt. Under the recent decision of the court of appeals in *Catlin v. St. Paul's Church*, 20 N. E. Rep. 864, the other half of the income of \$2,000 is subject to the tax. An order should be handed up confirming the report of the appraiser in all respects, except as above indicated, and assessing and fixing the tax.

BANKS v. BENSKY.

(*Supreme Court, General Term, First Department. November 7, 1889.*)

CHANGE OF VENUE—MATERIALITY OF WITNESSES.

In an action for assault and battery, where defendant alleges that he was assaulted by, and did not assault, plaintiff, and asks for a change of venue for convenience of witnesses, the fact that no person other than he and plaintiff were present at the time of the alleged assault is no objection to his right to the change, as the witnesses may be material to show defendant's condition after the alleged assault.

Appeal from special term, New York county.

Argued before VAN BRUNT, P. J., and BRADY and DANIELS, JJ.
E. A. Carpenter, for appellant. *J. Adriance Bush*, for respondent.

BRADY, J. This is an action for the recovery of damages occasioned by an assault and battery committed by the defendant in the county of Suffolk, in this state. The defendant applied for a change of the place of trial for the convenience of witnesses. His affidavit complies with the rules of the court to be observed in such applications. The plaintiff responds by asserting that when the assault was committed he and the defendant were the only persons present, and assumes, from that circumstance, that the defendant's witnesses cannot be material. He overlooks the defendant's allegation that the latter was the person assaulted, and the witnesses he names are to prove his condition after the assault, and which indicated violent treatment at the hands of some person. These witnesses, although not present at the occurrence, may be material for the defense, and indeed must be so regarded in view of the defendant's averment that he did not assault the plaintiff, but that the latter assaulted him. The pleadings contain nothing which affects the right of the defendant to have the change made which he asks. The order made should be reversed, therefore, and motion to change the place of trial granted, with \$10 costs of this appeal, and the disbursements. All concur.

RICE v. BAGGOT.

(*Supreme Court, General Term, First Department. November 7, 1889.*)

1. PARTNERSHIP—DISSOLUTION—ACCOUNTING.

On dissolution of a partnership, the fact that the retiring partner undertakes to carry on a similar business near by, and to divert the former customers of the firm, is proper to be considered in estimating the amount to be allowed him for the goodwill of the business.

2. SAME—RECEIVERS.

Where the partners had agreed as to the disposition and control of the property, except as to one item, which, as well as the whole question, had been placed in the power of the court by the evidence, a motion to appoint a receiver to sell the goodwill and lease was properly denied.

Appeal from special term.

Action by William H. Rice against Atmore L. Baggot for dissolution of a partnership, etc. Plaintiff appeals.

Argued before VAN BRUNT, P. J., and BRADY and DANIELS, JJ.
G. S. Hastings, for appellant. *W. K. Hall*, for respondent.

BRADY, J. This action was commenced in February, 1888, for the dissolution of a copartnership theretofore existing between the plaintiff and defendant, and for an accounting. Subsequently, and after issue joined, the parties signed articles of dissolution, by which all matters between them were settled, except as to whether the plaintiff should pay to the defendant any sum for the good-will of the business, in addition to the sum already paid, according to the articles of dissolution. The learned justice before whom the action was tried found in favor of the defendant on this subject, determining the good-will to be reasonably worth \$4,000, and this presents the only question of any importance on the appeal. The testimony with regard to it was conflicting, although that in favor of the defendant was more affirmative in character, and better in quality, than that given on behalf of the plaintiff; in addition to which it appeared that the defendant had offered to pay to the plaintiff the sum of \$2,000 for the good-will, or to accept that sum. And this offer, in connection with the testimony already alluded to, clearly justified the learned judge in holding that it was worth \$4,000. The counsel for the appellant thinks that this amount is erroneous, for the reason that the evidence established that the defendant endeavored to divert the trade from the old concern by opening a store on the opposite corner, and by securing the eye and ear of the old customers as far as possible; which meant that he had distributed circulars to the old customers, advising them that he had opened such a store,—a circumstance which no doubt was taken into consideration by the learned justice, inasmuch as the fact mentioned was one which had appeared in the evidence. If the testimony had not been considered, it would doubtless have been an error, upon the proposition which seems to be correctly stated in *Lindley on Partnership*, as follows: "The value of the good-will of any business to a purchaser depends, in some cases entirely, and in all very much, on the absence of competition on the part of those by whom the business had been previously carried on." Page 440. This rule is predicate of the character of the good-will, which is the favor the management of a business wants from the public, and the probability that old customers will continue their patronage. *Chittenden v. Witbeck*, 50 Mich. 401, 15 N. W. Rep. 526; *Myers v. Buggy Co.*, 54 Mich. 215, 19 N. W. Rep. 961, and 20 N. W. Rep. 545. Or, as was said by Chief Justice DALY in *Hegeman v. Hegeman*, 8 Daly, 4: The good-will in a business may be acquired from its being established in a particular place, from which the person conducting it has derived profit, and where there is attached to the business a name indicating to the public where or in what manner it is carried on. The judge doubtless took into consideration the fact that the store which was secured by the defendant was small, was the only one suitable to his business that he could find, and was already a shoe-store, and had been during the business of the copartners herein; and, as their business was prosperous, it was fair to presume there was little injury from the competition thus existing. It is also supposed that the conclusion in reference to the value of the good-will was erroneous, because there was no finding of fact showing that the lease had any value in excess of the rental charged. But this proposition does not embrace another element, and that is the existence of the business, and its success, which formed necessarily a part of the good-will.

It is also supposed by the learned counsel that his motion, made upon the trial and after the evidence was in, for the appointment of a receiver to sell the good-will and lease, should have been granted. And his proposition rests upon the case of *Marten v. Van Schatck*, 4 Paige, 479, which simply de-

cides, what is perfectly familiar, that upon a bill filed by one partner to close up a partnership concern it is a matter of course to appoint a receiver, if the parties cannot agree between themselves as to the disposition and control of the property, and the motion, therefore, is generally made before the issues are tried. Here the whole subject had by the evidence been placed in the power of the court. Not only that, but the parties had not been unable to agree as to the disposition and control of their property; for they had arranged that by their articles of dissolution, except as to the one item, which had been fully investigated before the motion was made. The judgment should be affirmed, with costs.

DANIELS, J. The amount allowed by the judgment for the good-will of the business seems to be more than its probable value, inasmuch as the stock was taken at a valuation of 90 per cent. But as the court at the trial had the advantage, not existing on the appeal, of personally seeing and hearing the witnesses, the conclusion there adopted must be accepted as final. There is no such preponderance in the evidence as will justify any interference with the judgment, and it should therefore be affirmed; but considering the large amount allowed, it should be without costs of the appeal.

VAN BRUNT, P. J., concurs.

BOWERY NAT. BANK v. SNIFFEN.

(*Supreme Court, General Term, First Department. November 7, 1899.*)

HUSBAND AND WIFE—CONTRACTS—ACCOMMODATION PAPER.

Where promissory notes are executed by a wife to her husband as mere accommodation paper, they do not constitute contracts between them; and under Laws N. Y. 1884, c. 381, giving to married women the power to contract as if they were unmarried, and making them and their separate estate liable on their contracts, whether they relate to such separate estate or not, but excepting from the provisions of the act all contracts between husband and wife, the bank which discounts such notes for the husband is entitled to recover thereon against the wife.¹

Motion for new trial on exceptions.

Argued before **VAN BRUNT, P. J.,** and **BRADY** and **DANIELS, JJ.**
James R. Marvin, for plaintiff. *Daniel T. Walden*, for defendant.

VAN BRUNT, P. J. The complaint alleges that the defendant, Catherine Sniffen, made her certain promissory notes in 1887 and 1888 in writing, and copies of such notes are set forth therein. Each of said notes was in the same form, but they varied in amount. The form was as follows:

"Four months after date I promise to pay to the order of John Sniffen \$2,500, at the Bowery National Bank, value received.

"**CATHERINE SNIFFEN.**"

The plaintiff alleged that the defendant delivered the said notes to the payee, who thereafter, and before maturity, indorsed the said notes, and for value delivered the same to the plaintiff. The defendant set up that at the time of the making and delivery of the said notes to Sniffen, the payee thereof, the defendant was a married woman, and the wife of said Sniffen, the payee of said notes, and that the same were made and delivered without consideration. The only evidence offered at the trial were the notes, and the testimony of the cashier of the defendant that they were presented for discount by John Sniffen, and discounted for him, and credit given therefor to him in his account with the bank; and it was admitted that the defendant was a married

¹Concerning the extent of the power of married women to contract under the various married women's acts, see *Carriage Co. v. Pier*, (Wis.) 43 N. W. Rep. 502, and note; *Jones v. Holt*, (N. H.) 15 Atl. Rep. 214, and note; *Nixon v. Whiteley, etc., Co.*, (Ind.) 23 N. E. Rep. 411.

woman, and the wife of John Sniffen. Upon these facts being established, the court directed a verdict for the plaintiff, and ordered the exceptions to be heard in the first instance at the general term.

The plaintiff is undoubtedly a *bona fide* holder of the notes in question, having paid full value therefor to the payee. But notwithstanding this fact, as the law stood prior to the enactment of chapter 381 of the laws of 1884, no right of recovery existed. In the case of *Bank v. Miller*, 68 N. Y. 639, it was definitely held that where a married woman had made certain notes payable to the order of her husband, which were presented by him for discount to the plaintiff, the notes were nullities, and no implication, presumption, or impression that she was to be benefited by them in her business or estate could be drawn from their form, or from the fact that she had given them to her husband for the purpose of having them discounted, but that, in order to charge her, it must be made to appear by evidence *altunde* the instrument that they were in fact made in her separate business, or for the benefit of her separate estate. This same rule was laid down in *Bank v. Pruyn*, 90 N. Y. 250. The question then presented is whether the enactment of chapter 381 of the Laws of 1884 has made any change in the law which will support a recovery upon the part of the plaintiff. The statute is as follows: "Section 1. A married woman may contract to the same extent, with the like effect and in the same form, as if unmarried, and she and her separate estate shall be liable thereon, whether such contract relates to her separate business or estate or otherwise, and in no case shall a charge upon her separate estate be necessary." It is clear that by this section the rules laid down in the cases cited have been abolished, except so far as relate to the next section, to which attention will be hereafter called; and that it is no longer necessary, in order to hold a married woman upon her contracts, to prove that the obligation was created by her in or about carrying on her trade or business, or that the contract relates to or is made for the benefit of her separate estate, or that the intention to charge her separate estate is expressed in the instrument by which the liability is created. The exception to which attention has been called is contained in section 2 of the act, which provides that this act shall not apply to any contract that shall be made between husband and wife. As already stated, unless the obligation which is the subject-matter of this suit is found to come within the restriction of the section last quoted, the plaintiff has a right to recover. The notes in question were either given for value received by the maker, in which case they would have been given for the benefit of her separate estate, and she would be liable upon them within the principles laid down in *Tiemeyer v. Turnquist*, 85 N. Y. 521, or it was a loan of her credit by the wife to the husband. The cases already cited show that there is no presumption that the notes were given for value, and therefore it must be assumed that they were mere accommodation paper, and that they were a loan of her credit by the wife to the husband. If that is the case, then the notes were no contract between the husband and wife. There was no obligation which could be enforced by the husband against the wife. Where two parties execute an instrument without any intention of creating an obligation between them, there is no contract. An intention to contract is an essential element of every contract. Therefore, if these were accommodation notes, there was no intention on the part of the maker to contract with the payee, and no intention on the part of either of the parties that any obligation, as between themselves, should be entered into because of the giving of the notes. Although the ordinary rule is that a promissory note is a contract between the maker and the payee, yet, if the parties to the instrument intend differently, it is difficult to see how a contract can spring into existence when neither intended that the act done should result in a contract as between them.

It follows from this, then, that the making of this promissory note by the defendant, and the giving of it to her husband, was not the making of any

contract between them, and was not intended so to be. When, therefore, did the contractual relation spring into existence? Clearly, not until the plaintiffs had discounted the paper in question, and given the proceeds of such discount to the husband of the defendant. It was then for the first time that a contract did actually spring into existence, and it was not intended by the parties to this paper until that event took place that any contract because of the making and delivery of the paper should arise. In the loaning of her credit to her husband the wife took this method, and in so doing, as already stated, no contractual relation was formed between the husband and the wife, nor was any contract whatever made between them by reason thereof. It would not be contended for a moment that if the husband and wife had been joint makers of this paper, payable to their own order, and indorsed by them, any contract, within the exception of section 2 of the act of 1884, would have been entered into. But although the form of the paper is different, yet the substantial liability to the holders of the paper of the husband and wife is the same, each being liable to be pursued for the recovery of the amount agreed to be paid upon the face of the paper. It may be a question whether it was the intention of the legislature to exempt contracts of this description from the action of the first section of the act of 1884. It may very well be, and probably was, the intention of the legislature to guard the wife against the making of contracts between herself and her husband which might be enforced by him against her separate estate, and that the policy of the law was not to promote traffic between the two, except under the same restrictions that had heretofore existed, and that it was contracts of this character to which the exception in the statute was intended to apply, and not to those transactions which were contracts in form between husband and wife, but which could not be enforced until the right of some third party had intervened. That this interpretation of the act of the legislature is in accord with its intention seems to be fortified by their passage, in 1887, of the act which permits husband and wife to convey directly to each other real estate without the intervention of a third person. By the passage of this act the legislature indicated that it was their policy to allow husband and wife to do directly that which heretofore they had been only enabled to do through the intervention of some third party, who really had no interest in the transaction. It seems to be reasonably clear that if these notes had been made by the defendant to the order of herself, and indorsed by her, and given to her husband, and he had had them discounted, a liability would have arisen, and there could be no question as to its being a contract between husband and wife, and thus within the exception contained in the statute of 1884; and yet so long as the husband was the holder of the notes the relation between the husband and wife in respect to the paper was precisely the same, and her obligation under the paper to her husband in no manner varied from what it was in the case at bar. Now, if the notes had been made in that form, and had been discounted by the bank for the benefit of the husband, a recovery could be had, and it would not be deemed a contract between husband and wife merely because they could not be used by the husband, for the purpose of having them discounted, without his indorsement. It seems, therefore, that, there being no rights whatever conferred upon the husband by reason of the making and delivery of this paper to him, the notes were not contracts between husband and wife, although in form they appeared so to be. The prohibition of the act is against contracts between husband and wife; that is, agreements or instruments made between husband and wife which would be valid contracts under the provisions of the first section. The alleged contract between the husband and wife arising out of the notes in question, being no contract at all, would not be valid, even under the broad provisions of the first section of the act in question, and therefore the exception contained in the second section can have no application. No contract, therefore, springing

into existence until the plaintiffs became the holder of the paper, and there being no contract between the husband and wife, the provisions of section 1 of the act became applicable. We are of opinion, therefore, that the plaintiff was entitled to recover, and that the exceptions of the defendant should be overruled, and judgment ordered for the plaintiff upon the verdict. All concur.

HAYWARD v. PLACE *et al.*

(*Supreme Court, General Term, First Department. November 7, 1889.*)

1. EXECUTORS AND ADMINISTRATORS—ACCOUNTING—PARTIES.

Where a legatee, after bringing an action against the executor for an accounting, is appointed administratrix of the estate, she becomes a necessary party to such action in her representative, in addition to her individual, capacity, that the judgment may be a final adjudication of the questions involved. DANIELS, J., dissenting.

2. SAME—MISAPPROPRIATION—EXTENT OF LIABILITY.

Where an executor and a legatee have misappropriated the estate of their testator, they are yet liable for no more than is proved to have remained in the hands of the executor, and to have been received by the legatee beyond what he was entitled to; and a judgment against them transcending this liability, without showing in what manner or upon what evidence it is done, so that its modification is impracticable, will be reversed.

Appeal from special term, New York county.

Action by Emeline P. Hayward, as a legatee under the will of Susan A. Place, against Barker Place as executor, and James K. Place as a beneficiary, under the will, and others, for an accounting. There was judgment for plaintiff, and defendants appeal.

Argued before VAN BRUNT, P. J., and BARRETT and DANIELS, JJ.

Ira D. Warren, for appellants. *J. K. Haywood*, for respondent.

DANIELS, J. The action was brought by the plaintiff, as a legatee under the will of Susan A. Place, to secure an accounting of and concerning her estate, and the recovery of the amount found to be in the hands of the defendant Barker Place as executor, and James K. Place as a beneficiary, under her will. While the action was pending proceedings were taken on behalf of the plaintiff as legatee, in the surrogate's court of the county of New York, to obtain an accounting from Barker Place as executor of the estate, and for his removal from his office as executor. This proceeding resulted in securing an accounting, and an order removing him in case of his failure to give a bond in the sum of \$20,000, in the form required by law of administrators, within five days from the date of the decree. He seems to have failed to provide this bond, and under this clause, and a further direction contained in the decree, his removal from his office became effectual. The plaintiff was afterwards appointed administratrix of the estate with the will annexed, and the moneys directed by the judgment in the action to be paid have been directed to be paid to her in that capacity. But for the purpose of sustaining the action it was not requisite that she should be made a party to the action as administratrix of the estate with the will annexed, for she was entitled to prosecute it, as she had regularly commenced it prior to that appointment, to its completion, as a legatee of the estate, for the purpose of correcting the *devastavit* of the executor, and securing indemnity for his misconduct in the management of the property.

By the will of the testatrix the defendant James K. Place, who was her husband, was entitled to the rents, issues, and income of the estate, after paying debts, charges, insurance, and taxes, for the period of his natural life. And her property, with the exception of her residence, which he was entitled under the will to occupy, was vested in her executors, as trustees, for the attainment of this result; and, after the decease of her surviving husband, then her estate was directed to be divided in equal portions between her three chil-

dren, or between the survivors of the three, and the children of each of her deceased children. The three children of the testatrix are still living, and they are now the persons who will be immediately entitled to her estate after the decease of her surviving husband, and are consequently the persons in whom the right to redress the maladministration of the estate by the executor was substantially vested at the time when the action was commenced. The other sister declined to join the plaintiff in the prosecution of the action, and was accordingly made a defendant. Letters testamentary upon the proving of the will were issued by the surrogate to Barker Place and Arthur T. Sullivan, two of the persons nominated in the will as executors and trustees. The other person named for that purpose failed to act as such, and the executor Arthur T. Sullivan was afterwards superseded and removed by an order of the surrogate, leaving the control and management of the estate in the defendant Barker Place as sole executor. It was proved upon the trial, and found by the court, that this executor had not only grossly mismanaged the estate, but had misappropriated a large part of its property and proceeds. And he was justly held liable to account for and pay over the funds he had received, and the property which had been misappropriated and misapplied by him, and by the other defendant, James K. Place, acting under his authority. And by reason of his mismanagement and misconduct he was held to be liable in the action in a fiduciary capacity for the sum of \$57,105.46, together with interest afterwards accruing upon the amount; and whether his liability has been to this extent established by the proof is one of the important controverted points in the action.

In arriving at the conclusion that this executor was liable to this extent, the court proceeded, as far as it became necessary to do so, upon the decree made in the course of the proceedings in the surrogate's court. And the proceedings before the surrogate, as well as the accounts filed by the executor, have been fully set forth in the case. And they indicate a full and final accounting to have taken place before the surrogate, notwithstanding the reservation in the decree of objections and exceptions, relating to moneys claimed to have been received on account of a mortgage for \$25,000, and moneys collected upon two policies of insurance, at that time in litigation in another court. These objections and exceptions were left undetermined by the surrogate to await the result of such litigation. What this litigation in this manner referred to was, has been no otherwise described in the decree. And whether it was intended to refer to this action, or to an action by the executor in the superior court against Jedediah K. Hayward, the husband of the plaintiff, has been left uncertain; and it does not seem to be important for the disposition of this controversy to endeavor to settle that uncertainty.

The proceeding in the surrogate's court was referred to a referee, who, after hearing the proofs and allegations of the parties, made his report to the surrogate, which in certain important respects was afterwards modified and changed. The referee found a balance due to the executor of \$4,589.17. But this was changed by the decision of the surrogate, making additional charges against the executor, and disallowing certain credits allowed by the referee, leaving him chargeable with a deficit of upwards of \$17,000 on the 30th of December, 1878, the date to which his accounts were brought down. And this was all that the surrogate appears to have considered to be necessary by way of correcting and adjusting the accounts of the executor, and ascertaining the amount for which he was still chargeable. And upon the adjudication in this manner made by the surrogate a final decree was made at a special term of the court of common pleas, at that time exercising the powers of the surrogate, against the executor. This decree was made on the 15th of August, 1887. And by the decree it was "ordered, adjudged, and decreed that the said Barker Place shall forthwith pay over to Emeline P. Hayward, as administratrix *c. t. a.* of the estate of Susan A. Place, deceased, the sum of \$24,-

732.31, together with interest thereon at the rate of six per cent. per annum from the 30th of May, 1887." And this was all that the decree required to be paid over by this executor. Further directions were given in the decree declaratory of the consequences of his failure to make this payment; and it was further added to be "the intent of this decree that the net amount of said trust fund, after the settlement of said estate, shall amount to double the sum of \$24,732.31, together with interest in said double amount from the 30th of May, 1887, and that the same shall belong to Emeline P. Hayward and Isabel P. Sullivan, before said Barker Place shall have any right or interest therein." On what principle this latter direction was inserted in and made a part of the decree does not appear. It has in no manner been explained by the decree itself, and it is probably unimportant to attempt an explanation of it now, inasmuch as the decree itself has directed only the payment by the executor of this sum of \$24,732.31. The effect of this direction was an adjudication of the executor's liability to that extent. And so far it was supported by the proceedings which had previously taken place before the surrogate himself; for in those proceedings such an indebtedness appears to have been sustained by the proofs and accounts taken before the surrogate.

The court at the special term, in the judgment from which the appeal has been brought, has directed the payment by the executor, Barker Place, of this sum of \$24,732.31, with interest from May 30, 1887, precisely as the decree made in the common pleas directed that to be paid. And so far the direction and adjudication is supported, not only by the evidence, but by this decree, which must have a conclusive effect between the plaintiff and the defendant Barker Place. In addition to the direction for the recovery of this sum of money in this action, the judgment has directed the recovery of further sums, amounting in the aggregate to \$17,873.15, with interest upon the items composing this sum, amounting to \$14,500. How this result was reached by the court does not clearly appear, unless it has been done by taking the balance or deficit in the executor's accounts, as that was found in the proceedings in the surrogate's court, and making that the foundation of a further recovery. That this was the course taken in the action derives support from the fact that the deficit in the executor's accounts on the 30th of December, 1887, was stated in the affidavit of the plaintiff, which was used in the proceeding and apparently not denied, at the sum of \$17,764.33. And that, with interest from December 30, 1878, would constitute substantially the amount for the recovery of which this additional direction was made a part of the judgment. But neither the proceedings before the surrogate nor the proof upon the trial warranted this adjudication, for the proceedings before the surrogate brought the executor in debt only to the extent of this sum of \$24,732.31 on the 30th of May, 1887; and the items of which the estate itself consisted, after allowing the payments which had been legally made by the executor, warranted no such additional recovery as this. The estate itself is shown by the proof upon the trial, as well as in the proceedings before the surrogate, to have consisted of the mortgage for \$25,000 already mentioned, upon which was collected by foreclosure the sum of \$33,946.29; two lots of land in Harlem, for which the sum of \$5,742 was received; two policies of life insurance, upon which \$12,423.15 was received; another mortgage, upon which \$1,950 was collected; and other items mentioned in the account of the executor, found so far to have been correct, aggregating \$3,232.54. These various sums amount in all to \$57,297.98, which was the entire aggregate estate left by the testatrix. Out of that, as the proceedings resulted before the surrogate correcting the findings of the referee, the executor had paid, and was entitled to be credited, \$35,787.38. He had also paid to Jedediah K. Hayward, the husband of the plaintiff, \$5,000 for his services as attorney, a retaining fee of \$500, and \$3,500 upon a transaction had between them for the disposition of the \$25,000 mortgage, making the amount disbursed by the executor \$44,781.38, leav-

ing a balance in his hands apparently of no more than \$12,512.60; or charging the executor, as he was by the surrogate, with what he had paid Charles Place, leaving a balance of \$13,762.60. This balance, however, is to be increased by adding interest in the several amounts of the estate from the respective times when the amounts were collected up to and including the making of the surrogate's decree. But the addition of such interest will fail to bring up the balance to such a sum as would justify this additional direction contained in and made a part of this judgment.

As the case is stated to have been made to appear before the surrogate, and to have been affected by his adjudications, a final balance from the whole amount received, after deducting the amount allowed the executor as payments, was stated to be the sum of \$17,764.33, upon which the executor was chargeable, with interest, after the 30th of December, 1878. Taking this as the correct statement of the accounts as they were presented to and sustained before the surrogate, still no foundation is found for adjudicating a greater liability against the defendant than the amount first mentioned in the judgment of the court. Included in the further sum directed to be paid was the \$3,500, already referred to, which had been received by Jedediah K. Hayward. But there was obviously no legal ground upon which the executor could be charged with liability for this sum of money, for it was received and retained by Hayward to reimburse himself for moneys which he had advanced to the estate upon the assignment to him as security of the \$25,000 mortgage. And there is no evidence in the case upon which his right to receive and retain that sum of money has in any manner been impeached. He received an assignment of the mortgage, and advanced the sum of \$19,000 upon it. And when the amount secured by it was collected this sum was retained by him towards the liquidation of what remained due to him upon the advancement which he had made. The executor afterwards brought an action in the superior court, endeavoring to recover from Hayward the moneys which had passed into his hands, but it was held that he was not entitled to maintain the action. And if he had no legal right to maintain the action, as it must be assumed he had not from the disposition of the case in the superior court, it seems to follow that there was no legal ground upon which he could be charged with liability for this sum of \$3,500. A further item included in the judgment to constitute this additional recovery is \$12,423.15, with interest from the 25th of November, 1875. This was money received by the executor upon two policies of insurance, and it entered into and formed a part of the statement of his accounts before the surrogate. He was charged with it there, and the surrogate's decree proceeded upon the regularity of that charge. And it was by making that charge against him that the balance mentioned in the decree, and first directed to be paid by this judgment, was ascertained. And after using it for that object it very clearly could not again be used, as it was, to increase the liability of the executor in the action. The other sum of \$1,950 also entered into the proceedings before the surrogate, although forming no part of the charge made by the executor in his accounts against himself. It appears, therefore, from the case, that the only liability of the executor was for this sum of \$24,732.31. And, so far as the judgment exceeds the direction for the recovery of that amount, with interest upon it from the 30th of May, 1887, it is erroneous. A similar though not quite so extended a recovery is included in the judgment against the beneficiary in the trust, the defendant James K. Place. And this has arisen out of the receipts by him of moneys and property of the estate, and the loaning to the executor by Hayward of the sum of \$19,000 on one occasion, and by Fuller, his assignee, of \$15,000 on another occasion, for the firm of Place & Co. Until the debts of the estate were paid, this beneficiary in the trust, who was to receive the rents and profits for the term of his natural life, was entitled to nothing. The estate is stated to have been insolvent. And if such was its character,

and the property had been wholly appropriated to the payment of debts, then this beneficiary was entitled to no part of the moneys received by the executor. But whether any, and, if any, what amount of, other debts exist against the estate than those which have been paid by the executor, has not been made clearly to appear upon the trial. The probability is rather against their existence, and that the balance already appearing in the proceedings before the surrogate of \$17,764.33 has remained after the payment of debts. And upon that balance this defendant was entitled to rents and profits, as that has been directed by the will, but in no event was he entitled to more than that.

It was insisted, in support of the action, that he was chargeable with the moneys which had been received by Place & Co. as the advances obtained upon the mortgage. But the evidence of the plaintiff's witness Mr. Hayward is to the effect that James K. Place was not a member of the firm of Place & Co.; that he managed the business, and knew about the advancement of the first sum of \$19,000 to the firm. But the general partner in this firm was Barker Place, the executor. And he, and not James K. Place, who was not a member of the firm, was the person who was primarily liable for this money. The mere circumstance that James K. Place negotiated each of the loans of \$19,000 and \$15,000 will not render him liable to account to the plaintiff for these sums of money. What he did was more in the capacity of an agent or broker than that of a debtor, known to the parties acting with him to be exercising the authority or power of that relation; and that did not create a liability to refund these loans.

It did, however, appear upon the trial that he had received from the executor, as a beneficiary under the will, larger sums of money than he was entitled to claim. And as he was familiar with the condition of the estate, and the manner in which Barker Place, his son, was managing it, he was chargeable with knowledge of the fact that this money was being wrongfully diverted from the capital of the estate, and paid over to him. He was permitted by the executor to collect, for what are known as the "Harlem Lots," the sum of \$5,742. This money he was not entitled to, for the extent of his interest was the profits to be derived from it as a part of the trust-estate committed to the possession and control of the executor. He is also shown to have received from the payments made upon the two policies, and from the proceeds of the \$25,000 mortgage, and this sum for the Harlem lots, the sum of \$17,194.22, which is a greater amount than he was entitled to receive as beneficiary of this estate under the provisions of the will; and for the excess received by him, over and beyond what he was entitled to demand upon the balance remaining in the hands of the executors, he was liable to account in this action. But the extent of that liability will fall far short of the amount with which he was charged by the judgment which has been entered.

As to the \$19,000 advanced to the firm of Place & Co., another objection to the charge made, as it was sustained by the judgment, arose out of the fact that this money is stated to have been used, in a large degree, for the purpose of paying the debts existing against the estate of the testatrix. According to the evidence of the plaintiff's witness Mr. Hayward, the firm of Place & Co. paid debts of the testatrix to the amount of \$10,000, and had become obligated for as much more. And this \$19,000 was put into the firm of Place & Co. "to reimburse them for their payments of debts after the death of Mrs. Place." This was probably an overstatement of the amount, for James K. Place, who appears to have had better means for accuracy, stated the amount paid, over and above a further sum which had been received, to be \$16,924.43. And, after this sum had been paid out in this manner by the firm, there was no ground upon which James K. Place could be made liable for it, arising out of the circumstance that Barker Place subsequently brought in the payments which he made as a charge against the estate. That act affected the executor alone, and not this other defendant. The judgment, so far as it has

proceeded against the beneficiary James K. Place, derives no support whatever from the proceedings before the surrogate. He was not a party to those proceedings, and simply making an affidavit to be used in the course of their prosecution or defense did not have the effect of making him a party. On the contrary, all that was done appears to have been done for the purpose of securing an accounting from the executor, and establishing his indebtedness to the estate. The decree which was made was solely against the executor, and furnished no authority whatever for the judgment so far as it has been directed against the defendant James K. Place.

The management of the estate by each of the persons participating in it reflects no credit upon either of them. And, while it is true that both the executor and the beneficiary have misconducted themselves in their acts connected with the estate, they can still be rendered liable by the judgment for no more than the proof shows to have remained in the hands of the executor, and for no more than the beneficiary has received beyond what he was entitled to. The judgment has transcended these allowances, and in such a manner as to render it impracticable to modify it, and thereby restrict it to what appears to be the liability of each of these defendants. It will accordingly be reversed, and a new trial ordered, with costs to the defendants to abide the event.

VAN BRUNT, P. J. I concur in the opinion of Mr. Justice DANIELS, with the exception that in my opinion the administratrix, as such, was a necessary party under the rule laid down in the case of *London v. Townshend*, 112 N. Y. 93, 19 N. E. Rep. 424. The judgment in this action would be no bar to another by the administratrix under the will suggested, and as the defendants should not be compelled to litigate the questions involved in this action, the administratrix should be made a party, so that the judgment will be a final adjudication upon the questions involved.

BARRETT, J., concurs.

PANAMA R. CO. v. CHARLIER *et al.*

(Supreme Court, General Term, First Department. November 7, 1889.

1. EVIDENCE—ADMISSIONS—BOOK-ENTRIES.

An account showing that defendant, as cashier of plaintiff, had credited in his favor a certain draft which had been credited in a former account, is not admissible as tending to show a consciousness on his part of a deficit to an amount equal to that of the draft, where it is not shown that such account was made by defendant, or by any one under his direction or in collusion with him, but it appears that he was absent from plaintiff's place of business when such account was rendered.

2. SAME—ACTS OF ACCOMPLICE.

Statements of accounts tending to show a deficiency in cash accounts, made by another person after defendant's alleged defalcation, are not admissible against defendant, even though he were in collusion with such person.

3. SAME—LETTERS FROM THIRD PERSONS.

Letters to defendant, containing statements which it does not appear were authorized or approved by him, are not admissible against him.

4. SAME—STATEMENTS OF THIRD PERSONS.

A statement by the court to the jury that it was admitted that at a certain time the cash in defendant's hand was short by a given amount, based on the testimony of two witnesses that in conversations with defendant it was stated that there was such a deficiency, is erroneous.

Appeal from circuit court, New York county.

Action by the Panama Railroad Company against Elie S. Charlier and others to recover an alleged deficiency in Charlier's accounts as cashier of plaintiff. There was judgment for plaintiff, and defendant Charlier appeals.

Argued before VAN BRUNT, P. J., and BARRETT and DANIELS, JJ.

Alfred Jaretzki, for appellant. *Joseph Larocque*, for respondent.

DANIELS, J. The defendant was in the employment of the Panama Railroad Company at Aspinwall, on the Isthmus, from the early part of January, 1885, until the early part of January, 1886. During a part of the time, the services rendered by him were those of a book-keeper. Clement Dupuy was the cashier of the company at the same place. He was absent from the Isthmus from the 5th of May until the early part of July, and also from the middle of August until near the middle of October, 1885; and during those periods the defendant, who was alone served with process and appeared in the action, discharged his duties in the capacity of cashier of the company. After the close of these services of the defendant, it was claimed by the company that a deficit was found in its cash accounts amounting to the sum of \$48,702.21 in gold; and the object of the action was to render the defendant accountable for this deficit to the extent of the demand for judgment contained in the complaint, which was the sum of \$40,000, with interest from the 1st of January, 1886; and the jury, by their verdict, held him liable for this sum of money. On the 31st of March, 1886, the buildings in the town, including those of the railway company, were burned by persons engaged in an insurrection against the local government. The books of the company were destroyed by the fire, but its funds were afterwards found to be uninjured; and, on the basis of the amount of money in gold and silver, the cash accounts of the company were again opened and continued. Monthly statements of its affairs were transmitted to the office of the company in the city of New York, but the evidence proved the fact to be that the accounts for the month were not completed at the end of the time included in the monthly statements, but were made up and completed subsequent to the termination of each month. It also appeared, from the evidence, that the entries in the books were made from memoranda or slips furnished by the teller to the book-keeper. The accuracy of these memoranda or statements was not proved by the witnesses, neither had they been preserved after the entries were made, and accordingly could not be appealed to or examined, to determine whether the books had been accurately kept or not. In the course of the trial, and from evidence produced on behalf of the plaintiff, it did appear that discrepancies were found in the accounts, but it was claimed by the defendant that the books themselves had been inaccurately kept.

A large part of the business of the company was transacted with the canal company, and that company was shown not to have been prompt in liquidating or settling its monthly accounts, and that the monthly charges which should be paid by the canal company were included as so much cash in the monthly accounts of the plaintiff. The canal company, in September, 1885, delivered its draft for the sum of \$50,000 to the cashier of the plaintiff; and this draft was credited to the canal company in the account for the preceding month of July, to which the payment to be secured by it was applicable. This draft was transmitted to the New York office on the 16th of September, and there received on the 24th of the same month. In an account afterwards transmitted, in the same manner, for the month of September, 1885, this draft was again credited in favor of the cashier for the sum of \$50,000; and the fact of this credit having been made in this manner during the period of time when the financial affairs of the company were under the charge of the defendant was a circumstance indicating by itself the existence of a consciousness that there was a deficit in this, or nearly this, amount in the cash accounts of the company. It was a circumstance, if it was admissible against the defendant, which in the minds of a jury would be attended with great force in the way of maintaining the plaintiff's allegations. But while this was contained in the monthly statement for September, it was proved upon the trial, by the witnesses produced on behalf of the plaintiff, that the account containing this credit was not received at the office of the company in New York until the 25th of November, 1885; and from the manner in which the business was done, and the accounts were transmitted, it is entirely evident that it must

have been made out some time during that month. The defendant was not at the Isthmus any time in the month of November; and the statement which in this manner was transmitted, was not shown to have been in any respect made out by himself, or by any other person acting under his direction or in collusion with him. At the time when it was made, the cashier of the company, Dupuy, had charge of its financial affairs, and he subscribed this statement, containing this second credit for the \$50,000, as cashier and auditor, for E. S. Charlier, acting cashier and auditor. But there was no evidence in the case tending in the slightest degree to prove that Dupuy was authorized to sign the statement with the name of the defendant, and, when it was offered in evidence by the plaintiff, it was objected to, as other statements offered with it also were, as being inadmissible, on the ground that it was not signed by him, or that he had any agency in making up the account, and it being in evidence that these papers were forwarded from the Isthmus when Mr. Charlier was not there. The objections were overruled, and this as well as the other accounts included in the offer were received in evidence, and to that ruling the defendant excepted; and this exception, as the defendant is not shown to have had any agency whatever in making up these statements, or any knowledge of the fact that his name had been subscribed to it in this manner, or that he had authorized the person making use of it so to subscribe it, and that he was absent from the plaintiff's place of business at the time when this was done, certainly appears to have been well taken. Proof of what Mr. Dupuy may have in this manner stated concerning the second credit for this sum of \$50,000 was in no respect admissible against the defendant. They were, it is true, alleged in the complaint to have confederated and combined together in abstracting the money of the company; but no evidence had been given, when this statement was offered, tending to prove any confederation or combination between these two individuals. If the money had been abstracted, as it was charged it had, while the defendant was in control of the affairs of the company as its acting cashier, it was taken by him, and he was accountable for it; and if he had made, or authorized to be made, this second credit for this one sum of \$50,000, which would balance up the apparent deficit claimed to appear from the books, that would be a circumstance of weight and force tending to establish the plaintiff's case; and, as it was received in evidence, the jury would be inclined to, and probably did, act upon it as testimony sustaining this conclusion.

An account for the month of March, 1885, received at the New York office in August of that year, was also allowed to be read in evidence against these objections and this exception on the part of the defendant. This account showed the balance of the silver and gold on hand at the Isthmus at the close of that month; and it was offered, and had some tendency, to fortify the position taken by the plaintiff, that there was a deficiency in its cash accounts. But the defendant was in no manner a party to this statement. It was made and subscribed by Mr. Dupuy as the cashier and auditor of the company. Another account for the month of October, 1885, was made out in the same manner, and received in New York on the 15th of December, stating the balance of gold and silver on hand at the close of that month. A still further and similar account was received in evidence for the month of November, and another for the month of December, made and attested only by Mr. Dupuy as cashier and auditor. For these accounts, or the statements contained in them, the defendant could not be held responsible; neither were they admissible as evidence having any tendency whatever to establish the charge made against him for this defalcation. And even if he himself and Dupuy had been confederated together, as the charge was contained in the complaint, but not proved, these statements, made subsequent to the time when the defalcation, if it took place, had actually occurred, would not then be admissible against the defendant; for it is only such acts and statements as may accompany the

progress or execution of the conspiracy, made by one of the parties to it, that are admissible against the other.

Before these statements were received in evidence, letters which passed between the defendant and his brother, Vandyke Charlier, who was a book-keeper in the employment of the plaintiff at the Isthmus, were allowed to be read in evidence. The first of these letters was dated on the 25th of October, 1885, and was from Vandyke Charlier to the defendant, and this letter was answered by the defendant by another dated on the 9th of November, 1885. It did appear by this correspondence, clearly, as well as by the general tenor of other evidence, that the defendant was absent from the Isthmus, certainly, from the latter part of October, 1885, and could have had no direct act or participation in making out the accounts and statements which have been mentioned. These letters were objected to; but certainly the one which was first written, as well as the answer to it from the defendant, were admissible in evidence in support of the plaintiff's case, and that which was written by the defendant had a tendency in this direction. But the fact that Vandyke Charlier stated that he had made a mistake in his coal account, which he proposed to correct by another entry of twice the amount, was not evidence in support of the existence of this deficit, for it had no reference whatever to the cash; but it was suggested that a mistake had been made which in this way could be corrected, and that drew out this answer from the defendant. The other letters written by Vandyke Charlier to the defendant related to the general condition of his own transactions in the way of buying and selling gold, which was a business in which the defendant himself was shown to have been engaged while he was upon the Isthmus; but what Vandyke stated in these letters, which was not assented to or adopted in any manner by the defendant, was not evidence against him. The same thing is true as to a similar letter written in November, 1885, to the defendant by Dupuy, the cashier. They could have had no other or greater effect in the case than to tend to prejudice it against him; and that was not corrected by the further direction which the court gave to the jury, that they should not consider the acts and declarations of Dupuy in the absence of the defendant, unless the former was a party to the fraud, for there was no proof of such joint co-operation between these persons as would allow the letter or the statement to be received in evidence at all. The letters with the exceptions mentioned contained no legal evidence which could be considered as confirmatory of the plaintiff's allegations. They were no more than the unauthenticated statements of the writers, not appearing to have been authorized or approved in any manner by the defendant, and consequently not evidence against him. These letters were received after they had been objected to on the part of the defendant as inadmissible, irrelevant, and immaterial; and to the rulings allowing them to be read the defendant's counsel excepted.

It has also been objected that the court erred in its direction to the jury that "it is admitted that, when the cash came to be counted in January, it was short to an amount larger than the amount claimed here, and to an amount larger than this draft." It is not entirely clear to what this direction referred; but if it was intended to remind the jury that the defendant had, upon the trial, admitted this to be the case, the statement was unsupported, and no evidence has been found in the case sustaining the statement as it was here made. The most that appears to have been said upon this subject was obtained from the witness George C. Power, who testified that the defendant spoke to him on the subject of the deficit in the cash. He was then asked: "Was the deficit communicated to him?" and he answered: "Yes, sir. I told Mr. Charlier and Mr. Dupuy. They said they could not understand how the deficit occurred, unless there was some error in the books." In this conversation the deficit was stated in round numbers to amount to the sum of \$70,000. He further testified that the defendant had pointed out to him no

errors in the books subsequent to his leaving the Isthmus, and no error changing the amount of the deficit. Additional testimony was given upon the same subject by the witness Frank G. Ward. He was asked: "Did Elie S. Charlier, the defendant, ever say anything to you as to how this deficit arose?" and his answer was: "Yes, sir; that it was undoubtedly negligence or gross errors in the books, which would be found in time by the parties who were examining them,—Messrs. Powers and Noyes. This was the only explanation he ever gave as to how this deficit occurred." And he testified, further, that no error had been found in the books which would account for this deficiency of over \$55,000 and odd in gold. These statements contained no admission by the defendant that there was this deficiency, and no evidence had been found in the case having any more direct tendency than this to admit its existence. The defendant himself, in his own evidence, denied it, although he stated upon his cross-examination that upon footing up certain portions of the books, as they were presented to him at the trial, a deficiency appeared from the items which were footed, amounting to about the sum included in this fictitious credit of the draft of \$50,000. But his testimony was direct and positive that, when he turned over the safe and the cash accounts before he left the Isthmus, there was not a cent of deficit in them. This direction of the court appears, therefore, to have arisen out of a misapprehension, and is undoubtedly an error which the defendant has the just right to complain of. It is not necessary that an exception should have been taken to it to entitle the defendant to the benefit of the error. It was a misdirection of the court; and, where that may be made upon a material part of the controversy, the party affected or injured by it, who is finally defeated in the litigation, has the right to make it the foundation of a motion for a new trial. *Pettis v. Pier*, 4 Thomp. & C. 690. The judgment and order should be reversed, and a new trial directed, with costs to the appellant to abide the event.

BARRETT, J., concurs. VAN BRUNT, P. J., concurs in result.

PEOPLE v. WATSON.

(*Supreme Court, General Term, First Department. November 7, 1889.*)

1. CRIMINAL LAW—EVIDENCE—CHARACTER.

A witness called to testify to the previous good character of a person accused of larceny may be asked, on cross-examination, what case he had heard of defendant's being connected with some time before, referring to some criminal prosecution.

2. SAME—RIGHT OF DEFENDANT TO TESTIFY—INSTRUCTIONS.

An instruction that defendant has the right to testify in his own behalf, but that the law expressly provides that no presumption adverse to him is to arise from his failure to do so, and the fact that he does not avail himself of this privilege should not be permitted to prejudice him with the jury, is sufficient for the protection of defendant's rights in this respect.

Appeal from court of general sessions, New York county.

This was an indictment against Frederick R. Watson for larceny. Defendant was convicted, and appeals.

Argued before VAN BRUNT, P. J., and BARRETT and DANIELS, JJ.

Ambrose H. Purdy and *Abraham Suydam*, for appellant. *McKenzie Semple*, for the People.

DANIELS, J. The evidence which was given at the trial, when taken together, tended to prove that the defendant had picked the pocket of the complaining witness, and had taken his pocket-book and appropriated it to his own use. While this witness was not positive of the identity of the defendant, and the testimony of the witness Tway was similar in its effect, that which was given by the witnesses Glass and Creeden very satisfactorily identified him as the person who had committed the offense. The case was

sufficiently made out to require it to be submitted, as it was, to the jury, and to justify the verdict which they rendered. On the part of the defense evidence was given by witnesses produced by him of his previous good character, and on the cross-examination of one of the witnesses he was asked what case he had heard of the defendant's being connected with a couple of weeks before. This was objected to, but the objection was overruled, and the defendant excepted, and the witness answered: "The case where he was arrested for carrying burglar's tools." But, where a witness is examined on the subject of the general reputation of the accused, he may be interrogated on the cross-examination as to what he may have heard concerning him conflicting in any respect with his general judgment expressed in his direct examination. The evidence obtained from a witness called upon the subject of character depends upon what he may have previously heard, and the party against whom his testimony may be given has the right to know all that he may have heard affecting the correctness or weight due to his conclusion. The case of *Smith v. State*, 47 Ala. 540, proceeded upon no different principle, for there it was proposed by independent evidence, not by way of cross-examination, to prove particular acts of criminal misconduct on the part of the accused, and it was held to be improper, as it also was in *McCarty v. People*, 51 Ill. 231. And the other cases cited in behalf of the defendant have gone no further than that in this direction. In *Ingram v. State*, 67 Ala. 67, it was held by the court that the witness could properly be inquired of on his cross-examination as to any other offense which he had heard had been committed by the defendant. That was allowed as evidence tending to prove the fact that the reputation of the accused was not that which on the direct examination had been expressed by the witness. *De Arman v. State*, 71 Ala. 361, was to the same effect, and so is *Jackson v. State*, 78 Ala. 471. There was no error, therefore, in permitting this question to be answered by the witness.

An exception was also taken to the refusal of the court to instruct the jury that they were absolutely bound by their own oaths to see that they did not allow their minds to be prejudiced in the slightest degree against the defendant by the fact that he did not testify in his own behalf. But this instruction was not necessary, for the jury had previously received a similar direction from the court. They were informed that "he has a right to go upon the witness stand and testify in his own behalf if he chooses to do so. If he does not choose to do so, the law expressly provides that no presumption adverse to him is to arise from the mere fact that he does not place himself upon the witness stand. So, in this case, the mere fact that this defendant has not availed himself of the privilege which the law gives him should not be permitted by you to prejudice him in any way." And that was all that was required to be said to the jury to preserve the defendant's rights in this respect. The court was not required to enjoin upon the jury the observance of any special duty as to the testimony of the witness O'Brian. What was required to be done was the submission of the case as it was presented by all the evidence, and to give to the defendant whatever advantage he might be entitled to from its infirmity or insufficiency in any respect, and that duty was fully observed by the court. There was no error in the statement excepted to, that a conflict in the evidence between the witnesses was not of itself sufficient to warrant the jury in coming to the conclusion that some of them had testified falsely. One or more may well have been mistaken as to the matters brought in conflict upon the trial, and that probably was sufficient to justify all that was said upon this subject. So the effect of circumstantial evidence, which to some extent entered into the disposition of the case, was not overstated by the court in submitting it to the jury. And what may have been said by the assistant district attorney during the argument of the case cannot now be relied upon as a ground of error. It was for the court to check and correct it at the trial, and all that

was necessary for that purpose appears to have taken place. Besides that, no appeal has been taken from the denial of a new trial on the affidavit, if any appeal will lie. There is no ground upon which the conviction can be interfered with, and it should therefore be affirmed. All concur.

UNITED STATES LAND INVESTMENT CO. v. MERCANTILE TRUST CO.

(Supreme Court, General Term, First Department. November 7, 1889.)

PLEADING—BILL OF PARTICULARS.

In an action for specific performance of an agreement to certify plaintiff's bonds, and for damages for the non-performance thereof, the allegations of the complaint, as to damage, were that plaintiff had entered into large enterprises from which it would have realized great profit if defendant had performed its contract, and that, by reason of defendant's refusal to perform its contract, plaintiff had suffered great loss. *Held*, that a bill of particulars was properly directed.

Appeal from special term, New York county.

Action by the United States Land Investment Company against the Mercantile Trust Company for specific performance of a contract, and for damages for breach thereof. An order was made directing the plaintiff to give a bill of particulars, and plaintiff appeals therefrom.

Argued before BRADY, P. J., and DANIELS, J.

Walter S. Cowles, for appellant. Alexander & Green, (Allan McCulloch, of counsel,) for respondent.

BRADY, J. This action was brought to compel a specific performance of an alleged agreement relative to the certification of the plaintiff's bonds by the defendant, and to recover damages suffered in consequence of the defendant's alleged refusal to perform the agreement. The complaint, after stating the making of the agreement suggested, and compliance with its terms, alleges that the plaintiff has entered into large and important business contracts and enterprises, and contracted large pecuniary obligations, which were contracts and enterprises greatly to its advantage, and from which it reasonably expected to and would realize large pecuniary profits if the defendant had performed its contract; and, further, that, by reason of the defendant's refusal to perform its part of the contract, the plaintiff had been and was subjected to great pecuniary loss and damage. Upon these allegations the learned justice in the court below thought the defendant entitled to a bill of particulars, as sought, of these contracts and enterprises, and of what profits were expected therefrom. The learned counsel for the respondent seems to contend that, the action being one seeking only to enforce the specific performance of a contract, the application for the bill of particulars should have been denied *in toto*; urging, in reference to the prayer for damages, that the plaintiff would, after an adjudication upon his demand for equitable relief, seek by subsequent proceedings in the action to obtain damages for the defendant's persistent and continued breach of the contract,—damages which it would have sustained; and this to avoid multiplicity and circuity of action. But this view cannot be sustained. A bill of particulars is proper in all descriptions of actions where the circumstances are such that justice demands the party should be informed of the matters for which he is to be tried with greater particularity. *Tilton v. Beecher*, 59 N. Y. 176, 184; *Dwight v. Insurance Co.*, 84 N. Y. 493, 505; *Cunard v. Francklyn*, 111 N. Y. 511, 19 N. E. Rep. 92. Without considering, therefore, the discretionary element involved in directing the order, it is quite apparent that it should have been granted. The defendant should not be subjected to a trial or called upon to answer charges so indefinite as those contained in the complaint, and to which reference has been particularly made; nor should the defendant be required to go to trial as long as the claim for damages remains without a full exposition of all the elements of which they are composed. The whole sub-

ject, that view being carried out, would be before the trial court, which could award damages if the plaintiff's cause of action was sustained in that respect, and avoid circuity of action by not sending the subject of damages to a referee for investigation. The direct mode of disposing of the issues presented by the pleadings is that which the courts will favor, invariably, as the most speedy and the least expensive way to determine them. For these reasons the order appealed from should be affirmed, with \$10 costs, and the disbursements.

RUDD v. ROBINSON.

(Supreme Court, General Term, First Department. November 7, 1886.)

1. CORPORATIONS—OFFICERS—EVIDENCE—BOOK-ENTRIES.

Testimony of a witness that he reported to a book-keeper of a corporation only such matters as he knew to be correct, and of the book-keeper that he entered such matters correctly as reported to him, render the entries admissible in evidence in an action by a receiver against a trustee of the corporation of whom the book-keeper is shown to have been a representative.

2. SAME—TRUSTEES—ACCOUNTING.

Where the corporation was formed to succeed a firm which had previously carried on the same business, and the firm turned over no property to the corporation, and its book-keeper is employed to represent and keep defendant posted, payment by it to defendant of the firm's debts to him is a misappropriation of its funds, and defendant is properly required to account therefor.

3. SAME—USURY.

He is also properly required to account for illegal interest received by him as a bonus on advances made by him to the corporation.

4. SAME—PROFITS OF BUSINESS.

He is also properly required to account for a share in profits received by him on purchases and sales, made by the corporation with moneys advanced by him, in excess of the amounts so advanced, with legal interest.

5. SAME—CHATTEL MORTGAGES.

Laws N. Y. 1858, c. 314, enacts that a receiver may "treat as void, and resist, all acts done, transfers and agreements made, in fraud of the rights of any creditor." 3 Rev. St. N. Y. (6th Ed.) 143, provides that chattel mortgages shall be void, as against subsequent *bona fide* purchasers and mortgagees, unless legally filed, where possession is not taken at or near the time when the mortgage is given. *Held*, that where a chattel mortgage was given by the corporation to defendant, and was not filed until the property had been almost all disposed of, and possession was not taken at or near its date, defendant was liable to account for the property.

6. SAME—BONA FIDE LOANS.

But he may retain moneys refunded to him in lieu of loans made by him to the corporation, in good faith.

7. SAME—DEBTS PAID THIRD PERSONS.

He is not liable to account for moneys paid by the corporation to other creditors on obligations on which he was liable as indorser.

8. SAME—COSTS.

Under Code Civil Proc. N. Y. §§ 8228, 8230, 8253, limiting the recovery of costs in such a case to final judgment, it is improper to direct the recovery of costs by plaintiff, and award an additional allowance, on an interlocutory judgment requiring the trustee to account.

Action by Frank Rudd, receiver of the Goodwillie-Wyman Company, a corporation, against George H. Robinson, a trustee and stockholder in such corporation. Judgment was rendered requiring defendant to account, and he moves for a new trial on exceptions at the general term, under Code Civil Proc. N. Y. § 1001.

Argued before VAN BRUNT, P. J., and BRADY and DANIELS, JJ.

Tuttle, Goodell & Brooks, (Edwin B. Goodell, of counsel,) for plaintiff.
Thomas Darlington, (S. Jones, of counsel,) for defendant.

DANIELS, J. The action was brought to charge the defendant, as a trustee of a corporation formed under the laws of this state for the creation of manufacturing corporations, for the unlawful receipt and appropriation of property received by him in that capacity. The corporation was formed on or about

the 5th of October, 1882, with a capital of \$50,000. It was called the "Goodwillie-Wyman Company;" and by its formation it was intended as, and was the successor of, a copartnership firm previously engaged in business under the same name. It succeeded to the assets, interests, and property of that firm, and the two persons who were copartners in the firm became stockholders and trustees in the corporation. It continued to carry on the business for which it was incorporated until about the close of the year 1883. A judgment was then recovered against it in favor of a creditor, upon which execution against its property was returned unsatisfied; and upon his application, in an action prosecuted for that purpose, S. A. Briggs, another trustee of the corporation, was appointed receiver of its property. This receiver was afterwards superseded, and the plaintiff was appointed, with all the powers and authority incidental under the law, to that position. The defendant was the owner of a small amount of stock in the corporation, and was one of its trustees during the time it was actually engaged in business. The corporation, from its organization, encountered difficulties in meeting and discharging its liabilities; and the defendant, being a man of financial responsibility, was applied to for his aid and assistance. And that was rendered in the advancement of money to and for the corporation, and in the negotiation of its paper, from time to time, while it was engaged in business. It was alleged, in support of the action, that he had taken advantage of this position to advance his own pecuniary prosperity at the expense of that of the corporation; and this was found to have been sustained by the court in the interlocutory judgment which has been entered, and under which he has been required to account for moneys and property received and disposed of by him as a trustee of the company. The trustees were five in number. Two of them were practically identified with the defendant in the direction and management of the business. These three trustees constituted the majority, and were at all times in a position to dictate as to what should be done in the way of controlling the finances and property of the company. At the time it was formed, the preceding firm was largely indebted. Among other debts, it was alleged to owe the defendant upon two promissory notes of \$505 and \$507.50, and the payment of these debts was obtained by him from the corporation.

The proof upon which these facts were found and incorporated in the judgment was derived mainly from entries made in the books of the company. The defendant objected to the book containing these entries being received as evidence, on the ground that it had not been authenticated in such a manner as to be proof against him. The accounts, so far as they included these items, were kept in the book by the witness Briggs. And evidence was given, upon the trial, by the witness Frederick B. Fiske, from which the court was warranted in finding that Mr. Briggs was acting, in this capacity, as the representative of the defendant. He was asked: "What did Mr. Robinson say, if anything, about who should be the incorporators and trustees?" *Answer.* He wanted Mr. Briggs to be a trustee, and to take charge of the books. *Question.* Did he say anything about Mr. Briggs representing him? *A.* In a general way; yes, sir,—that Mr. Briggs was in the company, in effect, as his representative. *Q.* Did he say that? *A.* Substantially that; yes, sir." And he added, further, that the defendant said that "whatever was said to Mr. Briggs would be communicated to him, or something like that." He was asked to give the substance of what was said, and answered that what was said to Mr. Briggs would be told to him. Added to this was the evidence of Briggs that he made the entries in the books from memoranda furnished to him by Mr. Fiske. He himself had no knowledge on the subject of the correctness of the entries, but they were made by him in the books from memoranda furnished to him by Mr. Fiske. Mr. Fiske was asked: "So far as you personally furnished Mr. Briggs data to be entered in the books of the corporation, were the entries truthful and correct entries of transactions made by you on behalf

of the corporation?" and he answered: "Most certainly." He was further asked: "None of them, to your knowledge, were otherwise?" *Answer*: "Assuredly not." He was further asked: "Was there ever, to your knowledge, any question made by Mr. Robinson, or any other officer of the company, in regard to the correctness of those entries, or the correctness of the books of the corporation?" *Answer*. Do you mean these *data* that I furnished? *Question*. No; these books here. A. I have no recollection of anybody calling them in question except myself." And the extent to which he called them in question was the account of the given transactions in which he had been interested. Other evidence of these witnesses was still more extended upon this subject, proving the facts to have been that Fiske reported to Briggs, for entry in the books, only such matters as were known to him to be correct; and the evidence of Briggs was that the entries were correctly made, as the information was given to him by the witness Fiske. And entries made, in the course of business, in this manner have been held to be admissible evidence to prove the transactions recorded, when they afterwards become the subject of legal controversy. *Mayor v. Railroad Co.*, 102 N. Y. 572, 7 N. E. Rep. 905; *Cheever v. Lamar*, 19 Hun, 130. And the admissibility of the books, in this manner proved, has not been affected by anything contained in *Peck v. Valentine*, 94 N. Y. 569; for there the decision was confined wholly to objectionable evidence of a lost memorandum.

These entries, established in this manner, sustain the conclusion adopted by the court, that these sums of money had been paid to the defendant by the corporation upon the indebtedness of the preceding firm to him; and no property or funds of that firm are shown to have been placed in the possession of the company out of which it should have made those payments. This was therefore, within the knowledge of the defendant as a trustee of the company, an appropriation and use of so much of its funds as were applied in payment of these debts to the satisfaction of demands held by him against the firm; and that, neither the corporation itself had the right to make, nor the defendant, as its trustee, the right to receive. His position was one of trust and confidence, which he was legally disabled from using for the promotion of his own advantage. *Hoyle v. Railroad Co.*, 54 N. Y. 314. It was there said, and the correctness of the statement has not since been denied, that "whether a director of a corporation is to be called a 'trustee' or not, in a strict sense, there can be no doubt that his character is fiduciary, being intrusted by others with powers which are to be exercised for the common and general interests of the corporation, and not for his own private interests. He falls, therefore, within the great rule by which equity requires that confidence shall not be abused by the party in whom it is reposed, and which it enforces by imposing a disability, either partial or complete, upon the party intrusted, to deal on his own behalf, in respect to any matter involved in such confidence." *Id.* 328. And this rule is further supported by *Blake v. Railroad Co.*, 56 N. Y. 485. And that a director or trustee of a corporation is within the principle, was also declared in *Butts v. Wood*, 37 N. Y. 317, and in *Wardell v. Railroad Co.*, 103 U. S. 651. The position of the defendant as a trustee was such as to preclude him from using, or permitting the use, of his power or authority for his own personal benefit; and, to prevent that from being done in this and other analogous cases, the law has subjected guardians, trustees, agents, directors, and other officers of corporations to account for all profits made by them by taking advantage of their official position and opportunities. It will not allow these officers to place themselves in the position where there may be a conflict between the duties and obligations which they owe to the corporations and their own personal interests. And for that reason it has been generally declared and maintained that "all persons who stand in a fiduciary relation to others must account for all the profits made upon moneys in their hands by reason of such relation;" and "agents, guardians, directors of corporations,

officers of municipal corporations, and all other persons clothed with a fiduciary character are subject to this rule." 1 Perry, Trusts, (2d Ed.) § 430. And this liability is further illustrated by sections 194 and 427, and cases referred to in the notes. The principle, also, in *Coal Co. v. Parish*, 42 Md. 598, was maintained, upon a consideration of the authorities, as broadly as it has already been stated. It was there said, with approval, that "it is now well settled that directors and managers of corporations and other companies are equally within the rule which guards and restrains the dealings and transactions between trustee and *cestui que trust*, and agent and his principal; such directors or managers being in fact trustees and agents of the bodies represented by them." Id. 605. And to the latter effect is *Coal Co. v. Sherman*, 30 Barb. 553; *Stewart v. Railroad Co.*, 88 N. J. Law, 505; *Gardner v. Butler*, 30 N. J. Eq. 702; *Kitchen v. Railway Co.*, 69 Mo. 224; *Chouteau v. Allen*, 70 Mo. 290; and *Hubbard v. Investment Co.*, 14 Fed. Rep. 679. The payment of these debts to the defendant with the funds of this company was a misappropriation of its money; and from his relation and position, and general acquaintance with the business, as well as through the employment of Mr. Briggs to keep him posted, it is justly to be inferred that he was well aware of the origin and source from which this money received by him was obtained. And for this misappropriation of so much of the funds of the company he was rightly required to account, under the judgment which has been entered.

It was further made to appear that for moneys advanced by the defendant, in the course of the business of the company, he received more than the legal rate of interest. As the evidence was given, these occasions were not frequent, however; neither were the amounts large. One occasion was stated particularly in the testimony of Mr. Fiske, which was the only one mentioned by him as being within his recollection. The witness William Corson mentioned another, where an excess above the legal rate of interest received was \$90.60. This excessive interest was not received by the defendant under any agreement for the payment of usury, but it seems to have been taken by him as a bonus for the advances which he had made; and, while it is true that a director or trustee of a corporation has not been disabled by the law from loaning money to the company, it is still necessary for his protection in the transactions that it shall appear that no undue advantage has been taken by him of his position, or of the authority permitted to be exercised by him over the affairs of the company. Loans made in good faith for the convenience or necessity of the company are sanctioned by what was held in *Oil Co v. Marbury*, 91 U. S. 587; but there it did not appear that any funds in the way of excessive interest or usury had been received. This part of this case appears to have been quite limited in its amount; but, for whatever the defendant did so receive from the company upon advances or loans made by him to the defendant, he has been regularly held accountable by the judgment. No specific amount has been adjudged against him; but that is left to be ascertained, as it very properly may be, upon the accounting ordered to take place.

It was further proved that the defendant had become interested in various transactions with the company which have been described and designated as "ventures." These were purchases made by the company, for which the defendant advanced the money. The property purchased went into the possession of the company, and was sold by it, and the profits arising out of the transactions divided equally between the company and the defendant. What he did was to advance his money to enable the company to enter upon and promote these enterprises. The services by which the property was taken in charge, or put into a condition to be sold, were those of the subordinates of the company, and not of the defendant. Various amounts of money are shown to have been paid to the defendant as his share of these profits. They were clearly secured by him by reason of his position in, and authority over the af-

fairs of, this corporation, and in substance and effect were in the nature of bonuses or premiums paid for the use of his money. Within the rule maintained by the authorities which have already been mentioned, these profits he had no right to exact or receive. While he was entitled to a return of his money out of these various transactions, together with lawful interest upon the amounts advanced, he had no legal right to share in the profits of the business. That was the business exclusively of the company itself, and the profits were wholly payable to it for the benefit of its stockholders and creditors; and so far as they have been received by the defendant, beyond the amounts to which he was entitled by way of interest and principal for the moneys advanced by him, he is liable to account in this action.

On the 20th of October, 1883, the company had become indebted to the defendant for moneys loaned and advanced, and for obligations which he had incurred, in the sum of \$16,500; and, with the consent of a majority of the stockholders, a chattel mortgage was executed and delivered to him for the security of this sum, upon a large part, if not all, of the property of the company. This mortgage was assailed as unlawful, under the provisions of the statute declaring that it should not be lawful to make any transfer or assignment, in contemplation of the insolvency of the company, to any person or persons whatever; and declaring every such transfer and assignment to an officer or stockholder or other person, in trust for them or their benefit, to be utterly void. 2 Rev. St. (6th Ed.) p. 399, § 4. But this section of the statute was not in force at the time when this mortgage was executed, for it had been repealed by section 1, subd. 39, c. 402, Laws 1882. And it was not again restored, by the repealing of so much of this act as related to it, until the enactment of chapter 434 of the Laws of 1884. It can therefore be of no advantage whatever to the plaintiff in this action.

But while this mortgage was made in October, 1883, it was not filed until the 13th of the following month of December, and after the property mentioned in it had, to a considerable extent, been disposed of. This omission to file the mortgage entitled the plaintiff to avoid it, under the provisions of the statute relating to this transaction. Possession of the property was not taken by the mortgagee at or near the time when the mortgage was given, and that subjected it to the presumption that it in fact was fraudulent. And the statute further declared the mortgage to be absolutely void against the creditors of the mortgagor, and against subsequent purchasers and mortgagees in good faith, for the failure to file it as that has been provided for by law. 3 Rev. St. (6th Ed.) p. 143, §§ 5, 9. The effect of a failure to file the chattel mortgage was examined in *Thompson v. Van Vechten*, 27 N. Y. 568; and it was then considered by the court, in giving effect to another, and no more than an equivalent, provision of the statute, that "the creditors who may take advantage of the default in refileing embrace all the creditors of the mortgagor, without regard to the time when the debts were contracted," (Id. 583;) and that is strictly the language of the statute itself as to the effect of the omission to file the mortgage at all. *Printing-Press Co. v. Damon*, 1 N. Y. Supp. 185, follows and gives effect to this language of the statute. The plaintiff, as receiver, represents, not only the creditor in whose suit he has been appointed, but the other creditors of the corporation; and as such, by chapter 314 of the Laws of 1858, he has been empowered to maintain an action to set aside this mortgage. For that purpose it has been declared that he may "treat as void, and resist, all acts done, transfers and agreements made, in fraud of the rights of any creditor." And every person, in fraud of the rights of creditors, receiving the property or effects of an insolvent corporation, has been declared to be liable, in a proper action by a receiver, for the recovery of such property. And this effect has been secured to the statute, as it is plainly included within its language, in *Southard v. Benner*, 72 N. Y. 424, and *Underwood v. Sutcliffe*, 77 N. Y. 58. For the disposition of this mortgaged property, as far as that has taken

place, and for what still remains under the control of the defendant, he appears to have become legally liable, and has rightly been directed to account in the action.

But where payments have been made to him by way of refunding moneys loaned by him in good faith, and without the employment of his coercive authority as a trustee of the company, he is entitled to retain the moneys in that manner received. As much as that is sanctioned by *Oil Co. v. Marbury*, *supra*. Neither is he liable to account for moneys paid to other persons holding obligations or paper of the company on which he was liable as indorser. For such payments no ground of liability appears to be disclosed by the evidence against the defendant, and in these respects the judgment which has been entered was unauthorized; and so it was in the last paragraph contained in it, directing the recovery of costs by the plaintiff, and awarding an additional allowance of 5 per cent. upon the amount to which he should become ultimately entitled. If the plaintiff shall become entitled to costs, that can only be ascertained upon the rendering of final judgment; and the recovery of costs in this class of cases has therefore been limited by the Code to that event. Code Civil Proc. §§ 3228, 3230, 3253.

Several of the findings of fact and conclusions of law, beyond those which have been considered, have been made the subject of special exception by the defendant; but it is not necessary, materially, to review these exceptions, for the reason that, even if some of the findings are broader than the evidence, still, with the modification already suggested, no injury or injustice will result from them to the defendant. And the same observation is applicable to the rulings concerning the admission and rejection of evidence. They have not changed the case, in any degree, to the prejudice of the defendant. His liability, to the extent already considered, has been sustained by the testimony taken upon the trial. And, while the motion for a new trial should be denied, the judgment should be so far modified as to exclude the provision contained in it awarding costs and allowances, and modifying the fourth subdivision of the sixth conclusion of law to such an extent as to exclude from it the direction that the plaintiff shall account for and pay over the moneys received by him in payment of the debts of the corporation in good faith made to him, or in payment of the debts of the corporation to others for which he had become liable, or for property, not included in the mortgage, disposed of for the payment of such debts; and as so modified the motion should be denied, without costs to either party. The principles laid down in *Hubbell v. Metgs*, 50 N. Y. 480, permitted the receipt of the entries in books as evidence. All concur.

MONROE *et al.* v. O'SHEA.

(*Supreme Court, General Term, First Department. November 7, 1889.*)

1. FRAUD—INTENTION—EVIDENCE.

In an action for damages for purchasing cattle with the intention of defrauding plaintiffs out of the purchase price it appeared that the sale was for cash, but that defendant sent his check for the price to plaintiffs in Massachusetts; that it was returned immediately to the bank for payment, and payment was refused; that in the mean time defendant had disposed of the cattle and made an assignment; that his liabilities amounted to \$44,000, and his assets to \$3,000. *Held*, that the question of defendant's intention to defraud plaintiffs at the time he made the purchase should have been submitted to the jury.

2. SAME—FORMER TRANSACTIONS.

Evidence of previous transactions of the same kind between the parties is admissible to show that defendant knew that he would be able to dispose of the cattle before the check could be returned for payment.

3. SAME—EVIDENCE.

Where defendant, as a witness for plaintiff, testified that he thought some of his debtors became insolvent after the purchase, and that one N. owed him \$2,700, it

was error to exclude his answer to the question as to when N. became insolvent, as it would tend to show whether there had been any change in defendant's financial condition after the purchase.

Appeal from circuit court, New York county.

Action by Albert N. Monroe and others against James O'Shea. The complaint was dismissed on trial, and plaintiffs appeal.

Argued before VAN BRUNT, P. J., and BRADY and DANIELS, JJ.

Joseph A. Shoudy, for appellants. *William H. Sweny*, for respondent.

DANIELS, J. The action was brought for the recovery of damages caused by the purchase of cattle by the defendant from the plaintiffs with the intention of cheating and defrauding them out of the purchase price. The sale was made on the 15th of October, 1886, at Jersey City, for the price of \$974.10. It was a cash sale, for which the defendant undertook to make immediate payment. He did not do so, but on the 16th of October, 1886, he drew his check for the price, and delivered it to the agent of the plaintiffs, who were engaged in business at Brighton, in the state of Massachusetts. The check was sent to them, and under their authority was presented to the bank for payment on the 20th of October, 1886, and payment was refused, the defendant at that time having in the bank to his credit the sum only of \$153.84. When the check was drawn he had a larger amount than the sum mentioned in it to his credit in the bank, but this was drawn down to the small balance just stated by other checks previously drawn by him upon the bank. On the 19th of October, 1886, the defendant made a general assignment for the benefit of his creditors. At that time his debts and liabilities amounted to \$44,310.77, and there were also contingent liabilities which he had assumed, amounting to about \$6,000. The actual value of his assets was \$7,811.66. His business was that of a butcher, and these cattle were the last purchased by him in the course of his business; and they were disposed of, prior to the time of the dishonor of the check, in such a manner as prevented the plaintiffs from disaffirming the sale and recovering the cattle.

Preceding dealings of the same description had taken place between these parties, from which it was claimed the defendant had acquired knowledge of the mode in which the plaintiffs' business was carried on, and that in this business the checks received for the prices of cattle were sent to them at their place of business in Massachusetts, and were then returned by them for payment, to be made by the banks upon which the checks were drawn. An offer was made on behalf of the plaintiffs to prove these facts. That was objected to by the defendant, and the evidence was excluded by the court; and to that the plaintiffs excepted. The theory of the case was that the defendant had purchased these cattle, intending at the time to defraud the plaintiffs out of the purchase price; and, if that were the fact, there seems to have been no legal obstacle in the way of their right to maintain the action. *Schufeldt v. Schnitzler*, 21 Hun, 462; *Wright v. Brown*, 67 N. Y. 1. And the facts which have already been narrated had a tendency to indicate this to have been the design of the defendant, for his insolvency was so marked as to have been at variance with any expectation on his part that he would be able to proceed with his business and pay his debts. The proof which in this manner was offered and rejected would have had a tendency to indicate the understanding on the part of the defendant that he would be able to dispose of the cattle prior to the dishonor of the check, and thereby avoid all legal measures which might be taken by the plaintiffs for the recovery of their property. The proof offered to be given included facts having a bearing upon the probable intention of the defendant in the purchase of the cattle; and it should, for that reason, have been received by the court.

In the course of the examination of the defendant as a witness for the plaintiffs upon the trial he was asked whether any person among his creditors be-

came insolvent after the 15th of October, and answered that he guessed there were some of them, and thought there was a man named Nolan who owed him something like \$2,700. He was then asked when Nolan became insolvent, and the answer to this inquiry was excluded by the court, upon the defendant's objection, and an exception was taken to the ruling. This evidence ought also to have been received, for the purpose of indicating whether or not any change whatever had taken place in the financial condition of the defendant after he purchased the cattle, and before he made the assignment.

Besides that, the case, as it was, presented by the proof received upon the trial, depended for its disposition upon a question of fact. It was for the jury to inquire and consider whether, under the circumstances proved, the defendant did not purchase the cattle with the intention at the time of the purchase to defraud the plaintiffs out of their price. That was the theory of the case stated in the plaintiffs' complaint, and the evidence given at the trial, to a reasonable degree of certainty, tended to sustain it. The complaint should not have been dismissed, but the case should have been submitted to the jury. The judgment should be reversed and a new trial ordered, with costs to the plaintiffs to abide the event. All concur.

KILPATRICK v. BURROW.¹

(*Supreme Court, General Term, First Department. November 7, 1899.*)

1. CONSTRUCTION OF WILL—POWER OF SALE.

Testator devised his residuary estate to his executrix, with power to sell, convert into money, and invest the proceeds, which were to be divided into as many parts as he should leave children or descendants of children. One equal share was to be divided between the descendants of any of testator's children who might die before him, and one share was to be invested for the benefit of each child of testator, and the income paid to her for life. At the death of each child her issue was to receive her share, and if she left no issue the share so invested for her benefit was to be paid to testator's surviving children. His dwelling was excepted from this general power of sale, and the executrix was directed to permit testator's unmarried daughters to occupy it as a home, rent free, during the lives of H. and K., two of his daughters, or so long as any of his daughters should remain unmarried. If a daughter should marry, she might no longer occupy the premises without the consent of her unmarried sisters. At the death of H. and K. or the marriage of all the daughters the house was to be sold, and the proceeds divided among testator's children or their descendants. At his death testator left five daughters unmarried. *Held*, that until the death of H. and K. or the marriage of all the daughters the executrix had no power to sell the dwelling-house.

2. SAME.

Testator's daughters were not absolutely entitled to the proceeds of the sale of the dwelling, but the descendants of any one who might die before H. or K., or before the marriage of all the daughters, would be interested therein, and conveyances by them and by the executrix herself would not vest the grantee with a perfect title.

Appeal from special term, New York county.

Action by Edward Kilpatrick against Mary E. Burrow, executrix, etc., of Thomas H. Geraty, deceased, to recover money paid on a contract by defendant to sell plaintiff certain land in New York city, with which contract plaintiff alleged that defendant was unable to comply. Judgment for defendant for specific performance of the contract. Plaintiff appeals. For former report see 5 N. Y. Supp. 782.

Argued before VAN BRUNT, P. J., and DANIELS and BRADY, JJ.

D. G. Crosby, for appellant. Robert W. Todd, for respondent.

DANIELS, J. The defendant, as the executrix of the estate of Thomas H. Geraty, deceased, entered into a contract with the plaintiff for the sale and conveyance to him of premises known as 54 East Seventy-Ninth street, in the

¹ Reversing 5 N. Y. Supp. 782.

city of New York. And by her agreement, for the consideration therein mentioned, agreed to deliver to the plaintiff an executor's deed, containing the usual full covenants, for the conveying and assuring to him the fee-simple of the premises free from all incumbrances. The plaintiff paid upon the contract the sum of \$1,000, and afterwards, deeming the defendant unable to convey the title as that was agreed upon by the contract, brought his action to recover back the amount that had been paid, together with the expenses incurred in the examination of the title. To perform the agreement on her part she presented herself at the place agreed upon for that purpose, with the deed subscribed and acknowledged by herself as the sole executrix of the estate, in form complying with the language of the contract. Added to this was a further deed, executed also by herself and all the living children of the testator, for the conveyance of the same property, and a third deed, executed by her, the sole executrix and trustee under the will of the testator's deceased daughter Margaret A. Fagan, for the conveyance of any interest which the testatrix had in the premises at the time of her decease, or which had been vested in her surviving infant son under her will. And no question is made in the case but that she possessed the authority to execute and deliver the last of these three conveyances. But her power to convey this land as sole surviving executrix and trustee, and the power both of herself and her living children to make that conveyance, has been denied by the plaintiff. And in support of that denial reference is made to the provisions of the will of the testator, who was the owner of this land at the time of his decease. By these provisions he devised and bequeathed to his executrices all the rest, residue, and remainder of his estate, both real and personal, except that previously disposed of. This devise and bequest was generally to sell and dispose of the property, and turn it into money; and after paying the debts of the testator, and his funeral expenses, to invest the residue in bonds and mortgages on improved and unincumbered real estate in the city of New York, or in public stocks of the state of New York, or the United States; and then to divide said rest and residue, or the proceeds thereof, into as many portions as he should leave children, or descendants of children, at the time of his decease; and then to pay one equal share, or portion thereof, to the lawful descendants of each of his children who should have departed this life before himself, leaving lawful issue surviving him, to be divided among them share and share alike; and to invest one of the shares for each of his children, and to pay the income or interest derived from each of such shares in quarterly payments to the child for whom the same should be invested during her natural life. And upon the death of his children, as that event should respectively happen, to pay over the share of the child dying, and divide the same equally between the children of that child. But in case any of his children should depart this life leaving no lawful issue surviving them, then the share, or portion set apart and invested for that child, was directed to be paid over and divided equally among his surviving children. This power of disposition was not otherwise qualified than that the improved property of the testator should only be sold when it clearly appeared to be necessary for the benefit of his estate. From these general directions for the sale and investment and disposition of his estate he excepted the premises now in controversy, together with the furniture and other things in and about the dwelling. And after making this exception the executrices were directed "to suffer and permit my unmarried daughters, during the life or lives of my two daughters, Agnes K. Geraty and Ada H. Geraty, or so long as any of my said daughters shall remain unmarried, to occupy as a home, free of rent, my said house known and designated as number fifty-four (54) East Seventy-Ninth (79th) street, in the city of New York, together with all the furniture, plate, linen, china, glass, books, prints, pictures, fuel, and other household effects that may be in said house at the time of my death. Should any of my daughters at any time marry, then I direct

that she shall not occupy said house as a home, except by the consent of all her unmarried sisters." And added to this direction was a power of sale given to the executrices, or the survivor of them, empowering her or them as follows: "Upon the death of my two children, Agnes K. Geraty and Ada H. Geraty, or the marriage of all my children, as either of said events may respectively occur, I order and direct that my said house, known as No. 54 East 79th street, New York city, shall be sold, and the proceeds arising therefrom be paid and divided to and among my said children and their descendants."

The testator at the time of his decease left surviving him six daughters, neither of whom were married, except Margaret A. Fagan, deceased. Josephine, one of the remaining daughters, became an inmate of a convent, and the other four are still entitled to the use, possession, and occupancy of these premises. And under the will they are entitled to continue in that use and occupancy until the death of the testator's two children, Agnes K. and Ada H. Geraty, or the marriage of all his children, as either of such events may first occur. No estate in the premises has been given by the will to these daughters. But as the executrices were vested with no more than a power of sale over the property, the testator's daughters became seised of the title to the land, subject to the execution of this power, vested in the executrices and the survivor of them. But the exercise of the power created by the will for the sale and conveyance of this land was dependent upon the occurrence of one of two events. They were the decease of the testator's two children, Agnes K. and Ada H., or the marriage of all his children. And neither of these events had occurred at the time when the conveyances were presented for the plaintiff at the place mentioned in the contract for its final performance. These two daughters were still living, and neither of the five surviving daughters of the testator was married. And for that reason the period prescribed for the sale of the property had not arrived. In this respect the case is entirely different from that of *Murray v. Murray*, 7 N. Y. St. Rep. 391, where a complete power of sale existed at the time when it was proposed to be, and was in fact, executed; while here the power of sale was contingent and dependent upon the occurrence of one of two events, neither of which had occurred at the time when the deeds were proposed to be delivered. The surviving executrix, therefore, was not in a condition to execute this power; for it has been held that the extent of a power, like the extent of an agency created by a written power of attorney, must be sought for in the instrument conferring the power, and authority not found there does not exist. *Hetzl v. Barber*, 69 N. Y. 1, 13.

But in behalf of the surviving executrix the position has been taken that the children of the testator, for whose benefit this power was primarily created, were entitled to make their election that the power should not be resorted to, but that they should at once secure the advantage of the sale of the property by a conveyance made and executed by them for that object. And that position under the authorities might probably be sustained if these children were absolutely vested with the title to this land, or to the proceeds arising from its sale. But as that has been directed by the will, they were not so entitled; for whatever interest vested in them by descent was liable to be defeated by the exercise of this power of sale given to the surviving executrix, as well for their descendants as themselves. The children were not absolutely entitled to the proceeds of the sale of the property, for those proceeds were to be distributed among them and their descendants. Under this direction, if either of the testator's remaining daughters should marry and have issue living, and die leaving surviving children prior to the decease of the daughters Agnes K. and Ada H., these children would be entitled to participate in the division of the proceeds of the sale of the land. And their title to such proceeds would not be derived from the deceased parent, but from the directions contained in the will of the testator. The event is not improbable that two, or even three, of

the testator's daughters may marry, and each die leaving children, prior to the decease of Agnes K. or Ada H., remaining unmarried. In that event, the deceased daughter would be entitled to no part of the proceeds arising out of the sale of this land. But the share which would otherwise be received by the daughter so dying would by the testator's will vest in and become the property of her children. And that might very well be the case with three of the testator's daughters living at the time of his decease.

By the language which has been employed in this part of the will the sale of the land was not to be made until one or the other of the events mentioned had transpired. And when the sale should in that manner be made, its proceeds were to be distributed among the testator's children who were living and the descendants of those who were deceased. It was at the occurrence of one of these events only that this sale and distribution were directed to take place. And the reasonable import of the language used by the testator is that the persons answering the description contained in the reference made to them in the will were those, and only those, who were to share in the proceeds of the sale of this property. The legal rule is conformable to the language of the will; for "legacies given to a class of persons vest in those who answer the description and are capable of taking at the time of distribution. They are deemed to be the objects of the gift." *Teed v. Morton*, 60 N. Y. 502, 506; *De Laney v. McCormack*, 88 N. Y. 174, 183. Neither the testator's children, nor the infant son of the daughter who died, had, at the time when these deeds were offered for delivery, the title to this land. What they had in the property was a right of possession, with a defeasible title, subject to the execution of the power, when either event occurred upon which it could be exercised, and to share in the proceeds of the sale so far as they might be living at that time. So far as the daughters should then be deceased, both the right and the title would vest under the will in her surviving children. And those children, after either event happened upon which the power was dependent, would be entitled to insist upon the execution of the power, the sale of the property, and the distribution of its proceeds, receiving for themselves the shares which they would then be entitled to under the will. And if a sale should now take place, and the proceeds of the property be divided among the testator's daughters, and the child of the daughter deceased, another sale and division of the proceeds would become necessary and legal after the decease of the daughters, if they left descendants or children surviving them. It follows, therefore, that the title proposed to be given by these deeds to the plaintiff was not such a title as he was authorized to demand under the language of the contract. And where that is the fact, or the title may be the subject of serious doubt, the law will not compel the purchaser to accept or receive it. *Church Home v. Thompson*, 108 N. Y. 618, 15 N. E. Rep. 193. The judgment adjudging the title to be such as the plaintiff was bound to receive, and directing a specific performance of the contract, was therefore erroneous, and it should be reversed, and a new trial ordered, with costs to the plaintiff to abide the event.

BRADY, J., concurs.

VAN BRUNT, P. J., (*concurring*.) Without concurring in or dissenting from the construction placed by Mr. Justice DANIELS upon the will of Thomas H. Geraty, deceased, I concur in the conclusion arrived at by him. A purchaser of land is entitled to a marketable title. A title open to a reasonable doubt is not a marketable one, and where such title depends upon a will the construction of which is open to discussion, even if the court is of opinion that the true construction will give the purchaser a good title, he should not be required to run the risk of a subsequent different construction being put upon

the will. The heirs and next of kin of the testator are not bound by the construction put upon the will in an action between seller and purchaser, and consequently no binding construction can be given to the will.

SPERO v. WEST-SIDE BANK.

(*Supreme Court, General Term, First Department. November 7, 1889.*)

WITNESS—EXAMINATION OF PARTY BEFORE TRIAL.

An order requiring a plaintiff to submit to an examination as a witness in an action, before trial, will not be granted on an affidavit of defendant which does not show the necessity of obtaining such evidence by an examination of plaintiff prior to trial, nor that it is designed to obtain such evidence for use on trial.

Appeal from special term, New York city and county.

Action by David Spero against the West-Side Bank of New York city, for the conversion of checks. The court made an order denying plaintiff's motion to vacate an order requiring plaintiff to submit to an examination, as a witness in the action, before trial. Plaintiff appeals.

Argued before VAN BRUNT, P. J., and DANIELS, J.

Horwitz & Hershfield, (Wales F. Severance, of counsel,) for appellant.
John C. Shaw, (Gibson Putzel, of counsel,) for respondent.

DANIELS, J. The action has been brought for the conversion of checks alleged to have been the property of the firm of which the plaintiff and Rachel Friedman were members. She has assigned her interest in the demands in suit to the plaintiff, and it was prosecuted by him to recover the value of the checks. There was a large number of these checks received in the course of the business of the firm, and negotiated by a person in its employment as a book-keeper and clerk, whose indorsements were alleged to have been made without authority. By the defense which has been presented it is proposed to show that this clerk was authorized to make the indorsements which he did upon the checks, and that their proceeds went into the business and assets of the firm, and it may very well be that a case can be made out entitling the defendant to an examination of the plaintiff as to these alleged facts. But the affidavit on which the order was made is deficient in its failure to comply with the rule which has been established by the authorities, as that has also been stated in *Jenkins v. Putnam*, 106 N. Y. 272, 275, 12 N. E. Rep. 613. The affidavit, as made, contains no statement from which it can be inferred that it is necessary that the defendant should obtain this evidence by the examination of the plaintiff prior to the time of the trial of the action. Neither has it stated that it is designed to obtain that evidence to be used upon the trial. In both respects the affidavit is materially defective. There cannot be the slightest difficulty standing in the way of such a statement of facts as will disclose the existence of this necessity, and the design so to obtain the testimony of the plaintiff, where these facts may be truthfully affirmed and set forth. What the law in theory requires to entitle a party to the examination before trial of the opposite party is such a statement as will indicate the necessity of that examination previous to the time of the trial, and the statement of the purpose of the party being to obtain the evidence to be used upon the trial. It is so often the case that these examinations are taken without any design to use the evidence, when it has been obtained, upon the trial, that it is due to the party who is to be examined that a case in these respects should be reasonably made out by the affidavit upon which the order may be made. This affidavit was substantially defective in each of these particulars, and the order should be reversed, with the usual costs and disbursements, but with liberty to the defendant to renew the application upon such affidavit or proofs as will not be liable to any substantial legal objection.

In re STRASBURGER'S ESTATE.

(Supreme Court, General Term, First Department. November 7, 1889.)

APPEAL—RECORD—CORRECTION.

Where the record on appeal is so imperfect that the question raised cannot be properly examined, it will be remitted for correction.

Appeal from special term, New York county.

Proceedings for the settlement of the estate of Oscar Strasburger. From so much of the judgment as rejects their claim for the same *pro rata* share decreed to the other creditors, Deutsch Bros. appeal.

Argued before VAN BRUNT, P. J., and BRADY and DANIELS, JJ.

Joseph Fettretch, for appellants. *Eustace Conway*, for respondent.

BRADY, J. This action was submitted, but upon examination the papers appear to be so imperfect that the question which is supposed to have arisen in some way cannot be properly examined. The question involved is whether Messrs. Deutsch Bros. are entitled to damages for their eviction from the premises which they hired from the lunatic under circumstances which would entitle them to some consideration. The referee seems to have determined that they were entitled to recover from the estate a comparatively large sum of money as damages. What was done with this report does not distinctly appear, inasmuch as the decree from which the appeal is taken is not printed, and the confusion is worse confounded from the statement on the part of the appellants that the referee found that the claim was invalid, whereas from the report printed it appears that he found in favor of the claim, and awarded its payment. It is true that it is stated in the case that the referee made his report, and rejected the claim of Deutsch Bros. for damages as improper, invalid, and not legally chargeable out of the estate, and that they excepted to the report, and to the rejection of their claim, and that the referee's report was confirmed. But the referee's report then states the facts found by the referee at the request of Deutsch Bros., setting them out, by which the result is in their favor, as already stated. The case has been examined with reference to its merits, and, if it were in a condition to be disposed of, it could be. But it is not. The case must therefore be remitted back for correction. All concur.

TUTHILL v. HUSSEY et al.

(Supreme Court, General Term, First Department. November 7, 1889.)

APPEAL—REVIEW—WEIGHT OF EVIDENCE.

Where a defendant's testimony on a material point is contradicted by a number of witnesses, and the verdict is for plaintiff, an order denying a motion for a new trial will not be disturbed.

Appeal from special term, New York county.

Action by Benjamin H. Tuthill against George W. Hussey and John N. Harriman on a promissory note. Verdict and judgment for plaintiff, and defendants appeal.

Argued before VAN BRUNT, P. J., and DANIELS and BARRETT, JJ.

E. G. Duvall, Jr., (*John R. Reid*, of counsel,) for appellants. *Warren W. Foster*, for respondent.

BARRETT, J. The sole question in this case was whether the words "with interest," were written in the note sued upon before or after its execution, indorsement, and delivery. A number of witnesses testified that these words were written in the note before it was executed, while the defendants testified to the contrary. It is apparent, therefore, that the question was purely one of fact. The verdict was in favor of the plaintiff, and it was fully supported

by abundant testimony; indeed, after reading all the testimony carefully, I feel bound to say, by the weight of evidence. There was not an exception in the case, and the question of fact was fairly and thoroughly presented to the jury. It is difficult to believe that this appeal was taken with any hope of success. It is plainly without merit. The judgment and order denying a new trial should be affirmed, with costs. All concur.

PEOPLE v. MURRAY.

(*Supreme Court, General Term, First Department. November 7, 1889.*)

1. DISORDERLY CONDUCT—QUESTIONS FOR THE JURY.

Where the evidence shows that defendant ran through the streets with an open knife in his hand, it is for the jury to say, from all the circumstances, whether his conduct was disorderly within Laws N. Y. 1882, c. 410, § 1453, (consolidation act,) providing that "every person in New York city who shall use any threatening behavior, with intent to provoke a breach of the peace, or whereby a breach of the peace may be occasioned, shall be guilty of disorderly conduct."

2. POLICE OFFICERS—ARREST WITHOUT WARRANT—ASSAULT.

Police officers of New York city are authorized by Laws 1882, c. 410, § 277, to arrest without a warrant any person who in their presence commits an offense prohibited by the laws of the state or ordinances of the city; and one who resists arrest in such cases by striking at the officer with an open knife, commits an assault in the second degree, within the meaning of Pen. Code, § 218, subd. 4, defining it to be "willfully and wrongfully assaulting another with a weapon or other instrument likely to produce grievous bodily harm."

3. RESISTING UNLAWFUL ARREST—ASSAULT.

In resisting the attempt of an officer, with open hands, to arrest him, defendant was not justified in using greater force than was necessary to avoid arrest; and for striking at the officer with an open knife he is guilty of an assault, though the attempted arrest was unlawful.

Appeal from court of general sessions, New York county.

The defendant Joseph Murray was indicted for assault, the indictment containing two counts, one for assault in the first and one in the second degree. Defendant was convicted on the second count, and appeals.

Argued before VAN BRUNT, P. J., and DANIELS and BARRETT, JJ.

Purdy & McLaughlin, for appellant. *John R. Fellows*, Dist. Atty., for the People.

BARRETT, J. Murray's case clearly came within the fourth subdivision of section 218 of the Penal Code, namely, wilfully and wrongfully assaulting another by the use of a weapon or other instrument or thing likely to produce grievous bodily harm. Murray was seen by an officer running through the streets with an open jackknife in his hands. The handle of this knife was about two and one-half inches long, and the blade was of about the same length. The officer attempted to stop him, whereupon Murray sought to stab the officer, making three lunges at him with the open knife. There was no defense upon the facts. I mean that no testimony was offered by the prisoner. He relied, and now relies, upon the point of law that the officer had no right to arrest him without a warrant. While it must be conceded that there was no evidence from which the officer could reasonably infer the commission of a felony, yet there was, to my judgment, enough to go to the jury upon the question of disorderly conduct. Section 1453 of the Consolidation Act (Laws 1882, c. 410) declares that every person in the city of New York who shall use any threatening behavior, with intent to provoke a breach of the peace or whereby a breach of the peace may be occasioned, shall be guilty of disorderly conduct. By the same act (section 277) the members of the police force are authorized to arrest, without warrant, any person who shall commit, or threaten or attempt to commit, in the presence of such member, or within his view, any breach of the peace or offense directly prohibited by act of the legislature or by any ordinance of the city. The question, then, is whether Mur-

ray's conduct came within the definition of disorderly conduct given in section 1458. It is true that a man may run through the streets without being guilty of threatening behavior, even when pursued lawfully or unlawfully by an officer. It is equally true that he may lawfully hold in his hand an open jackknife. But the circumstances attending these acts may be such as to bring the case within the statute. In other words, a man may run through the streets, wielding an open knife, in such a manner as to threaten the public peace. Whether he did so in the present instance; whether the prisoner's "behavior" was "threatening;" whether it tended to provoke a breach of the peace; whether it was such that a breach of the peace might be occasioned thereby,—were questions to be determined by the jury, upon all the facts and circumstances of the case. There was not enough here to warrant the court in directing the jury one way or the other, as matter of law. The evidence, though uncontradicted, was susceptible of two views or inferences; and, upon the whole, I think the question was properly left to the jury, as one of fact, under appropriate instructions. Such instructions were given, and the prisoner cannot complain of their fairness. It is also contended that the arrest was not in fact made upon the ground of disorderly conduct. This, however, is a pure assumption. The jury, too, have found the other way,—in substance, that the prisoner was lawfully arrested by one (an officer) in whose presence he was committing a misdemeanor.

The conviction can properly be sustained upon another ground. It seems that Murray, when stopped, was running away from one Mitchell,—also an officer. That officer requested the complainant, Holahan, to assist him in securing Murray. Holahan then got behind a wagon, and, as Murray approached, jumped out in front of, and reached for, him. This was all that Holahan did prior to Murray's assault. Upon the undisputed facts, therefore, Murray lunged at Holahan three times with the open jackknife before even a hand had actually been placed upon him. Holahan managed to retreat, and to escape being stabbed. He subsequently succeeded in tripping Murray, who fell, and the arrest followed. What transpired afterwards, namely, Holahan's drawing his club and striking Murray to protect himself as he said, against the still open knife, did not condone the original assault. That assault cannot be justified, even upon the theory of an illegal arrest. Holahan had apparently no weapon. He had not then drawn his club. He simply attempted with open hands, to seize Murray's person. If he thus erred in doing what he supposed to be his duty, Murray had no right to use greater force than was essential to maintain his freedom. He was certainly responsible, on the facts stated, for the unnecessary attempt to stab, and for that wrongful and willful act he was justly convicted. The judgment should therefore be affirmed. All concur.

SANDERS v. SOUTTER *et al.*

(*Supreme Court, General Term, First Department. November 7, 1889.*)

PLEADINGS—BILL OF PARTICULARS—ATTORNEY'S AFFIDAVIT.

The affidavit of an attorney of record is sufficient in proof of the necessity for a bill of particulars, he being the judge of whether it is required, and there being no statute or rule of practice requiring proof by the affidavit of the party.

Appeal from special term, New York county.

Action by Lewis Sanders against Agnes Gordon Soutter, William K. Soutter, Emily W. Dix, and Eliza N. Bell, to recover for services as attorney and counselor at law, and for money advanced. On application of defendants, supported by the affidavit of their attorney, an order was made requiring the service by plaintiff of a bill of particulars, from which order plaintiff appeals.

Argued before VAN BRUNT, P. J., and DANIELS, J.

William J. Amend, for appellant. *Vanderpoel, Cuming & Goodwin*, (*De los McCurdy*, of counsel,) for respondents.

DANIELS, J. An essential part of the plaintiff's cause of action consists of the demand for services performed by him as an attorney and counselor at law for, and advances of money made to, the defendant, at whose request the services are stated to have been rendered. The amount claimed is \$10,000 and upwards, and the allegations concerning the services and the advances are in the most general form in which they can be made. Upon the face of the complaint there is reason, therefore, for assuming that a bill of particulars of the plaintiff's demand might very well become necessary to enable the defendants to meet the case without surprise upon the trial. But notwithstanding the general nature of the allegations made upon this subject the practice still requires that some proof shall be presented of its necessity to justify the making of an order directing the service of a bill of particulars. *Willis v. Bailey*, 19 Johns. 268. The power of the court upon this subject, as it is contained in section 531 of the Code of Civil Procedure, is very general; for it has provided that in any case it may direct a bill of particulars of the claim of either party to be delivered to the adverse party. The measure of proof to be furnished to obtain the order has been left to the discretion of the court and the apparent necessities of the case. Neither the statute nor the practice has required the affidavit of the party himself, but, whenever the proof from any source shall be obtained that a bill of particulars is a necessity in the action, the court has complete authority to direct it to be served. The proof in this instance was supplied by the affidavit of the attorney for the defendant; and, if it be assumed that a portion of his statement was broader than his knowledge of the facts, it is still reliable in the further affirmation that the defendants cannot safely answer the complaint until they are furnished with the particulars of the plaintiff's cause of action. This was a subject necessarily committed to the judgment and experience of the attorney himself. It was for him to decide whether a proper answer could be presented in the case without information of the particulars of the plaintiff's demand. And if the defendant himself should make the affidavit it would be founded mainly upon the judgment and advice of his attorney. He had examined the complaint as it was served, and from his knowledge of the case and his legal experience he satisfied himself that an answer could not be intelligently served without a statement of the particulars of the plaintiff's demand, and that was a sufficient foundation for the order made by the court. The case of *Tim v. Smith*, 93 N. Y. 87, is no authority for the application of any different principle. For that decision was not made upon this subject. What was then before the court was an application to discharge an attachment, and it was as to that that doubt was expressed of the ability of the attorney to supply the requisite proof. The decision has no bearing whatever upon an application of this description. As the case was made to appear, it was an entirely proper one for the order. For in no other way could the party or the attorney be apprised of the specific character of the demands relied upon to support the plaintiff's action. The order should be affirmed, together with the usual costs and disbursements.

VAN BRUNT, P. J., concurs in the result.

WINCHESTER v. BROWNE.

(*Supreme Court, General Term, First Department. November 7, 1899.*)

PLEADING—COMPLAINT—MOTION TO MAKE DEFINITE AND CERTAIN.

Where a complaint is so framed that there is no difficulty in understanding the claim of plaintiff, and the circumstances on which he relies to create the liability alleged, there is no error in denying defendant's motion to strike out and make more definite and certain.

Appeal from special term, New York county.

Action by George C. Winchester against T. Quincy Browne. Defendant moved to strike out certain portions of the amended complaint, and to make other portions more definite and certain. The motion being denied, defendant appeals. For former reports, see 4 N. Y. Supp. 155, 6 N. Y. Supp. 913.

Argued before VAN BRUNT, P. J., and DANIELS, J.

Henry Schmitt, for appellant. *A. Walker Otis*, for respondent.

DANIELS, J. The action has been brought to recover damages which the plaintiff alleges he has sustained by reason of transactions between himself and the defendant and others, at the instance and request of the defendant, by which he has lost, or been deprived of, a large amount of property. The facts from which the liability is alleged to have followed are clearly set forth in the complaint, so far as they appear to be material to the plaintiff's cause of action. There is no uncertainty as to the description of the circumstances relied upon to create the liability, and from their perusal there seems to be no difficulty whatever in definitely understanding the entire purpose of the plaintiff as the complaint has been framed. It is only when allegations are so indefinite and uncertain that the precise meaning and application thereof is not apparent that the court has been authorized, by section 546 of the Code of Civil Procedure, to direct the statements to be made more definite and certain by amendment. The object of the system of pleading which has been devised was to require a plain statement of the facts in such language as would enable the defendant to understand what was designed to be alleged against him as the ground of his liability, and that has been accomplished by the allegations which are contained in this complaint. There is no uncertainty as to the material circumstances, or the manner in which the plaintiff asserts himself to have been injured in the transactions mentioned and set forth, and the court was accordingly right in denying the motion to make the complaint more definite and certain.

There were no such irrelevant allegations or statements inserted in the complaint as would justify an order to strike them out. Whatever has been alleged is pertinent to the case intended to be presented, and allowing the allegations to stand as they have been made in the complaint will produce no disadvantage or injury whatever to the defendant. How far the evidence will be found to be material to the plaintiff's alleged right of action included in these allegations will be better determined at the trial than upon a mere motion of this description. It will be a source of no trouble or confusion in the action to leave the complaint as it has been framed.

In *Nealis v. Lissner*, 5 N. Y. Supp. 682, the allegations which were stricken out were disconnected with the cause of action which was relied upon to sustain the action. No allegation was excluded from the pleadings in that instance which, in any probable view, would become important upon the trial; while in this case all the facts which have been alleged by the plaintiff will be pertinent to the inquiry intended to be set on foot in the action.

The order from which the appeal has been taken was right, and it should be affirmed, with \$10 costs and the disbursements.

HAYDEN *et al.* v. NATIONAL BANK OF THE STATE OF NEW YORK.

(*Supreme Court, General Term, First Department. November 7, 1889.*)

1. GARNISHMENT—LEVY AND LIEN—NOTICE.

In an action against the non-resident firm of L. & Bro., money was attached in the hands of defendant bank, and the attachment was served by the sheriff by handing to defendant's cashier a copy, on which was indorsed a certificate that such paper was a true copy of the original, and that by it the sheriff was commanded to attach all property of L., and that having been informed that said defendant had in its possession money belonging to L., and that defendant was indebted to him,

the sheriff attached and required said money to be delivered to him. At the time of delivery of said copy, warrant, and notice, defendant had no property of nor was it indebted to L., but defendant was indebted to the firm of L. & Bro., of which fact the sheriff was informed. This amount was afterwards applied by defendant towards payment of a debt due to it by L. & Bro. *Held*, that the levy was insufficient under Code Civil Proc. § 649, subd. 3, which requires a notice showing the property attached, to entitle plaintiffs to the application of the balance to the credit of L. & Bro. in defendant's hands to the payment of their judgment.

2. SAME—KNOWLEDGE OF GARNISHEE.

As the statute prescribing the mode of attachment was not complied with, so as to give plaintiffs a lien on the property, the fact that the bank officers knew what the plaintiffs were attempting to do did not aid the attachment.

Appeal from circuit court, New York county.

Action by Peter Hayden, William B. Hayden, Cotton H. Allen, and Bernard Reilly, sheriff of the city and county of New York, against the National Bank of the State of New York, to recover the sum of about \$2,000, claimed to have been attached in defendant's hands.* Judgment entered upon dismissal of complaint. Plaintiffs appeal.

Argued before VAN BRUNT, P. J., and BRADY and DANIELS, JJ.

Martin & Smith, (Geo. A. Strong, of counsel,) for appellants. *Shipman, Larocque & Choate*, (Joseph Larocque, of counsel,) for respondent.

VAN BRUNT, P. J. This action was brought under the provisions of section 677 of the Code, to recover from the defendant the sum of about \$2,000, claimed to have been attached in defendant's hands. The questions involved arise upon the following facts: In the year 1878 the firm of Hayden & Allen, of which firm the plaintiffs are the successors, brought an action in this court against G. H. Loker & Bro. to recover the sum of over \$3,000. An attachment was issued against the property of the defendants in said action upon the ground that they were non-residents of the state of New York, and did reside in St. Louis, in the state of Missouri. On the 9th day of October, 1878, the sheriff attempted to serve the said attachment upon the defendant by handing to its cashier a copy of the attachment, upon which was indorsed a certificate to the effect that such paper was a true copy of the original, and that by it the sheriff was commanded to attach all property of the defendant G. H. Loker within his county then in the possession of the said defendant bank, to take the same in his custody, and that he thereby attached the same, and that having been informed that the said defendant bank had in its possession and under its control certain money belonging to the said defendant, (meaning G. H. Loker,) and that the bank was indebted to him, he particularly attached and required to be delivered to him said money, etc. At the time of the delivery of this copy, warrant, and notice to the bank, it had no property of nor was it indebted to G. H. Loker in any amount, but the bank was indebted to the firm of G. H. Loker & Bro. in the sum of upwards of \$2,000, of which fact the deputy-sheriff was informed at the time of the service of the warrant of attachment. This amount was subsequently applied by the bank towards the liquidation of an indebtedness to the bank by the firm of G. H. Loker & Bro.

The question presented, therefore, is whether the delivery by the sheriff's deputy to the bank's cashier of the copy, warrant of attachment, and notice above referred to constituted a sufficient levy, under the provisions of the statute, upon the indebtedness of the bank to the firm of G. H. Loker & Bro., and entitled the plaintiffs to the application of the balance at that time to the credit of the firm of G. H. Loker & Bro. towards the payment of their judgment. The Code (section 649, subd. 3) provides the manner in which an attachment shall be levied upon an indebtedness such as that existing upon the part of the bank to G. H. Loker & Bro., which is by leaving a certified copy of the warrant, and a notice showing the property attached, with the person against whom it exists. This requirement evidently was not complied with.

There was nothing either upon the face of the attachment or the notice showing that it was intended to attach any property belonging to G. H. Loker & Bro. Upon the contrary, the notice as to the property attached expressly limited the levy to the property of G. H. Loker, and such levy could not be extended, simply because the sheriff intended to levy upon other property. The doctrine in respect to notices which is relied upon by the appellant does not seem to apply to the case at bar. The question here is, have the plaintiffs caused those things to be done which gave them a lien superior to any other which might subsequently be acquired upon this indebtedness due from the bank to G. H. Loker & Bro.? The statute certainly has not been complied with, and this has been conceded; but whether the bank officers knew what the plaintiffs were attempting to do seems to be immaterial, as a lien can never be acquired by expressing an intention to procure such lien. The right of subsequent claimants can only be defeated by showing that the necessary steps have been taken which give a preference. Suppose another attachment has been issued and levied regularly upon this indebtedness, could the knowledge of the bank officers as to what the plaintiffs were striving to do by their proceedings defeat this subsequent levy? We think not, as in such a case a lien could not be established. So in the case at bar, the whole basis of the action resting upon the existence of a lien procured by the due levy of the warrant, unless such a lien has been procured good against all claimants the action must fail. It would appear, therefore, that the plaintiffs, not having complied with the statute, did not acquire a lien which they in this action are entitled to enforce. The judgment appealed from should be affirmed, with costs. All concur.

In re CUNARD'S ESTATE.¹

(Supreme Court, General Term, First Department. November 7, 1889.)

EXECUTORS AND ADMINISTRATORS—DISCOVERY OF ASSETS—SUMMARY PROCEEDING.

Code Civil Proc. N. Y. § 2708 *et seq.* provides a means of discovery when money or other personal property which ought to be delivered to the administrator, or which ought to be included in an inventory or appraisal, is in the possession or under the control of a person who withholds the same, or conceals or refuses to exhibit it, so that it cannot be inventoried or appraised. Section 2710 provides that the proceeding must be dismissed on the filing of a verified answer setting up ownership or possession by virtue of a lien or special property. In a proceeding under the statute it appeared that the administrator had filed an inventory which included the property sought to be discovered; and respondent's answer alleged that the administrator had left the property in respondent's hands, under a special arrangement authorizing its use, conversion, and reinvestment from time to time; and that the property in respondent's hands when decedent died had been converted under said arrangement. *Held*, that the object of the statute was to provide a summary means of discovery, and, in case of mere naked possession of decedent's property, to compel delivery to the legal representatives; and that petitioner had no remedy under the statute, his remedy being an action for an accounting.

Appeal from surrogate's court, New York county.

Application of Bache Cunard, ancillary administrator of Edward Cunard, for the examination of Charles G. Francklyn, as to personal property consisting of cash and securities, belonging to the estate of Edward Cunard, in his possession. Francklyn appeared and filed an answer to the petition, by which he admitted that at the time of Edward Cunard's death there was personal property of his in the possession and under the control of respondent, but denied that he was the agent of deceased, as alleged in the petition, and alleged that said Cunard left said property in his hands with authority to use the same as he saw fit in his transactions; that after his appointment as administrator in England the petitioner left property of deceased in respondent's hands as

¹Affirming 6 N. Y. Supp. 883.

it was before the death of decedent, and consented that respondent should continue in the same relation as he had been before such death towards the property; that he had paid to petitioner, to his brother and two sisters, their proportions of the estate, or adjusted their claims; and that as to the portion of the estate which was not so paid or adjusted no part remained in respondent's hands. The surrogate dismissed the proceedings, and the petitioner appeals.

Argued before VAN BRUNT, P. J., and DANIELS and BARRETT, JJ.

Whellock & Simonds, (William C. Beecher and Alexander B. Simonds, of counsel,) for appellant. *Butler, Stillman & Hubbard*, (John Notman, of counsel,) for respondent.

BARRETT, J. The petitioner entirely misconceives the purpose and scope of sections 2706-2714, Code Civil Proc. These sections were not intended as a substitute for ordinary civil remedies, in cases where the latter are alone appropriate. The object was to provide a summary means of discovery, and, in case of a mere naked possession of the decedent's "money or other personal property," to compel delivery to the legal representative. In the case of money, it must be a specific sum, tortiously withheld,—not merely money due or belonging to the deceased in the sense of an indebtedness. *In re Nay*, 6 Dem. Sur. 346; *In re Knittel*, 5 Dem. Sur. 371. So as to personal property in general. It must be some definite thing, upon which the person proceeded against has no possessory claim, and which can be described in the decree. Section 2712. Thus, the executor or administrator is entitled, without delay, to make a full and complete inventory, to frustrate fraudulent concealment of the decedent's personalty and to reduce the latter to executorial possession. In effecting this purpose he has the efficient aid of the statute. Where, however, there has been neither concealment nor withholding, the executor should be remitted to his appropriate action. Even where there is a withholding the statutory proceeding must be dismissed upon the filing of a duly-verified answer, setting up ownership or possession by virtue of a lien or special property. Section 2710. In the case at bar the statute has been resorted to without a shadow of necessity. The administrator's remedy, even upon the facts stated in his petition, is plainly an action for an accounting. Upon the entire case, however, as presented by the answer,—and not in any way replied to or rebutted,—the application is wholly without merit. It appears that the petitioner long since filed an inventory which specifically included the very property now sought to be discovered. This proceeding was therefore unnecessary in aid of a proper inventory. It further appears that the petitioner left this very property in the respondent's hands under a special arrangement, fully authorizing its use, conversion, and reinvestment from time to time. It seems, too, that the securities in the respondent's hands when Mr. Cunard died have long since been converted under this very arrangement; for it is alleged that in September, 1883, the respondent paid to the petitioner individually the sum of about \$300,000, partly for himself and partly for a brother and sister of the deceased, as their proportion of the estate. Now, if the respondent has not fully accounted for his doings under the arrangement in question, the petitioner has, doubtless, his equitable remedy. But it is idle to speak of the assets which may yet remain in his hands unaccounted for as "money or other personal property" of the decedent withheld from the administrator within the meaning and spirit of this act. The application was an attempt to use this summary procedure to effect an end entirely foreign to the purpose for which the statute was designed. It was properly denied, and the order appealed from should be affirmed, with costs.

All concur.

PEOPLE v. GLYNN.

*(Supreme Court, General Term, First Department. November 7, 1889.)***1. ROBBERY—WHAT CONSTITUTES—FEAR.**

Under Pen. Code N. Y. § 224, providing that "robbery is the unlawful taking of personal property from the person, or in the presence, of another, against his will, by means of force or violence, or fear of injury, immediate or future," fear is a possible, but not necessary, element of the crime; and where property is taken by force or violence, in the presence of the captain of a vessel, a verdict of guilty, on trial for robbery, is warranted, notwithstanding evidence that the captain, when commanded under cover of a pistol to go below deck, threw the robber overboard, whereupon his accomplice jumped into a row-boat along-side, and it drew away.

2. SAME—FORCIBLE TAKING.

Though the property was taken without force or violence, yet where the evidence shows that it was in the boat, and carried from the presence of the captain by means of the force and violence used by its occupants, the crime is complete though the captain was ignorant that the property was in the boat.

Appeal from court of general sessions, New York county.

Indictment against William Glynn for robbery in the first degree. Pen. Code N. Y. § 224, provides that "robbery is the unlawful taking of personal property from the person, or in the presence of another, against his will, by means of force or violence, or fear of injury, immediate or future, to his person or property," etc. Verdict of guilty, and defendant appeals.

Argued before VAN BRUNT, P. J., and BARRETT and DANIELS, JJ.

Purdy & McLaughlin, (*Ambrose H. Purdy*, of counsel,) for appellant.
John R. Fellows, Dist. Atty., (*McKenzie Semple*, of counsel,) for the People.

VAN BRUNT, P. J. The evidence in this case shows that one Hiram Springfield was in October, about the 17th, 1888, the captain of a trading schooner, which was lying at the foot of One Hundred and Ninth street, East river, in this city. At midnight he, being in his cabin, heard a noise on deck. The cabin doors had been fastened with lashings on the inside. The captain shoved the door, but could not get out because of obstructions from the outside. A knife had been stuck through, and the inside lashings out. The captain then blew out the light, and went through the hold, and out on deck through the fore-peak hatch. Upon getting upon the deck he saw the appellant standing aft by the cabin door; also another man on deck, and a man in a row-boat along-side. The appellant pointed a pistol at the captain, and ordered him to go below, or he would blow his brains out, which injunction the captain does not seem to have heeded, because he says: "I took my chances, and slugged him, and he fell overboard, and the other man jumped into the boat, and it went away." They then pegged the captain with stones and brick-bats, so that he had to lay below the rail of the vessel to escape the missiles. After they had rowed away the captain examined the boat, and missed the articles which were claimed to have been stolen. The point made upon this appeal is that the evidence was insufficient to warrant the verdict, in that the acts proved do not constitute robbery. The indictment charged that the appellant, with force and arms, took the articles in question in the presence of the captain, against his will, by means of putting the said captain in fear of some immediate injury to his person.

It is urged, first, that there is no proof whatever that any property was taken in the presence of the captain, and that the evidence shows that the taking was not against his will, and that the property was not taken by putting the captain in fear; and it is urged that the facts show that the captain not only was not put in fear, but that he put his assailants, among whom was the defendant, in that condition of mind. It seems to be assumed that under the definition of "robbery," as contained in the Penal Code, fear is a necessary ingredient of the crime. But, as we read the Code, fear is not a necessary element, but may be an element which goes to make up the crime. "Robbery"

is defined to be "the unlawful taking of personal property from the person, or in the presence, of another, against his will, by means of force or violence." Fear does not enter into this definition. It is only in the third definition where the element of fear is mentioned,— "or fear of injury, immediate or future, to his person or property." Therefore, if the property in question was taken in the presence of this captain by means of force or violence, whether it produces fear or not, the crime of robbery was made out.

It is urged that the taking was complete at the time that the captain discovered the presence of the appellant and his associates upon his boat, and therefore nothing that was done afterwards could alter or change the nature of the offense. It seems to be clear that, although the thief may have procured possession of the property of another without force or violence, the removal of the property from the presence of that other, with force or violence, constitutes robbery. It is not stated in the definition of "robbery" that the owner or person in whose presence the property is removed shall know of its removal at the time. The fact that it is removed from such presence by means of force or violence constitutes the crime. Suppose a man should set his carpet-bag upon the sidewalk for some reason, and, two persons confederating to rob him, one should make an assault upon him while the other took out some of the contents of the bag, and shut it up so that it appeared to be in the same condition as before, and his assailants should then retreat, carrying the stolen property with them, the person robbed having no knowledge that his bag had been opened, and anything taken away, until after the thieves had entirely escaped, can there be any doubt but that the crime committed would be "robbery?" The facts in the case at bar seem to be exactly like this. The thieves used force and violence in order to be able to carry off the property which they had secured. There was ample evidence from which the jury could find that the property in question was in the boat, and was carried from the presence of the captain by means of the force and violence used by the men in the boat. The mere fact that the captain did not know that it was in the boat in no way altered the effect of these facts, as knowledge of the fact of removal from the presence by the person from whose presence property is removed is not a necessary ingredient of the crime. The judgment appealed from should be affirmed. All concur.

LAWTON v. LAWTON *et al.*

(*Supreme Court, General Term, First Department. November 7, 1889.*)

NEW PARTIES—AMENDMENT—FORECLOSURE OF MORTGAGE.

Code Civil Proc. N. Y. § 452, provides that when a person not a party to the action has an interest in the subject thereof, or in real property the title to which may in any manner be affected by the judgment, and makes application to the court to be made a party, it must direct him to be brought in by proper amendment. *Held*, that an order opening a decree of foreclosure and allowing a person who has a vested interest in the mortgaged property to become a party to the foreclosure action, but which imposes the conditions that she pay the referee's fees, giving a bond for the costs that may be taxed against her, and, if plaintiff desired it, consenting to refer the issues raised by her answer and try the cause on five days' notice, is erroneous to the extent of such conditions, in the absence of laches.

Appeal from special term, New York county.

Action by Susan R. Lawton to foreclose a mortgage made by George B. Lawton, her husband. On petition of Jennie Mull Allaire an order was made, opening the decree of foreclosure and allowing her to become a party to the foreclosure action on certain conditions. From that part of the order which imposes conditions, petitioner appeals.

Argued before VAN BRUNT, P. J., and BRADY and DANIELS, JJ.

E. W. Chamberlain, for appellant. *A. J. Perry*, for respondent. *J. L. Bennett*, for defendant Lawton.

BRADY, J. This is an action to foreclose a mortgage made by the defendant George B. Lawton to his wife, the plaintiff. The complaint was served on the defendant George B. Lawton, who voluntarily appeared on the same day. The defendant George B. Lawton, Jr., did not appear. Neither answer nor demurrer was served herein, and judgment was entered by the plaintiff's attorney on the 26th of April, 1889. The appellant, by petition verified May 11, 1889, obtained an order to show cause why the judgment should not be opened and she made a party to this action. Upon the argument which followed, an order was made at special term, on May 31, 1889, granting the petition on terms; but on failure to comply with them the motion was denied. The learned justice in the court below, under the provisions of section 452 of the Code, granted the application; and, upon the ground that the petitioner had a vested interest in the property which was described in the complaint, declaring in his opinion that the extent of the interest it was not necessary to determine,—it was enough that she had a substantial interest, and that she had such an interest was clear. The learned justice, however, thought it should be granted upon the conditions which he imposed, namely, paying the referee's fees, giving a bond for the costs of the action that might be awarded against her, and, if the plaintiff desired it, consenting to refer the issues raised by her answer and try the same on five days' notice. If she failed to comply with these conditions the application was denied. The learned judge erred in imposing the conditions. The section of the Code mentioned declares that when a person not a party to the action has an interest in the subject thereof, or in real property the title to which may in any manner be affected by the judgment, and makes application to the court to be made a party, it must direct him to be brought in by proper amendment. In *Haas v. Craighead*, decided in this department and reported in 19 Hun, 396, it was said that the section referred to was very comprehensive and peremptory. And in *Earle v. Hart*, 20 Hun, 75, the general term of this department said: "As to persons having an interest at the time of filing the *lis pendens*, the right to be made a party is absolute." And, the right being absolute, the court had not the power to impose the conditions mentioned. *Wood v. Swift*, 81 N. Y. 84. In that case a condition was imposed where the right to the remedy asked was absolute, and it was discarded as unlawful. See, also, *Tompkins v. Smith*, 62 How. Pr. 499, 89 N. Y. 602, declaring a kindred doctrine. The question involved herein has therefore been decided against the respondent. No successful answer to this view is presented on the record. Perhaps the only suggestion that could be made would be laches on the part of the petitioner; but this criticism in this proceeding cannot be made.

For these reasons that part of the order appealed from should be reversed, with \$10 costs and the disbursements. All concur.

MANHATTAN RY. CO. v. CORNELL.

(Supreme Court, General Term, First Department. November 7, 1889.)

CONTRACTS—INTERPRETATION—NEGLIGENCE.

A contract by which a contractor, who is about to extend a station platform for a street-railway company, agrees to indemnify the company for "any damages arising from injuries sustained by mechanics, laborers, or other persons, by reason of accidents or otherwise," does not require him to reimburse the company for damages paid for the death of one of the contractor's employees who was killed by the negligent operation of the company's engine.

Case submitted on agreed statement.

Argued before VAN BRUNT, P. J., and BRADY and DANIELS, JJ.

Samuel H. Benton, for plaintiff. Tallmadge W. Foster, for defendant.

DANIELS, J. The plaintiff entered into a contract with J. B. & J. M. Cornell for the extension of its station platform on its Sixth-Avenue line at Fifty-Eighth street, in the city of New York. The contract contains the agreement that (2) the contractor is to assume all liability for, and to indemnify the company against, all loss, cost, or damage, for or by reason of any liens, claims, or demands for materials, or from laborers, mechanics, and others, and from any damages arising from injuries sustained by mechanics, laborers, or other persons, by reason of accidents or otherwise, and from damages sustained by depositing materials, to the injury of the city or any person, including costs and expenses of defense; providing that they be duly notified of the bringing of such suits in such cases, and be permitted to defend the same by their own counsel, if they should so elect. While the work was in progress John Sullivan, who was a laborer in the employment of the contractor's firm, was struck by one of the plaintiff's engines, and so injured that he died on the sixth of March, 1886. His widow, as administratrix, brought an action against the plaintiff to recover damages for the killing of her husband, alleging that to have been caused by the negligence of the plaintiff. This action was not brought to trial, but it was settled for the sum of \$1,000, and, by the stipulation providing for the settlement, the contractors agreed that the settlement should be without prejudice to the company's right to claim indemnity for the amount paid, against them. There is, however, no reasonable ground for sustaining the position taken by the plaintiff that the defendant, who is the surviving member of the contractors' firm, should reimburse to it the moneys paid for bringing about this adjustment; for the accident by which Sullivan lost his life was the negligence of the plaintiff itself, and not of any person in the employment of the contractors. For while the language of this part of the contract is very general, it cannot reasonably be so construed as to impose upon the contractors the obligation to protect the plaintiff against the carelessness or negligence of persons in its own employment. What the parties designed and intended by this part of the agreement was to indemnify the plaintiff against liability for any damages or injuries that might be sustained by persons in the employment of the contractors in the progress and execution of their work. As to those injuries, they took the responsibility of loss upon themselves, and that they very well could be expected to do, inasmuch as they would proceed, if they occurred, from the acts of the contractors themselves, or persons in their employment. They had nothing whatever to do with the operation of the plaintiff's railway. The persons engaged in that pursuit were employed by the plaintiff itself. There was no relation whatever existing between them and the contractors, and it is not reasonable to suppose that in the use of this language either the plaintiff or the contractors intended or understood the latter to be obligated to indemnify the plaintiff against the carelessness or misconduct of its own servants or employees. The plaintiff has no legal claim against the defendant for indemnity arising out of these facts, and judgment to that effect should be directed in favor of the defendant, together with the costs. All concur.

SWART v. CENTRAL TRUST CO. *et al.*

(*Supreme Court, General Term, First Department. November 7, 1889.*)

DEPOSITARIES—ACTIONS—PAYMENT UNDER ORDER OF COURT.

Where a person claims money in the possession of a depository of court, and, on receiving notice that it is to be paid out under an order of court, calls at the depository's office, and attempts to secure a delay, and, on refusal, fails to apply for an order staying proceedings for the payment of the money, he cannot recover of the depository after it has been paid, though he commenced his action before payment, and his claim is entitled to priority over that paid.

Appeal from special term, New York county.

Action by Clarence F. Swart, the assignee of a judgment creditor, against the Central Trust Company and others to recover the remaining proceeds of a foreclosure sale of the judgment debtors' lands, which proceeds were deposited with defendant subject to order of court. Judgment for defendants, and plaintiff appeals.

Argued before VAN BRUNT, P. J., and BRADY and DANIELS, JJ.

Edward C. Perkins, for appellant. *James C. Colgate*, for respondents.

DANIELS, J. The suit was commenced and prosecuted by the plaintiff as the assignee of a creditor who had recovered a judgment against Emily B. Oakley and Angeline Thompson in the city court of the city and county of New York. An execution had been issued upon this judgment, and returned wholly unsatisfied, and the object of the action was to obtain the appropriation of moneys to the payment of the judgment, which had arisen out of the foreclosure of a mortgage and sale of lands belonging to Emily B. Oakley, one of the judgment debtors, and which was on deposit with the defendant, the Central Trust Company. This land had been conveyed by her in 1883 to Daniel Thompson and Angeline Thompson. That deed was alleged to have been fraudulent and void as to the judgment creditors of the grantor, and it was so held, upon proof maintaining that fact, upon the trial of this action. Prior to the conveyance of the land, Emily B. Oakley executed the mortgage which had been foreclosed, and under the judgment in that action the premises had been sold. A surplus remained after the payment of the amount due upon the mortgage. This surplus, pursuant to the rules and practice of the court, had been paid over to the chamberlain of the city of New York, and by him deposited with the Central Trust Company. This had been done pursuant to the directions contained in rules 61 and 68 of the general rules of practice. While the money was on deposit in this manner, and pursuant to an order of the court, so much of it was paid out by the trust company as satisfied the claims of Daniel and Angeline Thompson, leaving a residue amounting to the sum of \$568.54, out of which the plaintiff claimed the judgment assigned to him should be satisfied. This action to obtain that object was commenced on the 25th of November, 1887, and the summons and complaint served upon the trust company, and on the 30th of November, 1887, an order was made, at a special term of this court, in the foreclosure action, directing the moneys on deposit with the trust company to be paid over to the persons for whose benefit the deposit was made. A copy of the order directing that payment to be made, countersigned, as rule 70 of the general rules of practice required it to be, was served upon the Central Trust Company, and, pursuant to that order, the money was paid over to the attorneys for those parties on the 3d of December, 1887.

According to the disposition which was made of the controversy concerning the title to the land, the plaintiff, as a judgment creditor, was entitled to have that judgment paid out of these moneys in preference to the children of Daniel and Angeline Thompson, whose attorney received it. But neither that preference nor the effect of the judgment creditor's action entitled the plaintiff to maintain this suit against the trust company, for the money was in its possession only as the designated depository of the court. It had been received in court as the result of legal proceedings regularly producing it, and it had been placed under its authority in the possession of the trust company, to be disposed of by its subsequent order. The company was bound to conform its conduct to the order which the court should make, and it did so by the payment which was made of this money; and the fact that the plaintiff, by his summons and complaint served upon the company, made an adverse claim to the money, in no way prevented that disposition of it. What should have been done to prevent the money from being paid out in this manner, under the order of the court, was an application on behalf of the plaintiff for

an order staying proceedings for the payment of this money by the trust company. And such an order would no doubt have been made if the plaintiff had applied for it, and he had an abundant opportunity to make that application; for he was informed by Mr. Hyde, the second vice-president of the company, that the money was on deposit, and that it would be paid over whenever an order was made directing that to be done. Mr. Hyde also promised to inform the plaintiff when the order should be served, and he was so informed of service of the order when he himself called afterwards at the office of the company. He then desired delay in the payment of the money. But that was declined, for the reason that the company was bound to comply with the terms of the order. The failure to retain the fund in such a condition as would leave it available to the plaintiff's action was owing to his omission to act when the opportunity for that purpose was presented to him.

The case of *Schrauth v. Bank*, 86 N. Y. 390, does not support this action, for there the money was paid out by the bank under an entirely different order. It was not in court, subject to its special direction, as the money now in controversy was, and its payment was accordingly not protected by the order which had been obtained without notice to the party afterwards contesting the legality of the payment; while in the present case the money was in the possession of the trust company, by the direction of the court to be paid out precisely as it was paid when the attorney acting for the parties afterwards received it; and that, under the case of *People v. Randall*, 73 N. Y. 416, was a protection to the company. As to a payment made in that case under the order of the court by the chamberlain, it was held that he was entitled to protection; and the same principle which will protect the chamberlain for the payment of money under these circumstances will protect the company holding it, as this money was held, subject to the order of the court. The failure of the plaintiff results from his own inaction, and for that the trust company in no sense became liable. The judgment should be affirmed, with costs. All concur.

NEWMAN v. NEW YORK, L. E. & W. R. Co.

(Supreme Court, General Term, First Department. November 7, 1889.)

1. FALSE IMPRISONMENT—PROBABLE CAUSE—PERSON IN DISGUISE.

In an action for the alleged wrongful arrest of plaintiff by an officer in the employ of defendant, it appeared that plaintiff had on a rubber suit, and a hood which concealed his face down to his mouth, with openings for his eyes; that he wore false whiskers; and that he had in his possession a paper box containing oily rags, several wax tapers, and some bottles of a liquid substance. *Held*, that the question whether the officer was warranted in concluding that plaintiff had committed or was about to commit a felony was for the jury.

2. SAME—INSTRUCTIONS.

Where plaintiff testifies that he was detained by a sergeant during the night, at the instance of defendant's officer, but the officer denies this, and the sergeant testifies that the officer did not request him to detain plaintiff, but that he did so because he did not think his explanation satisfactory or that he ought to release him, it is improper to refuse to instruct that if the officer did not request the detention the company is not liable for the damages caused thereby.

3. SAME—EXEMPLARY DAMAGES.

Where it appears that the arrest was made in good faith, upon suspicion deemed to warrant the same, a refusal to instruct that, there being no evidence of malice, the plaintiff was not entitled to recover exemplary damages, and an instruction that if the officer, in making the arrest, acted carelessly, and in wanton disregard of plaintiff's rights, the jury might award exemplary damages, are improper.

Appeal from circuit court, New York county.

Appeal from a judgment on a verdict for plaintiff, and from an order denying a motion for a new trial.

Charles Steele, for appellant. *J. Delahunty*, for respondent.

DANIELS, J. The jury rendered a verdict in favor of the plaintiff for the sum of \$500, as damages for his arrest and detention by the act of a person in the employment of the defendant as a detective. The arrest was made at the depot of the defendant, where the plaintiff was awaiting the departure of a train on which he had purchased a ticket and sleeping berth to Lackawaxen. After his arrest he was taken before a police sergeant and detained in custody during the night, and upon his examination on the following morning and his identification by a reputable citizen of New York he was discharged by the justice. The cause assigned for his arrest was his general suspicious appearance. The evidence as to this was obtained in some degree from the plaintiff himself, but it was chiefly given by the witnesses sworn on behalf of the defendant. The detective who is alleged to have made the arrest, or directed the making of the arrest, testified that the plaintiff had on a rubber suit, and a hood, part of which came down upon his face, leaving his mouth and that part of it right under his nose only visible; that there were holes in the hood through which he could see; that he had a mustache on, which was on one side, and the witness pulled it off, and when his cap was off he could see that he had false whiskers. He was regarded as a suspicious and disorderly person, and for that reason the arrest was made. In his possession was a paper box which contained bottles of liquid substances, rags in an oily condition, and 8 or 10 wax tapers; and upon these facts he was detained by the sergeant before whom he was taken. The court held the arrest to have been without legal authority and unlawful, and for which the defendant was liable in damages if it was made by an officer of the defendant employed for this purpose. This ruling of the court seems, under the authorities, to have exceeded the legal rule, for there were circumstances in the case, connected with the plaintiff's appearance and the contents of the box in his possession and the statements made by him, from which it might be inferred that he was a person who either had committed, or was contemplating the commission of, a crime. At least, the evidence upon this subject was sufficient to present that inquiry to the jury, and the court was in error in taking it from their consideration by the decision which was made. It did not appear what was the law in the state of New Jersey upon this subject; but, as the common law is presumed to prevail there, the officer was authorized to make the arrest if the facts were such as to indicate the plaintiff to have been either a criminal or a person contemplating the commission of a felony. This principle was considered in *Beckwith v. Philby*, 6 Barn. & C. 635, where it was held that an officer was authorized to make the arrest and detention of an individual when there was reasonable cause to suspect that he had either committed a felony or was about to commit one, having in his possession the implements proper and necessary for that purpose; and whether the party arrested was accompanied by such circumstances as to warrant the belief that he was a criminal, or probably intended the commission of a felony, was a question for the jury, and not for the court. The same general principle was followed in *Lawrence v. Hedger*, 3 Taunt. 14, and it has the sanction of *Eanes v. State*, 6 Humph. 53, and *Holley v. Mia*, 3 Wend. 350. In that case it was declared to be the law that if no felony was committed by any one, and a private individual arrests without warrant, such arrest is illegal, though an officer would be justified if he acted upon information from another which he had reason to rely on. *Id.* 353. And this was approved in *Burns v. Erben*, 40 N. Y. 463, 469. And to the like effect is 1 Hil. Torts, 220, 221, and cases referred to in note. Whether the officer, who was in the employment of the company, was excused for making the arrest, if he in fact made it at all, was therefore for the jury to consider and decide under the evidence. If his appearance, under the circumstances, was such as to justify the careful conclusion on the part of the

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officer that the plaintiff had either committed a felony or was about to commit a felony, then he was excused for making the arrest, although it turned out that the suspicion was unfounded.

The plaintiff's testimony was to the effect that he was detained by the sergeant during the night at the instance of the officer in the employment of the defendant. The testimony of the officer was to the contrary,—that he made no complaint against the plaintiff; and that of the sergeant was that the officer did not request him to detain the plaintiff, but that he did so for the reason that he did not consider his explanation was satisfactory, or that he ought to let him go. The court, in view of this evidence, was asked to direct the jury, if they should be of the opinion that Brown arrested the plaintiff, that the defendant was not liable for such damages as were caused by the action of the sergeant (Wohlleben) or Justice STILSING in detaining him, unless they believed that Brown requested that also. The court declined so to charge, and to that the defendant excepted. This point was considered in *Lock v. Ashton*, 18 Law J. Q. B. 76, and the court there held that the defendant was not liable for damages for the detention of the plaintiff by the magistrate himself. And this authority appears to have entitled the defendant to this instruction from the court. From the time when the plaintiff was taken before the sergeant he was subject to his control and direction; and if he, in the discharge of his duty and the exercise of his authority, considered the case to be one requiring the further detention and examination of the plaintiff, it was his act, and not that of the defendant. If, on the contrary, the detention was produced by the instigation or urgency of an officer in the employment of the defendant having authority on its behalf to make the arrest, then the defendant would be liable for the damages sustained by this continued detention of the plaintiff; and the case should have been in that manner submitted to the jury, instead of the subject being withdrawn, as it was, from their consideration by this refusal to charge.

The court also charged the jury that if Brown, the officer in the defendant's employment, arrested the plaintiff, and in making the arrest acted recklessly, and with wanton disregard of the rights of the plaintiff, that then the jury might award damages by way of punishment of the defendant,—what is called "exemplary damages." The defendant's counsel requested the court to direct the jury that, there being no evidence of malice, the plaintiff was not entitled to recover beyond his actual pecuniary loss, and was not entitled to recover exemplary or punitive damages. These requests were refused, and exceptions were taken to the refusal, as well as to the charge given by the court. The evidence failed to establish the fact that there was any ill will or malice, or wanton disregard of the plaintiff's rights, in making the arrest. It appeared, on the other hand, to have been made in good faith, upon the suspicion, deemed to be warranted by the circumstances, that he was either a criminal or a person contemplating the commission of a crime; and under this evidence no case was presented for the allowance of exemplary damages. Upon that subject the exceptions were well taken. The judgment and order should be reversed, and a new trial directed, with costs to the defendant, to abide the event. All concur.

LEVY *et al.* v. MUTUAL LIFE INS. CO.

(Supreme Court, General Term, First Department. November 7, 1889.)

1. INSURANCE—RIGHTS OF INSURED—INJUNCTION.

A policy-holder sued to enjoin the company from buying certain land and from erecting a building, and to compel it to sell land already acquired, on the ground that it was exceeding its charter rights and was rendering itself liable to a forfeiture. The complaint failed to allege an intention to buy the land, and showed that the building was already in progress of erection. It did not show that a sale of the land acquired could properly be made, or that such sale could be made with-

out injury to defendant, nor did it show that plaintiff would suffer in any way by the action of the company, or that its assets would not meet all liabilities if the charter were forfeited. *Held*, that the complaint should be dismissed.

2. SAME—ACTION—PARTIES.

An action for such purpose, if maintainable at all, should be brought against the officers or trustees of the company, and not against the company itself.

Appeal from special term, New York county.

Action by Samuel Levy and another against the Mutual Life Insurance Company, for an injunction. A demurrer to the complaint was sustained, and plaintiffs appeal.

Argued before VAN BRUNT, P. J., and BRADY and DANIELS, JJ.

James A. Dennison, for appellants. *Robert Sewell*, for respondent.

DANIELS, J. It appears by the complaint that two policies of life insurance were issued by the defendant upon the life of Samuel Levy, for the benefit of his wife. They amounted, together, to the sum of \$30,000; and, as a ground of action, it was alleged that the defendant, which was incorporated under an act of the legislature of this state passed April 12, 1842, had purchased land and was engaged in the erection of a building upon it, as an addition to a building previously erected and owned by it, and that this was in excess of, or beyond, the authority conferred upon the company by its charter, and exposed it to an action by the attorney general for its dissolution. No special injury to either of the plaintiffs, or any other person taking insurance from the defendant as a mutual insurance company, was alleged or shown by the complaint. It was not stated that the ability of the defendant to meet these, as well as all its other engagements, was or would be in any respect diminished or affected by the acquisition of the land or the erection of the building. But the sole peril to the plaintiffs was the possibility, or remote probability, that the attorney general, for this exercise of authority, might institute and maintain an action to dissolve the company and forfeit its corporate rights. But, even if that should be done, no allegation was made of any apprehended inability to pay the amount of its policies out of the assets of the company; and it did not appear, consequently, that either of the plaintiffs had been, or would be, in any respect subjected to an injury requiring redress through an action on their part. And under this state of facts the case of *Uhlman v. Insurance Co.*, 109 N. Y. 421, 17 N. E. Rep. 363, seems to be in principle a direct authority against the action. The relief for which the plaintiffs applied by their complaint was that the defendant and its officers should be enjoined and restrained from further purchasing real estate to enlarge or add to the building in which its principal office was situated. But no statement was made in the complaint that any intention existed to purchase or acquire such additional real estate; and, in the absence of that allegation, there was no reason for invoking the interposition of the court to prevent such a purchase. A further object of the complaint was to enjoin and restrain the defendant from erecting or making the additions proposed to its building, and in process of erection. But no case was presented by the facts for this relief; for it appeared by the complaint that the company was already engaged in erecting and putting up the building, and no benefit whatever, either to the plaintiffs or to the company, would result from restraining its progress. On the contrary, it may well be inferred from what has been set forth in the complaint that such a restraint or interference would be not only an injury to the company, but might be to the plaintiffs themselves. A still further object of the action was a requirement that the directors of the company, who were not parties to it, should sell and dispose of the real estate which in this manner had been acquired. But a direction to make that sale and disposition has not been maintained by anything contained in the complaint. It does not appear that it could properly be made in the condition in which the work upon the land had been placed at the time of the commence-

ment of the action, or that such a sale could be made without detriment or injury to the defendant, or that any loss or prejudice whatever would result to the plaintiffs if it should not be made. Whatever was done in the acquisition of this land and the commencement of the building is reasonably to be inferred to have been done by the officers or trustees of the company. If any misconduct has taken place, it has been the misconduct of these persons, and the action should have been against them, if it could be maintained at all, for the vindication of any rights which had accrued to the plaintiff, and the protection of the corporation itself. They, and they alone, are the wrong-doers, if a wrong has been perpetrated and the powers of the company have been exceeded; and, as wrong-doers, the action should have been for their restraint, and not that of the company, which apparently has no more then submitted to what these officers have and are endeavoring to accomplish. The judgment in the action was right, and it should be affirmed, with costs. All concur.

LYON *et al.* v. DAVIS *et al.*

(*Supreme Court, General Term, First Department.* November 7, 1839.)

CHANGE OF VENUE.

An order for change of venue to the county where the cause of action arose will not be disturbed where the affidavits show with reasonable certainty that the convenience of a majority of the witnesses who will be sworn will be thus suited.

Appeal from special term, New York county.

Argued before VAN BRUNT, P. J., and BRADY and DANIELS, JJ.

Freeman & Green, for appellants. *H. H. Hustis*, for respondents.

VAN BRUNT, P. J. An examination of the papers in this case fails to disclose an error made by the court below in changing the place of trial. That the convenience of a majority of such of the witnesses who are sworn to in the affidavits as will be examined in the trial will be consulted by having the trial in Dutchess county, where the defendants reside, and where the cause of action, if any, arose, seems to be established with reasonable certainty. The order appealed from should be affirmed, with costs. All concur.

WATTS v. ADLER.

(*Supreme Court, General Term, First Department.* November 7, 1839.)

PARTNERSHIP—ACCOUNTING—WHEN ACTION LIES.

In an action for an accounting between partners it appeared that on the termination of the partnership there was a settlement; that there was no fraud; and that the only evidence of mistake was as to a single item. Evidence of outstanding assets and liabilities was excluded, on the objection of both parties that it was competent only on the accounting. *Held*, that the complaint was properly dismissed. DANIELS, J., dissenting.

Appeal from special term, New York county.

Action by James R. Watts against Samuel B. Adler for an accounting. The complaint was dismissed on trial, and plaintiff appeals.

Argued before VAN BRUNT, P. J., and BRADY and DANIELS, JJ.

Tredwell Cleveland, for appellant. *Jacob P. Miller*, for respondent.

VAN BRUNT, P. J. I cannot concur in the conclusion arrived at by Mr. Justice DANIELS. The court below found upon competent evidence that upon the termination of the copartnership the accounts between the partners were settled and liquidated, and notes given for the balance due, and that there was no fraud or mistake by which such settlement could be impeached. The only evidence as to any mistake related to a claim for rent,—a single item. There was no proof of outstanding assets or other liabilities, and if there was only

one unsettled item between the parties no accounting was necessary, as an action at law would be by one partner against the other, to recover one-half of the amount. There was no exception taken to the exclusion of evidence upon the ground that the evidence was only competent upon an accounting, and this objection was made by both parties. The judgment appealed from should be affirmed, with costs.

BRADY, J., concurs.

DANIELS, J., (*dissenting*.) The action was brought for an accounting of the affairs and business of the parties as copartners. Upon a preceding trial the complaint was dismissed on the ground that no cause of action for an accounting was presented by it. An appeal was taken to the general term from the judgment, where the complaint was regarded as sufficient in its statements for an action of this description, and the judgment was reversed and a new trial ordered. *Watts v. Adler*, 13 N. Y. St. Rep. 553. It appeared that a settlement had taken place between the parties after the dissolution of the partnership, and notes had been given by the defendant to the plaintiff, which he had negotiated and passed into the hands of other persons. But this settlement on behalf of the plaintiff was claimed to have been only partial in its character; and evidence was proposed to be obtained from him, as a witness, establishing the fact to be that other liabilities of the firm remained outstanding and unsettled, and that accounts due to it were unpaid. This evidence, in part, at least, was objected to by the defendant's counsel, and it was excluded by the court, for the reason that it was more proper to be received and considered upon the accounting itself. The plaintiff, therefore, had no opportunity of making this proof, showing the necessity for an accounting before the court. And at the close of the evidence the complaint was dismissed, apparently upon the ground that no action for an accounting, as the proof presented it, existed in favor of the plaintiff. But, as there were unsettled dealings of the partnership still outstanding, although not specifically proved, to that extent the action was well founded. The relations and business of the parties were confidential, as they usually are among partners; and, when a disagreement shall arise in their adjustment, courts of equity have uniformly taken the jurisdiction of the controversies, and settled them according to the rights and liabilities of the parties. *Marvin v. Brooks*, 94 N. Y. 71. It has the ability, which a court of law has not, to inquire into and investigate, not only the relations of the parties, but their rights to participate in the division of the profits of the firm, and their obligations to satisfy and extinguish its liabilities. These attributes all form a part of the decree directed to be entered in this class of cases; and the fact that the parties had largely settled their affairs prior to the commencement of the action formed no objection to their completion and adjustment through its intervention. It was not requisite that the notes should be returned, and the settlement, as far as it had been carried out, rescinded; but what was necessary in the action was to settle and take the accounting for that which still remained uncollected and unpaid and unadjusted between the parties. And, even if the case had been such as to be capable of being made the subject of an action at law, still, as the objection was not presented by the answer served, it had been waived by the defendant. *Truscott v. King*, 6 N. Y. 147, 165. The judgment should be reversed, and a new trial ordered, with costs to the plaintiff to abide the event.

*In re BAYER'S ESTATE.**(Supreme Court, General Term, Fifth Department. October 19, 1889.)***REFERENCE—FINDINGS OF REFEREE—ADMINISTRATOR'S ACCOUNTS.**

Code Civil Proc. N. Y. § 1023, providing that before a referee has rendered a decision he may make findings of fact or rulings on questions of law, thereby prohibiting him from making them afterwards, applies only to issues arising on pleadings, and not to special proceedings; and a surrogate may send back a referee's report on the accounting of an administrator for further findings on material questions of fact which the evidence tends to support, and on which the report is silent, though no requests to find were submitted before the report.

Appeal from surrogate's court, Monroe county.

Accounting of Edward Bayer, administrator with the will annexed of Martin Bayer, deceased. The account, as rendered by the administrator, was contested by one of the legatees named in the will, and the issues were referred to a referee to hear and determine, and report thereon. On the coming in of the report, and before the same was confirmed by the surrogate, the administrator made an application to have the same sent back to the referee to pass upon certain questions of fact not ruled upon in his report. This motion was denied by the surrogate, upon the sole ground that he had no authority to make the order, and was prohibited from granting the application by section 1023 of the Code of Civil Procedure, which provides that before the cause is finally submitted to the referee, or within such time afterwards, and before the report is rendered, as the referee allows, the attorney may submit in writing a statement of the facts which he deems established by the evidence, and of the rulings upon questions of law which he desires the referee to make, and that at or before the time when the report is rendered, the referee must note in the margin of the statement the manner in which each proposition has been disposed of, as no requests to find had been submitted to the referee prior to making his report. The report was confirmed, and the administrator appeals.

Argued before BARKER, P. J., and DWIGHT and MACOMBER, JJ.

J. M. Dunning, for appellant. *George F. Yeoman*, for respondent.

BARKER, P. J. Before the questions presented by this appeal relative to the merits are considered, an error in procedure should be corrected, so that the appellant may be able fully to present his case on the state of facts which he insists were fairly established by the evidence presented to the referee. The appellant had been by the order of the surrogate removed as administrator of the estate of the decedent, and ordered to render an account of the moneys which he had received and paid out, in his representative capacity. We think the learned surrogate was mistaken in supposing that the provisions of section 1023 were applicable to this case, and that he had no power to remit to the referee his report for further findings on questions of fact. The findings of fact, as contained in the report, are very general, and from them it is impossible to determine how the referee disposed of certain material questions of fact, for which the appellant contended, and which the evidence tended to support. After the order was made refusing to send back the report, the respondent moved for its confirmation, and the surrogate modified the report by crediting the appellant with an item of \$100, and, as modified, confirmed the same. We are unable to find any statute denying the surrogate the power, when a proper case is made, for sending back to the referee the report to make corrections, and to pass upon questions of fact not noticed in his report. It was the settled practice of this court, prior to the adoption of section 1023, when the referee's report failed to pass upon the material questions of facts involved in the issues, to require him to do so upon application of either party. That section provides that when the referee has rendered a decision he shall not thereafter make additional findings of fact or rul-

ings on questions of law. *Formerly v. McGlynn*, 84 N. Y. 284; *Gardner v. Schwab*, 84 Hun, 582; *Bank v. Levy*, 41 Hun, 461. The provisions of this section, prohibiting the court or referee from making further findings of fact or rulings on questions of law after the decision or report has been made, is limited in its application to cases where the issues arise in an action on the pleadings, and are not applicable to special proceedings. When questions of fact arise in any stage of the action except on the pleadings, which the court is required to determine, and a referee has been appointed to try and determine the same, the court, on the coming in of the report, has the undoubted right, in a proper case, to send the same back to the referee to pass upon material questions of fact not determined by the report, or to set aside the report, and order a retrial before the court. Such references are ordered for the purpose of informing the court as to the facts of the case, in the matter pending before it, and, if the report is unsatisfactory for any reason, a further hearing may be ordered. The class of cases in which a reference may be ordered by the court with or without the consent of the parties, for the purpose of aiding it in disposing of questions of facts, are enumerated in sections 1015, 1215, Code. It is provided in section 1232 that in such cases, where the reference has been executed, either party may apply for an order directing a new hearing, upon proof by affidavit that error was committed to his prejudice, upon the hearing or in the report, and in a proper case the application may be granted after judgment has been rendered. In such a case the judgment may be set aside, either then or after the new hearing, as justice may require. These rules are made applicable to all special proceedings in surrogate's court, except for the probate or the revocation of the probate of a will. In section 2546 it is provided that the surrogate may, in his discretion, appoint a referee to take and report to the surrogate the evidence upon the facts, or on specific questions of fact; to examine an account rendered; to hear and determine all questions arising upon the settlement of such an account, which the surrogate has power to determine; and to make a report thereon, subject, however, to confirmation by the surrogate. It is also provided, in the same section, that the referee has the same power as a referee appointed by the supreme court for the trial of an issue of fact in an action, and that the other provisions of the Code applicable to a reference by the supreme court apply to a reference made as prescribed in this section, so far as they can be applied in substance, without regard to the form of the proceedings. There are other provisions on this subject indicating very clearly that the provisions of section 1023 do not apply to this case. It is declared, in section 2545, that when a trial takes place before a surrogate, and a case is made by an aggrieved party, for the purpose of reviewing the rulings and proceedings of the surrogate, either party may, on the settlement of the case, request a finding upon any question of fact, or a ruling upon any question of law, and an exception may be taken to each finding or ruling. When questions of fact are tried before a referee, he, on the settlement of the case, also has the power, and it becomes his duty, to pass upon all requests made for additional findings, either of fact or of law. The referee is, to all intents and purposes, the surrogate, so far as respects the trial of the issues before him, and the mode and manner of settling a case prepared for the purpose of reviewing his findings. *In re Niles*, 14 N. Y. St. Rep. 538. There it was stated by the learned judge who prepared the opinion of the court that findings of fact are to be presented in the settlement of the case where the issues are tried before the surrogate according to section 2545 of the Code, and that that provision applies when the case is tried by a referee. As the appellant in his moving papers made a case for the exercise of the judgment of the surrogate, whether the report of the referee should be sent back for further findings, he was entitled to a decision of his action on the merits, and the surrogate erred in holding that he had no jurisdiction to entertain the application. If the referee had made the addi-

tional findings of fact, which the appellant requested and which the evidence tended to support, it is not at all clear that the surrogate would have confirmed his report. After perusing the evidence, it cannot fairly be said that the denial of the appellant's application for further findings did not affect the decree from which the appeal is taken, and the order is here to be reviewed, as provided in section 2571.

It is also stated, as indicating the effect which the order denying the motion may have had upon the subsequent proceedings, that, on the settlement of the case, the appellant presented requests in writing for further findings, which the referee refused to pass upon, for the reason that they were not presented to him before he made his report, and that it was then too late for him to entertain the same. Upon the facts, as found by the referee, interesting legal questions are presented, which have not been examined with the attention which their importance demands. As there seems to be no other way to cure the error we have pointed out but to reverse the decree of the surrogate, as well as the order denying the application to send the case back to the referee for further findings, the decree and the orders are both reversed, with the costs of this appeal to abide the final award of costs. All concur.

WILLIAMS *et al.* v. FOLSOM *et al.*

(Supreme Court, General Term, First Department. November 7, 1889.)

DEPOSITIONS—OF PARTY.

A complaint alleged that plaintiffs were induced to convey property for a certain price to J., the wife of one of the defendants, who were real-estate agents, by means of misrepresentations that they could thereby sell it more advantageously, and that defendants shortly afterwards sold it for a larger price; and plaintiffs sued for the difference. *Held*, that an order for the examination of defendants before trial, granted on an affidavit stating that their testimony was desired for use on the trial, to show that J. was not a *bona fide* purchaser, but acted for defendants; that defendants received offers for the property which they did not communicate to plaintiffs; that they failed to take proper steps to sell the property; and that the sale for the larger price was made to a certain person, and for defendants' benefit,—was erroneous, where no reason was suggested for supposing that defendants could not be had as witnesses on the trial, as the statement did not show that the prosecution of the action depended on the examination of defendants before trial.

Appeal from special term, New York county.

Action by Louisa Williams and others against Samuel D. Folsom and others. An order was made for the examination of defendants before trial, and from an order denying a motion to vacate the former order defendants appeal. For former reports, see 3 N. Y. Supp. 681; 5 Id. 211.

Argued before VAN BRUNT, P. J., and BRADY and DANIELS, JJ.

Davenport, Smith & Perkins, (Geo. Putnam Smith, of counsel, for appellants. *Carter, Hughes & Cravath*, (Henry B. Gayley, of counsel,) for respondents.

DANIELS, J. An order was heretofore made in this action for the examination of the defendants, and upon the denial of the motion to vacate it an appeal was taken to the general term, and the order was vacated because of the insufficiency of the case made in its support. 5 N. Y. Supp. 211. The case as it has been presented for the other order does not so materially differ from that previously presented as to remove it from the controlling effect of this decision. The action has been brought for damages arising out of the alleged misconduct of the defendants as real-estate agents in and about the sale of property owned by the plaintiffs. It has been alleged that they were induced to convey the property to the wife of one of the defendants by means of misrepresentations made concerning their ability to obtain a better purchaser for it and their ability to sell it upon more advantageous terms, (the price for which it was sold was the sum of \$97,000,) and shortly after its con-

veyance in this manner a sale was made of it to another person for the sum of \$110,000; the claim being that the defendants should be held liable for this difference. In the affidavit on which the order has been made, it has been stated in support of the application "that plaintiffs desire the testimony of said defendants for the purpose of use upon the trial, and to prove, among other things, the following facts: That said Jessie Folsom was not a purchaser in good faith and for value of the premises hereinbefore referred to, but acted for the benefit of defendants; that defendants received offers for the purchase of said premises which they did not communicate to plaintiffs, or either of them; that they failed to take the necessary and proper steps for the sale of said property, but conceived the idea of purchasing it themselves, or for their own benefit, at an inadequate price; that within a short time after the contract of sale hereinbefore mentioned was signed by the plaintiff Williams said property was resold to said Fred. J. Stone at a price of \$110,000; and that said sale was for the benefit of defendants, or some of them, and not for the benefit of said Jessie Folsom. That the foregoing are merely some of the matters upon which the testimony of the defendants is required."

But from this statement it nowhere appears that the proper prosecution of the plaintiffs' action will be in any manner dependent upon their ability to obtain the examination of the defendants before the trial itself shall actually take place. No reason has been suggested for even supposing that the defendants will not be as accessible as witnesses in the action when the time for the trial shall arrive as they are at the present time, and no necessity accordingly exists for their examination. Certainly, they will not be required to prove the price for which Mr. Stone purchased the property, for he will be a competent witness to make that proof; and, as to the facts that the defendants received offers for the premises not communicated to the plaintiffs, or that they failed to take the necessary and proper steps to make a suitable sale of the property, which are the only additional circumstances proposed to be proved by them, there is no reason for supposing that they may not be as well proved by the examination of the defendants upon the trial as by taking their testimony previous to that time. And proof of as much as that was considered to be required for the support of the order in *Jenkins v. Putnam*, 106 N. Y. 272, 275, 12 N. E. Rep. 613. The cases of *Miller v. Kent*, 59 How. Pr. 321; *Judah v. Lane*, 12 N. Y. St. Rep. 181; *Dyett v. Seymour*, 2 N. Y. Supp. 841; and *Frothingham v. Railroad Co.*, 9 Civ. Proc. R. 304,—are entirely distinguishable from the application which was made for this order; for in each of them it was made to appear that a knowledge of facts which could only be obtained by the examination of the opposite parties was essential to enable the plaintiffs to proceed with the prosecution of the action. They were facts, too, of such a description as were required to be known before the trial itself, while here no necessity whatever exists, or has been shown, for obtaining the evidence of the defendants prior to the trial of the action. The cases are so common where parties are required to be examined, at the instance of their adversary, for an application to be made either for the purpose of annoyance or the mere discovery of what may be the evidence expected to be encountered upon the trial, that it has become necessary to apply reasonably strict rules for the support of these proceedings. It is quite clear from the case as it has been stated in the complaint and in this affidavit that no necessity exists for the examination of these defendants prior to the time of the trial. The order should therefore be reversed, with \$10 costs and the disbursements. All concur.

HORTON v. CHILDS et al.*(Supreme Court, General Term, First Department'. November 7, 1889.)***CONTRACTS—WAIVER OF CONDITIONS—FORECLOSURE SUIT—SET-OFF.**

Plaintiff contracted to sell to defendant land over which ran the tracks of a railroad company. He gave to defendant a sealed instrument by which he agreed within 80 days either to have the tracks removed or to procure from the railroad company the execution of a lease to it, authorizing the lessor [plaintiff] to obtain possession within 80 days, and to indemnify defendant from all loss by the encroachments of the track, including loss of profits in any future transaction. The price was partly paid, and a mortgage given for the residue. Defendant instructed plaintiff's attorney to satisfy his own attorney as to the form of the lease. Plaintiff failed to procure the lease or remove the tracks for 10 months, when defendant's attorney wrote to plaintiff's attorney, suggesting that the proposition for a lease be not submitted to the company till he could hear from defendant whether he would take a lease at a substantial rent. Before this letter defendant contracted to sell the land to one who refused the title on account of the encroachment of the tracks. Held, that defendant did not waive the element of time in the sealed contract, and could set-off his loss by failure to sell the land, in a suit by plaintiff to foreclose the mortgage.

Appeal from special term, New York county.

Action by James M. Horton against William H. Childs, and one Bauer, to foreclose a mortgage. Judgment for plaintiff, and defendants appeal.

Argued before VAN BRUNT, P. J., and BRADY and DANIELS, JJ.

R. S. Newcombe, for appellants. John M. Scribner, for respondent.

VAN BRUNT, P. J. On the 14th day of May, 1887, the plaintiff entered into a contract for the sale to the defendant of the property which is the subject of this foreclosure suit for the sum of \$160,000, part of which was to be paid by a mortgage upon the premises in question. The property was in an open part of the city, and the streets were not clearly defined, and when the parties came together to close the contract the attorney for the purchaser objected to the title because it appeared by a recent survey of the premises that the car tracks of the Eighth Avenue Railroad Company were running across the property. The attorney for the plaintiff, to meet this objection, exhibited a couple of letters bearing date the 3d of August, 1887,—one from the secretary and treasurer of the railroad company, in which it is stated that the company had examined certain maps, and from them it appeared that their tracks encroached on the land of the plaintiff, and, if this was correct that they would remove the tracks at any time on 80 days' notice; and one from the plaintiff, in reply to the secretary and treasurer of the company, acknowledging the receipt of the letter of that date, and stating its substance, and concluding with the statement that he agreed to those terms, and accepted the corporation as a tenant at a nominal rent. These letters evidently not having been considered sufficient to constitute a lease between the Eighth Avenue Railroad Company and the plaintiff which could be enforced, the plaintiff gave to the defendant an instrument under seal, reciting the fact that he had sold to the defendant a block of land upon which the tracks of the railroad company encroached, and that, in consideration of the payment by the defendant of the purchase price of the lands, the plaintiff agreed within 30 days thereafter either to obtain the execution by said railroad company of a lease of said premises in a form satisfactory to the defendant, containing the privilege to the lessor to recover possession of the premises on 90 days' notice, or to have the tracks entirely removed from the lands; and in said agreement the plaintiff expressly covenanted and agreed to indemnify and save harmless the said defendant of and from all loss and damage from the encroachment of said tracks, including loss of profits in any future transaction in respect to said lands. The title to the property was then closed by one Childs, to whom the defendant had assigned the contract, executing a bond and mortgage for part of the purchase money; the cash required by the contract being paid by the defendant, and a

deed duly executed and delivered by the plaintiff to the defendant Childs. Mr. Childs in this transaction was simply acting for Mr. Bauer, and upon the next day conveyed the premises to him, subject to the purchase-money mortgage. At the time of closing the contract the defendant Bauer spoke to the plaintiff's attorney respecting the form of the lease that might be proposed to be executed by the railroad company, and told the attorney to endeavor to get a lease that would satisfy his attorney, Mr. Beers,—a more formal one than the documents produced, (referring to the letters,)—and to take his instructions from Mr. Beers. Up to the 25th of January, 1888, no lease had been secured; and the defendant wrote to his attorney, Mr. Beers, stating that he was entitled to a lease dated back, and obligations and conditions in said lease to commence to be in force 30 days after the title was closed, in accordance with Mr. Horton's bond of indemnity for the same, and that it was sufficient if the lease was made between the company and Mr. Childs, the owner of record. On the next day Mr. Beers wrote to Mr. Waite, the counsel for the plaintiff, stating that he would be glad to see the form of the lease before he submitted it to the company. Afterwards, on or about the 1st of March, 1888, Mr. Waite presented a form of lease to Mr. Beers, in which proposed lease some changes were made by Mr. Beers. The next we hear of this matter is on the 8th of March, when Beers wrote to Waite as follows: "I would suggest that you do not finally submit to the railroad company the proposition for a lease until I can hear from Mr. Bauer, to know if he is willing or not to take a lease at a substantial rent." On the day preceding this last letter Mr. Bauer had entered into a contract to sell to a man by the name of Borger at a price largely in advance of that at which the premises had been bought by the defendant, and upon the maturity of this contract Borger declined to take title solely because of the encroachment of the tracks thereon. Subsequently, Bauer not having paid the interest upon the bond and mortgage, the plaintiff commenced this action to foreclose the mortgage, and defendant, among other things, set up as a counter-claim the damages sustained by reason of the loss of Borger as a purchaser. The learned court below decided that this counter-claim could not prevail, because it was Beers' act in seeking delay that prevented Waite from proceeding with the negotiations he was then carrying on with the railroad officials, and because it could not be disputed, had the lease been signed before the rejection of the title, that the plaintiff would have done all that was required of him by the agreement; the element of time being waived by the clear understanding of the parties, as shown by the correspondence.

In this conclusion we think that the learned court committed a fatal error. That time was of the essence of this contract in regard to the removal of this encroachment appears clearly upon the face of the contract. Neither Bauer nor Childs, his representative, could have been compelled to take title under the contract with these railroad tracks upon the land. They were entitled upon delivery of the deed to immediate possession of the whole and every part of the premises conveyed. The plaintiff could not give possession, and knew that he could not, and, in order to induce Bauer to close the contract, he made this instrument under seal, which is in the nature of an indemnity, by which he agreed to hold Bauer harmless from any damage which he might sustain by reason of those tracks being there. It was not intended that the matter should remain open for any length of time, because the plaintiff agreed to do one of two things within 30 days,—either to procure a lease or to have the tracks removed; in other words, to remove this incumbrance from the property. That was to be done within 30 days; and, in addition, to indemnify Bauer, and hold him harmless from any loss or damage which might arise. This evidently applied to the term of 30 days, because, if he kept the first part of his agreement, then Bauer could not sustain any damage whatever by reason of the existence of these tracks, because either he would have given a lease to the railroad com-

pany to keep the tracks there, or they would have been removed; the object also being, undoubtedly, to recognize the superior title of the landlord, so that there would be no difficulty in taking summary proceedings to oust the company upon the terms contained in the agreement of lease. Therefore, when the plaintiff allowed the 30 days to expire, and the lease had not been obtained nor the tracks removed, he was in default. We have searched the record in vain to find any waiver of this default. It is true that, as late as the 25th or 26th of January, Bauer signified his willingness to take the lease; but he could not have been compelled to take it. A man may be willing to do a thing when he cannot be compelled to do it. The plaintiff was not in a position to compel him to take the lease, to relieve himself from the penalties contained in the instrument under seal. The only point, then, upon which the waiver of Horton's default can hinge is the letter of Beers of the 8th of March, in which he directs Waite not to finally submit the lease to the railroad company until he could hear from Bauer, to know whether or not he was willing to take a lease at a substantial rent. This letter was an express recognition that Mr. Beers had not the authority to act. He was simply the attorney of Bauer for the purpose of determining as to the form of the lease; and, although the learned counsel for the respondent claims that Bauer told Waite he was to take all his instructions from Beers in adjusting the lease matter, we fail to find any evidence tending to sustain any such proposition. The evidence to which reference is made is simply a reference to Mr. Beers as to the form of the lease. Waite's testimony is: "He told me to endeavor to get a lease that would satisfy Beers,—a more formal one than the documents then produced; to take my instructions from Mr. Beers." It certainly would be stretching of the words far beyond their natural elasticity to say that under such an authority Waite had any right to suppose that Beers had the authority from Bauer to waive any of the rights which he had acquired under the instrument in writing under seal which he had obtained from Horton. At the time of the writing of this letter Horton had been long in default, and there was nothing throughout the whole of this transaction which authorized Waite or Horton to suppose that Beers had the right to release Horton from the performance of his contract, or waive any rights which Bauer had acquired by reason of the default. It is claimed by the learned court below in its decision that it would be unconscionable to allow Bauer to permit this contract to be extended, and then to claim the default. There does not seem to have been presented upon the face of this record any reason for this undue delay upon the part of the plaintiff. He was anxious to have the defendant Bauer take this title. He was willing enough then, in order to get rid of the property and obtain Bauer's cash, to make all sorts of promises. But he seems to have been exceedingly slow in fulfilling the obligation entered into in the most solemn manner. It does not seem to us that rights acquired under an instrument under seal can be disposed of in this way by an attorney who is simply to determine as to the form of a lease, and who has no further or other authority. As already stated, upon the face of this letter Mr. Beers informs Mr. Waite that he has not the authority to act, except upon further instructions from Mr. Bauer. He had no other authority than to settle the form of the lease, which was to carry out the provisions of the letters between Horton and the railroad company. The court below properly held that the letters did not constitute a lease. It was so understood by the parties, because the letters were there present; and, if they had been considered sufficient, the agreement in regard to the lease was not necessary. It was clear they had in contemplation something more formal, upon which Bauer could rely, and until the plaintiff procured that he had not performed his contract; and there is nothing to show that Bauer in any way extended the time to the plaintiff to perform, any more than by being willing some months after the term limited in the contract had expired to accept a lease. We do not think that there was anything whatever in the authority

conferred by Bauer upon Beers, so far as this evidence shows, which justified the conclusion that he had any authority to waive any default made by the plaintiff in respect to the terms of this agreement under seal. It is found by the court that the contract between Borger and Bauer was made in good faith, and it is evident that the reason why the judgment was rendered against him was because the court was of the opinion that Beers had the authority to waive rights which the defendant had acquired by reason of his agreement under seal with the plaintiff.

Under these circumstances, we think the court took an erroneous view of the legal rights of these parties, and that the judgment must be reversed, and a new trial ordered, with costs to appellant, to abide event. All concur

PIERSON v. CRONK.¹

(*Supreme Court, General Term, First Department. November 7, 1889.*)

1. CONTRACT—INTERPRETATION—INSURANCE COMPANIES.

One insurance company passed under control of another by virtue of a contract whereby the latter agreed to fulfill contracts entered into by the former with policy-holders, "to the same extent and in the same manner as if no change * * * should take place." *Held*, that this was not a contract to pay in any event what might be due on the policies, but to fulfill the contracts the same as if no change had occurred, and that a receiver of the former company could not sue on a guaranty of such contract without showing that the former company would have been solvent if the consolidation had not occurred, or that the failure of policy-holders to obtain redress resulted from the mismanagement of the other company.

2. RECEIVERS—ACTIONS.

Where the receiver applied for and obtained an order to bring suit on the guaranty, he cannot maintain such suit on the ground of the misappropriation of assets of the company by defendant.

Appeal from circuit court, New York county.

Action by Henry R. Pierson, receiver, against Andrew W. Morgan, on a contract of guaranty. Defendant having died pending the action, it was revived against his administratrix, Justine M. Cronk. From a dismissal of the complaint, plaintiff appeals.

Argued before VAN BRUNT, P. J., and BRADY and DANIELS, JJ.

Raphael J. Moses, Jr., for appellant. *P. H. Vernon*, for respondent.

DANIELS, J. This action has been brought by the plaintiff as receiver of the Widows' & Orphans' Benefit Life Insurance Company. It was created as a corporation under the laws of this state, and authorized to make insurances upon lives. On the 8th of March, 1877, the corporation was dissolved by a judgment of this court, upon the application of the attorney general; and this action was brought by the receiver appointed upon the dissolution of the corporation, to recover the amount unpaid upon policies of insurance issued by the company. To maintain the action against the intestate, who died during its pendency, a proposal made by him as president of the Mutual Protection Life Insurance Company, and by the vice-president and secretary of that company, to the trustees of the Widows' & Orphans' Benefit Life Insurance Company, on the 5th of March, 1871, was read in evidence. By this proposal an offer was made to purchase the majority of the stock of the Widows' & Orphans' Company, and substantially to consolidate it with the Mutual Protection Life Insurance Company. This proposal, to that extent, was accepted as a basis for the consolidation of the two companies. The stock to the amount required for this purpose was purchased by the officers of the Mutual Protection Life Insurance Company; a majority of the directors or trustees of the Widows' & Orphans' Company resigned, and others, selected for that purpose by the Mutual Protection Life Insurance Company, were

¹ Affirming 5 N. Y. Supp. 58.

elected as their successors; and in this manner the Widows' & Orphans' Company was placed under the control and management of the Mutual Protection Life Insurance Company. The latter company afterwards transferred its assets to still another company, which finally became insolvent. The plaintiff averred the intestate to have become liable for the payment of the amounts left unpaid upon the policies of the Widows' & Orphans' Company, by reason of a contract entered into as a part of the proposal, the performance of which was guarantied by him. In support of the appeal it has been alleged that the plaintiff was also entitled to maintain the action because of the misappropriation of the assets of the Widows' & Orphans' Company; and provisions of the statute of this state have been referred to as sustaining this theory. But it is sufficient, by way of answer to this position, to say that the action was not brought in that form. It was upon an alleged guaranty of the proposed contract of the Mutual Protection Company that the complaint was formed; and that this was the understanding at the time when the action was about to be commenced appears from the petition made for leave to commence and prosecute it. That petition applied for a direction for the receiver to "bring an action against the guarantors upon the said contract, or that your petitioners may have leave to commence such action in his name as receiver, for their benefit and the benefit of such other policy-holders of said Widows' & Orphans' Company who may come in and contribute to the expenses of such proceeding, upon giving indemnity to said receiver in such sum as to the court may seem just." The order which was made pursuant to the application was of the same tenor, for it authorized the applicants "to commence a suit in behalf of themselves, and of others similarly situated, in the name of Henry R. Pierson, receiver of the Widows' & Orphans' Benefit Life Insurance Company, upon the guaranty in said petition set forth." There was no misunderstanding, therefore, as to the nature of the proceeding intended to be taken when the application and order were made, and the complaint itself discloses no other intention than to proceed upon the alleged guaranty, as the ground of action; and, unless the plaintiff can maintain the right to recover in the action upon the guaranty, it necessarily must fail, as it was held that it should at the circuit. 5 N. Y. Supp. 58.

In the proposal which formed the basis of the consolidation of the widows' & Orphans' Company with the Mutual Protection Life Insurance Company this statement was made: "It need hardly be said—but for greater clearness we do say, and thereto pledge ourselves—that the contract obligations entered into by the Widows' & Orphans' Company with its policy-holders and others, of every name and nature, will be rigorously fulfilled, to the same extent and in the same manner as if no change such as is contemplated should take place." And following the proposal was added this guaranty: "In consideration of one dollar to each of us paid, and for other valuable considerations as thereunto moving, we hereby individually and collectively guaranty the fulfillment of the agreement in the foregoing letter of the Mutual Protection Life Insurance Company,"—which was subscribed by the intestate, as one of the parties to it. The effect of these two instruments was carefully considered in *Wise Morgan*, 13 Daly, 402. That was an action brought by a policy-holder in the Widows' & Orphans' Company, to recover the amount unpaid upon it under this guaranty; but it was held by the court that the action could not be maintained—*First*, for the reason that the guaranty itself did not inure to the benefit of the individual policy-holders; and, *secondly*, for the reason that it contemplated no more than the faithful management and administration of the affairs of the Widows' & Orphans' Company by the officers to be placed in charge after the consolidation should be effected. This case was afterwards appealed to the court of appeals, and the judgment was affirmed in 103 N. Y. 682. The present action differs from the case then before the court in the circumstance that it has now been brought by the receiver, not only represent-

ing the Widows' & Orphans' Company, but also its policy-holders and other creditors. He is in a situation, therefore, where, if this contract could be legally construed to create a pecuniary obligation for the payment of the amounts mentioned in the policies for whose recovery the suit has been brought, it might be maintained. But no such obligation as that appears to have been intended to be entered into, either by the Mutual Protection Life Insurance Company itself or by the persons subscribing this guaranty. What the officers of the Mutual Protection Company proposed to do was to fulfill the policy contracts, as well as others, of the Widows' & Orphans' Company, to the same extent and in the same manner as that would have been done if no change in the way of a consolidation should take place. It was not proposed, in any event, to pay what might become due upon the policies of the Widows' & Orphans' Company, but to fulfill the contracts the same as though the change which was contemplated should not be brought about; and that is all that the intestate himself became liable for by subscribing the guaranty, as he did, at the foot of the proposal. There was no pecuniary obligation assumed, in any event, to pay the policies; but the agreement was to manage the affairs of the consolidated companies in such a manner that the holders of policies in the Widows' & Orphans' Company should be in the same condition as though no consolidation had been projected. And the difficulty in the way of maintaining the plaintiff's action seems to arise out of the circumstance that proof was not given at the trial that the Widows' & Orphans' Company would have been in any better pecuniary condition than it was at the time when the receiver was appointed if this consolidation had not taken place. It was shown that the pecuniary condition of the Widows' & Orphans' Benefit Life Insurance Company on the 1st of October, 1871, was then such as to exhibit its ability to pay off the amounts mentioned in its policies; and further proof was given to the effect that the Mutual Protection Life Insurance Company was not in that pecuniary or solvent condition. But no evidence was given tending to establish the fact that it was by reason of this disparity then existing in the pecuniary situation of the two companies that these policy-holders were prevented from securing the payment of the amounts for which the company became liable. There may have been a remote probability that such was the fact, and that if it had not been for the consolidation of the two companies the persons represented by the receiver might have been paid the amounts maturing upon their policies; but this was in the nature more of conjecture than proof, and the case was left in that condition where the court could very well hold that the failure of the holders of these policies to obtain indemnity did not result from any failure in the management and conduct of the affairs of the Widows' & Orphans' Company, or that the company would have been in a solvent condition if this consolidation had never taken place. Proof of one of these facts was essential, under the agreement and the guaranty entered into, to entitle the plaintiff to maintain this action; and, inasmuch as it was not given in the case, the court was justified in dismissing the plaintiff's complaint. The judgment should therefore be affirmed. All concur.

MACDONALD *et al.* v. WALLSTEIN *et al.*

(*Supreme Court, Special Term, New York County. November 1, 1889.*)

FRAUDULENT CONVEYANCES—ACTIONS TO SET ASIDE—PLEADING.

A general creditor cannot maintain an action to set aside judgments confessed and transfers of property made by his debtor, as being in violation of the general assignment act of New York, where the complaint discloses no intention by the debtor to make an assignment.

Action by Robert Macdonald and others against Anna Wallstein and others. Defendant Wallstein demurs to the complaint.

Blumenstiel & Hirsch, for plaintiffs. *Benno Loewy*, for defendants.

PATTERSON, J. The complaint in this action sets forth that the plaintiffs are creditors of the defendants Wallstein & Heineman, and that such defendants were copartners in business, and being in failing circumstances, and intending to give up their business, on the 21st day of May, 1889, confessed various judgments to parties named in the complaint, and conspired with other defendants to evade the statute regulating general assignments, and restricting preferences in such assignments to one-third of the assets of the assignors; and that with such intent they transferred all their outstanding accounts to one of the defendants; and that the persons who received the confessions of judgments and transfers of property knew that the debtors were insolvent, and also knew that the debtors intended, by means of such transfers, to evade the provisions of the general assignment act, and that the judgments and transfers were made and given in order to devote more than one-third of the assets of the insolvent firm to the preferential payment of debts.

The only ground upon which the action is based, therefore, is an attempted evasion of the provisions of the general assignment act, as that act now reads. There can be no claim that the complaint may be regarded as an ordinary creditors' bill, as the plaintiffs, not being judgment creditors with executions returned unsatisfied, are not in the position to file such a bill. No authority is shown to support this action, unless those cases in which it has been held by this court at special term, and by the supreme court of the United States in the case of *White v. Cotzhausen*, 129 U. S. 329, 9 Sup. Ct. Rep. 309, that voluntary transfers of property, made contemporaneously with the general assignment, may, according to the circumstances of the case, be regarded as part of the act of assignment; so that an assignee, or, in case he declines, a creditor at large, may bring an action in aid of the assignment, to have the property thus voluntarily transferred brought under the operation of the assignment, and to set aside such transfers,—may be considered as affecting this case. But there is nothing in any of the cases referred to which gives support to such an action as this. There was no intention whatever, so far as this complaint discloses, on the part of the debtor firm to make an assignment for the benefit of creditors. On the contrary, it appears that they did not intend to take advantage of the general assignment act; and there is nothing in that act which compels debtors in failing circumstances to resort to its provisions, and to put their property in the hands of a trustee for creditors. The provisions of that act only apply to cases in which an assignment is made, and the interdiction upon preferences relates only to preferences made in the instruments authorized by that act. There is nothing in it which changes the general rule of law, existing in this state, that a debtor may prefer a creditor by confession of judgment, or by the absolute transfer of property. There can therefore be no such thing as evading a statute by which the party performing the act complained of is not bound, and is not required by law to follow. That these confessions of judgment and transfers may be fraudulent, and may be set aside by a plaintiff properly in court, is not the question here. The sole question is whether or not a general creditor may maintain an action to set aside such judgments and transfers, as being in violation of the terms and provisions of the assignment act. I think there can be no doubt that the general assignment act does not apply at all; and therefore the demurrer must be sustained, and judgment thereupon ordered in favor of the defendant demurring, with costs.

BANDMANN v. JONES.

*(Supreme Court, General Term, First Department. November 7, 1889.)***DEPOSITIONS—OF PARTY—APPLICATION.**

An application by defendant to examine plaintiff, in an action for libel, before trial, under Code Civil Proc. N. Y. §§ 870, 872, relating to taking depositions of parties before trial, and the contents of the affidavit therefor, which states that the answer intended to be made is the general denial, and that the facts set forth in the alleged libel are true, and that it is necessary to examine plaintiff concerning these facts, without averring that they are not within defendant's knowledge, or readily attainable by him, is insufficient.

Appeal from special term, New York county.

Action for libel by Daniel E. Bandmann against George Jones, as treasurer of the New York Times, a joint-stock association. Defendant obtained an order for the examination of plaintiff before trial, which plaintiff moved to vacate. His motion was denied, and he appeals. Code Civil Proc. N. Y. § 870, relates to taking the deposition of a party to an action before trial, and section 872 specifies what shall be the contents of the affidavit for such examination.

Argued before VAN BRUNT, P. J., and BRADY and DANIELS, JJ.

Benno Loewy, for appellant. *Townsend, Dyett & Einstein*, for respondent.

DANIELS, J. The action has been brought for the publication of an alleged libel in the New York Times, and the order was made for the examination of the plaintiff, upon the statement that his testimony is material and necessary for the defendant in the defense of the action, and to enable him to prepare his answer. The facts concerning which it is stated to be necessary to examine the plaintiff are those which are set forth in the alleged libelous publication, and the answer intended to be made is stated to be that of a general denial, and that the facts set forth in the alleged publication are true. But neither of these statements, nor all of them taken together, indicate the existence of any necessity for examining the plaintiff as a witness in the action before trial. It has not been set forth that the facts upon which the answer is designed to be made are not at present within the knowledge of or otherwise readily attainable by the defendant. The presumption, on the contrary, is that they must be within his knowledge, or had been obtained by him, or others in the employment of the association, before the time when this publication was made. From the statement made in his own affidavit, and that of the attorney added to it, they can be accepted as entirely truthful and reliable, and still no probable necessity for the examination of the plaintiff in this manner has been disclosed. The defendant certainly has the ability to deny the allegations in the plaintiff's complaint without such an examination, and so if the facts have come to his information justifying the publication he may also allege the truth of the publication, without in any manner being dependent upon evidence to be derived from the plaintiff. If this cannot be done, the least that can be expected is that the affidavits should disclose such a state of facts. There can be no difficulty, in an application of this description, for the party, in whose behalf it may be made, to state why it becomes necessary to examine the opposite party; and, if the applicant has not already the information to be acquired, that readily admits of a distinct statement to that effect. It was equally so as to the necessity of acquiring further information for the purposes of the proposed pleadings, or to prepare the case for trial. And the additional statement may also readily be made where the facts will justify it, showing the party's dependence upon evidence to be procured in this manner for the attainment of one or the other of these objects. As much as that is required by the authorities applicable to applications of this character. It is true that in the case of *Herbage v. City of Utica*, 109 N. Y. 81, 16 N. E. Rep. 62, the broadest possible discretion has been stated to exist for the

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making of this class of orders. But this decision does not appear to be in harmony with what was decided in the same court in *Jenkins v. Putnam*, 106 N. Y. 272, 12 N. E. Rep. 613, where it was stated in the opinion followed by the court that "the affidavit is required to disclose the nature of the action, and to set forth that the testimony of the party is material and necessary, and the judge must be able to see from the facts stated that the testimony is material and necessary. If from the nature of the action and the other facts disclosed he can see that the examination is not necessary for the party seeking it, then it cannot be supposed that it was the legislative intent that he should be obliged, nevertheless, to make the order. Here there is no allegation in the affidavit showing that the facts were not perfectly known to the defendant, or that it was important for him to have the testimony of the plaintiff before the trial, or that he had any reason to apprehend that he could not have his examination at the trial." The construction in this manner to be placed upon the provisions of the Code are in strict harmony with the decisions which have generally been made by this court upon the same subject, and seem to meet the necessity of the case, rather than the wide and unlimited range of discretion mentioned in the later authority. In *Strakosch v. Publishing Co.*, 6 N. Y. Supp. 246, an application, supported by affidavits substantially the same as those used in this action, was held not to be sufficiently sustained for the support of an order for the examination of the plaintiff. And *Balcom v. Adams*, 2 N. Y. Supp. 255, supports this construction of the law, and so does *Kirkland v. Moss*, 11 Abb. N. C. 421; *Weston v. Reich*, 1 N. Y. Supp. 412; and *Williams v. Folsom*, 5 N. Y. Supp. 211. And *Dudley v. Publishing Co.*, 6 N. Y. Supp. 388, in no manner extends these rulings; for there it was shown to have become necessary, by the examination of the plaintiff, to identify the letter which was published with the one written by him. Under the rule which has been settled and followed, although not uniformly, yet by most of the authorities, the order which has been made in this case cannot be sustained, but it should be reversed, with the usual costs and disbursements. All concur.

In re FLORANCE'S WILL.

(Supreme Court, General Term, First Department. November 7, 1889.)

DOMICILE OF WIFE—SEPARATION FROM HUSBAND.

A wife who lives apart from her husband for 12 years by mutual consent, during which time their children live with her, and are wholly supported by her, the husband living in another state, and contributing nothing to the support of the wife or children, acquires a domicile in the state where she lives, so that the husband's rights in her property at her decease are governed by the laws of that state, and not of the state where the husband resides.

Appeal from surrogate's court, New York county.

Motion to vacate the probate of the will of Rosalie Florance. The motion was made by the husband of deceased, who appeals from an order denying the same.

Argued before VAN BRUNT, P. J., and DANIELS and BARRETT, JJ.

George H. Yeaman, for appellants. Chas. E. Miller, for executors, respondents. Edward W. Sheldon, for United States Trust Company, as trustee under will. Meyer Butzel, special guardian, pro se.

VAN BRUNT, P. J. This application is a renewal of one made in June, 1888, pursuant to leave duly given. It appears from the papers before the learned surrogate that the petitioner and appellant resides in the city of Philadelphia, state of Pennsylvania, and that he was the husband of Rosalie Florance, who died on October 12, 1887, in Europe. That in November, 1887, the last will and testament of said Rosalie was filed for probate with the surrogate of New York, and at the same time a petition was presented alleging

that she had been previous to her death a resident of the county of New York. A citation was duly issued to and served upon all persons entitled to notice, including the petitioner, to attend the probate of the will. That the petitioner neglected to appear, and the said will was admitted to probate, and letters testamentary issued thereon. The petitioner stated in his petition that he did not attend the probate of the will, because he did not suppose that any of his rights would be affected thereby, and that within a week or so after said probate the petitioner learned that said will had been improperly probated, in that the deceased was not a resident of New York at the time of her death, and he was advised by counsel that steps should be taken to modify and correct said probate; that thereupon, on June 21, 1888, a petition was presented to the surrogate's court, upon which a citation was issued, and such proceedings had that in October, 1888, the motion was denied; and that pursuant to leave granted the petition in question was presented in December, 1888. It further appeared that the petitioner and said Rosalie were married in the year 1860, and in the city of New York, where she was born, and had always resided up to the time of her marriage to the petitioner. That the petitioner and his said wife then went to Philadelphia to live, and resided there until 1873, when they broke up housekeeping, and resided in various places. In the fall of 1875 the petitioner and his wife finally separated from one another, he making his home in Philadelphia, and she, with three children, in New York; she taking care of and maintaining them. The said Rosalie, from her savings of some property left her, accumulated some \$60,000, which comprised her estate at her death. The petitioner claims that, as no legal separation had taken place between them, although they had lived apart for 12 years, the residence of his wife was that of her husband, viz., Pennsylvania, and that by the laws of said state he was entitled to share in her estate, which would not be the case, were she a resident of New York.

The whole claim of the plaintiff is based upon the old rule that a woman in marriage acquires the domicile of her husband, and changes it with him. It is admitted that a wife may procure a separate domicile for purposes of divorce, but it seems to be claimed that such domicile cannot be procured for any other purpose. The old rule in reference to a married woman's domicile cannot certainly prevail, in view of the rights which are recognized to be hers by the statutes. The property relations between husband and wife have been entirely changed since the rule in question has obtained, and the reasons for the rule no longer exists. The wife is now a distinct legal entity, having in the disposition of her property all the rights, and even more, than a husband has ever possessed, and the husband has no control whatever over her movements or her disposition of her property. In the case at bar it appears that, in 1875, the petitioner and his wife agreed to separate; she to take their children and maintain them. They did separate, he going to Philadelphia, and she living in New York, which had been her home before marriage, and supporting their children from her own means. There is no pretense that the petitioner ever contributed a cent to the support of his wife or their children since 1875, or offered to do so, and the best that he can say in his petition is that he never refused to provide a home for his said wife or her children in the city of Philadelphia. Probably he was never asked to do so, and consequently did not refuse; but he nowhere alleges that he offered to provide a home for his wife and children anywhere, and probably he did not. They had agreed to live separated, and she had agreed to support herself and her children. She then, by and with his consent, acquired a domicile in New York; made that her home, and that of her children; and certainly, if she was enough of a resident to institute divorce proceedings, as is conceded, she is enough of a resident to leave her property to her children, and to be protected from the claim of a husband with whom she had not lived for 12 years, and who has not during that time either contributed or offered to contribute to her support or to that

of their children, and who desires now, under a legal fiction, to take away from his own children a portion of their mother's inheritance. The motion was decided correctly by the learned surrogate, and the order appealed from should be affirmed, with costs to each of the parties appearing as respondents. All concur.

STARR v. STARR *et al.*

(*Supreme Court, General Term, First Department. November 7, 1890.*)

1. WILLS—CONSTRUCTION—RENTS OF LAND.

A testator bequeathed to his wife, for life, one-third of the use and income of his land, without alluding to taxes and other expenses, and directed his executors to lease the remaining two-thirds, and out of the rents "to pay all taxes, expenses, and repairs, and all other charges thereon," and to divide the residue between his children, for life, "and, after their death, I do devise and bequeath the same to their heirs, in fee, forever." *Held*, that the widow was entitled to one-third of the rents and profits, undiminished by taxes or other expenses.

2. SAME—DEVISE IN LIEU OF DOWER.

The devise of one-third of the rents and profits of the land to testator's wife will be deemed in lieu of dower, as it would otherwise partly defeat the disposition made by the will of the rents and profits of the other two-thirds.

3. ESTOPPEL—IN PAIS—VOLUNTARY PAYMENT.

Where, before suit, plaintiff agreed with four of the children to relinquish her claim of dower, in consideration that the other parties acknowledge her right to one-third of the gross profits of the land, and thereafter the money is voluntarily paid to and received by plaintiff, under a claim of right, the parties to the agreement are estopped from recovering money respectively claimed or paid under it.

Appeal from special term, New York county.

• Action by Nathan S. Starr against Sarah M. Starr and others for the partition of two parcels of land. From an interlocutory and a final judgment Sarah M. Starr appeals.

Argued before VAN BRUNT, P. J., and BARRETT and DANIELS, JJ.

Albert Mathews, for appellant. *Theodore H. Silkman* and *Frederick H. Mann*, for respondent.

DANIELS, J. The plaintiff's right to maintain the action for the partition and sale of the two parcels of real estate described in the judgment has not been questioned. But, as a part of the judgment which has been recovered, the defendant has been declared to be liable for moneys received by her as a tenant for life, and which she has been required in part to refund to the plaintiff, and in part to other defendants in the action. These moneys for which she has been held liable represent taxes and other charges upon one-third of the two parcels of real estate. They were owned by her husband at the time of his decease. He left a will, including in the fourth and sixth paragraphs a disposition of these parcels of land. By these paragraphs it was declared: "*Fourth*. I give and bequeath to my wife, Sarah Maria, the use and income of one third part of my house and lot of land, situate and lying in the city of New York, and known as number seven Great Jones street; also, one-third of the use and income of my store and lot of land in the city of New York, and known as number five Barclay street, during her natural life. *Sixth*. I authorize and direct my said executors, or such of them as shall take upon themselves the execution of this will, the survivor or survivors of them, to lease or rent that portion of my real estate not heretofore devised, being two-thirds of my house and lot of land known as number seven Great Jones street, also my store and lot of land known as number five Barclay street, from time to time to collect the rents and income thereof, to pay all taxes, expenses, and repairs, and all other charges thereon, and to divide the residue of the income thereof, and pay the same in equal portions to my five children, Nathan S. Starr, Harriet W. Barry, Zalomon W. Starr, Mary E. Starr, Frederick A. Starr, during their natural lives; and after their death I do devise and be-

queath the same to their heirs, in fee, forever." And the persons in the management of the property, under the authority of the executor, paid over to the defendant, as the widow, one-third of the gross rents or profits of these two parcels of land. It was held at the trial that this was an unauthorized disposition of such proceeds, so far as taxes and the expenses of necessary repairs were paid upon this one-third; and that for the amounts received by her, to this extent, she should be held accountable to the other parties who, by the sixth paragraph of the will, were interested in the estate.

But in the fourth paragraph the use and income of one-third of these parcels of land were unqualifiedly devised to the widow. It is true, if this devise stood by itself, and was all that was contained in the will relative to her life-estate, that she might legally be obliged to bear the necessary expenses of keeping her one-third of the property in repair, and of paying the taxes and assessments upon that third. But by the sixth paragraph the testator appears to have had this subject particularly in mind. His attention was directed to these charges, and to the propriety of making a provision for their payment in the will; and, if he had been disposed to subject this third to the payment of any part of these charges, it is reasonable to suppose that he would have so declared in the fourth paragraph of his will. But he failed to do that, or to make any allusion whatever to this subject. That was reserved for the sixth paragraph, by which the other two-thirds of the rents and profits of these parcels of land were directed to be disposed of; and by the directions which he then gave, his executors, or the survivor of them, were required, out of the rents and income of the other two-thirds of the land, to pay all taxes, expenses, and repairs, and all other charges thereon, and to divide the residue of the income thereof among his children. His intention was not clearly expressed by the employment of this language, as it was used. But it was sufficiently so to support the inference that the taxes, expenses, and repairs were not intended to be divided, but were to be wholly paid out of the proceeds of the rents and profits of this two-thirds of the land. If that had not been the testator's design, it is reasonable to believe that a direction concerning this subject would have been inserted in the fourth paragraph of the will. Or if it had been the intention to leave the burden of taxes and repairs on the property as that should be imposed upon it by law, then it may be presumed that no reference whatever to the payment of taxes and expenses would have been inserted in any part of the will. That, however, was not his design; but it was to provide for the payment of taxes and expenses out of the income of the property. And from that income his direction was, to his executors, to pay all taxes, expenses, and repairs, and charges thereon. Literally, it is true, this would confine the payments to the taxes and expenses of the two-thirds. But the language employed by the testator is not required to be taken and construed literally, where, from other parts of the will, and the objects he probably had in his mind, such a construction would not be warranted. And, in this instance, the circumstance that he gave to his widow, without qualification, the use and income of one-third of this property, and confined his directions concerning the payment of taxes and expenses to the income of the other two-thirds, are indications that he intended she should be allowed to receive one-third of the gross amount annually yielded by the land, and that the taxes and expenses should be paid from the other two-thirds. This is confirmed by the final direction, that after the decease of his children he devised and bequeathed the property to their heirs, in fee, forever. This devise he could not have intended to restrict to the two-thirds previously mentioned in the paragraph. His purpose was to dispose of his estate by his will; and, in conformity with that purpose, this final clause of the paragraph should be construed to include the entire estate in these parcels of land, and to entitle the heirs of his children, not only to the two-thirds reserved for their benefit, but also to the one-third in which he created the life-estate for the

support and maintenance of the widow. And, under this construction of the will, she has received no more out of the income of the property than she was entitled to under the directions given by the testator.

The testator died in December, 1856, and previous to the 18th of October, 1858, a controversy had arisen in which she claimed to be entitled to dower in the land, in addition to her right to one-third of the rents and profits; and an action was brought by her to establish that right. But, as the real estate of the testator consisted wholly of these two parcels of land, it is to be inferred from the directions contained in the will that he intended those made in favor of the widow to be in lieu of dower; for he disposed of the entire rents and profits, as well as of the fee, of the other two-thirds of the property. And it would defeat that disposition, in part, as it was directed, to hold her to be entitled to dower in this land, in addition to her right to receive one-third of its income; and, where that is found to be the case, there the directions contained in the will are required to be construed as excluding the right to dower. *In re Zahrt*, 94 N. Y. 605; *Konvalinka v. Schlegel*, 104 N. Y. 125, 9 N. E. Rep. 868.

But while this controversy remained unsettled an agreement was made between the widow and four of the children of the testator for its adjustment, and that agreement, though not specially set forth in the answer, was received, by apparent consent, upon the hearing; and, by the agreement, her right to receive one-third of the rents and profits of the land, undiminished by taxes or expenses of repairs, was conceded and agreed to. The plaintiff subscribed this agreement. It was made to adjust a dispute between these parties and the widow, and included the controversy as it existed between them; she surrendering her claim for dower, and the other parties agreeing to her right to receive one-third of the gross profits of the land. And from that time she was paid one-third of the gross rents of these two parcels of land; and having received such rents in this manner, after the making and execution of this agreement by the plaintiff, she was precluded from claiming or recovering any part of the money she received pursuant to this authority. And so were the other persons, likewise, who subscribed this instrument. Besides that, the money was voluntarily paid to the plaintiff under a claim of right on her part, and with a complete knowledge of all the facts on the part of the persons making or affected by the payments. And, where payments are made in that manner, the law will not afterwards allow the act to be disaffirmed, and the money recovered from the person so receiving it. *Cox v. Mayor*, 103 N. Y. 519, 9 N. E. Rep. 48.

The judgments, so far as they impose this liability upon the widow, are erroneous; and they should be reversed, with costs to her, to abide the event unless the parties shall, within 20 days after notice of the decision, stipulate to modify the judgments by relieving her from this liability, and correspondingly reducing the allowances made by way of costs to them out of the proceeds of the property. And, if such stipulation shall be given, then the judgment should be affirmed, as modified, without costs of the appeal to either party. All concur.

PEOPLE v. MORAN.

(*Supreme Court, General Term, First Department. November 7, 1889.*)

LARCENY—ATTEMPT TO COMMIT—PICKING POCKETS.

Laws N. Y. 1860, c. 508, §§ 33, 34, (Laws N. Y. 1883, c. 410, §§ 1446, 1447,) provide that an attempt to pick pockets in New York city constitutes an attempt to commit grand larceny, though the value of the property taken be less than \$35; and that any one who shall lay hands on the person or clothing of another, with intent to pick his pockets, "under such circumstances as shall not amount to an attempt to rob or to commit grand larceny, shall be deemed guilty of an assault with intent to steal;" and that, in a prosecution under this section, it need not be alleged or proved that any article was intended to be stolen, or its value stated. *Held*,

that a person who attempted to pick a lady's pocket in New York city was not guilty of an attempt to commit grand larceny, in the absence of evidence that the lady had any property in her pocket. DANIELS, J., dissenting.

Appeal from court of general sessions, New York county.

Thomas Moran was indicted for an attempt to commit grand larceny in the second degree. He was convicted, and appeals.

Argued before VAN BRUNT, P. J., and DANIELS and BARRETT, JJ.

Abram Suydam and Purdy & McLaughlin, for appellant. *W. T. Jerome*, for the People.

VAN BRUNT, P. J. The evidence in this case showed that the defendant attempted to pick the pocket of a lady in the city of New York. There was no evidence whatever from which it could be inferred that the lady in question had any property in her pocket, and the appellant contends that it was necessary to prove that there was property in the pocket in question, in order to warrant a conviction on this indictment; and this is the question brought up by this appeal. In the consideration of this question, it may be proper to refer to the history of the law in reference to crimes such as it is claimed the defendant committed. By Rev. St., pt. 4, c. 1, tit. 7, § 3, it is provided that "every person who shall attempt to commit an offense prohibited by law, and in such attempt shall do any act towards the commission of such offense, but shall fail in the perpetration thereof, or shall be prevented or intercepted in executing the same, * * * shall * * * be punished," etc. It has been held in the state of Massachusetts, under a similar statute, that, although it did not appear that there was any property to be stolen, yet, as the attempt to steal constituted the crime, and that, as an attempt is simply to make an effort to effect some object,—to make a trial or experiment,—therefore, the prisoner, by thrusting his hand into a pocket, makes an attempt to pick a pocket, although he does not succeed, because there happens to be nothing in the pocket. It, however, appears from the legislation in this state that such was not deemed to be the rule by our legislature, because, by chapter 508 of the Laws of 1860, after having provided by section 33 that picking pockets in the city and county of New York should be punished as grand larceny, although the value of the property taken should be less than \$25, and that attempts under similar circumstances should be punished as for attempts to commit grand larceny, it provided by section 34 that "every person who shall lay hand upon the person of another, or upon the clothing upon the person of another, in said city and county, with intent to steal, as a pickpocket, under such circumstances as shall not amount to an attempt to rob or an attempt to commit larceny, shall be deemed guilty of an assault with intent to steal, and shall be punished as now provided by law for the punishment of misdemeanors. It shall not be necessary to allege or prove, in any prosecution for an offense under this section, any article intended to be stolen, or the value thereof, or the name of the person so assaulted." This legislation clearly shows that it was the opinion of the legislature that an attempt to pick a pocket that had nothing in it was not a crime which might be punished as an attempt to commit grand larceny; because, by the provisions of the previous section, an attempt to pick a pocket in the city of New York might be punished as for an attempt to commit grand larceny. Now, if it had not been supposed that unless there was some proof of property no crime would be made out, what could have been the possible reason for the adoption of section 34, particularly in view of the last clause, which provides that for the establishment of the offense mentioned in that section it shall not be necessary for the prosecution to allege or prove any article intended to be stolen, or the value thereof, or the name of the person so assaulted? If an attempt was intended to be construed to mean simply the making of an effort to steal, as a pickpocket, there could have been no pos-

sible necessity for providing for the crime mentioned in section 34, because the legislation of the previous section would then have covered the whole ground embraced within the provisions of said section 34. It seems to us, therefore, that the only interpretation that can be placed upon these sections is that, unless the existence of property was proven, no conviction of an attempt to commit the crime mentioned in section 33 could be maintained.

This legislation contained in sections 33, 34, was attacked upon the ground that it was unconstitutional, in that the law was a local one, and did not comply with the requirements of the constitution, but it was maintained finally by the court of appeals; and it would appear that because of this attack the legislature passed, in 1862, chapter 374, in which it incorporated this same legislation, making it embrace the whole state. This was the condition of the law at the time of the adoption of the Penal Code. The codifiers, in the spirit of improvement which seems to have guided them in the codification of the law, entirely changed the language of the definition which had long prevailed, under the Revised Statutes, as to what should be deemed an attempt to commit a crime; and it cannot be said that they have added anything in lucidity, although, perhaps, their definition is more brief. Section 34 of the Penal Code provides that "an act done with intent to commit a crime, and tending but failing to effect its commission, is an attempt to commit that crime." We do not see that the section in question is any broader than the statute, nor have we any reason to believe that the legislature intended that it should have any greater scope. We have been unable to find, however, any provision in the Penal Code which embraces section 34 of chapter 508 of the Laws of 1860, or section 3 of chapter 374 of the Laws of 1862. And under section 725, notwithstanding the adoption of the Penal Code, those acts necessarily remained in existence, as such section provides that all acts defining and providing for the punishment of offenses, and not defined and made punishable by the Code, should not be affected by the provisions in the Code, but were to be recognized as continuing in force, notwithstanding the provisions of the Code. The next legislation affecting this subject is to be found in chapter 410 of the Laws of 1882, where, by sections 1446, 1447, sections 33, 34, c. 508, Laws 1860, were re-enacted, and made part and parcel of the act of 1882,—another legislative interpretation of the previous enactments that it was still the opinion of the legislature that a person could not be convicted of an attempt to commit grand larceny by proof of an attempt to pick a pocket, without proof of property.

Therefore, as the law stood after the adoption of the consolidation act, above mentioned, the proof in the case at bar was sufficient to convict the offender of the offense defined in section 34 of chapter 508 of the Laws of 1860, but was not sufficient to convict the offender of an attempt to commit grand larceny under section 33 of the Laws of 1860. In its definitions of larceny the Code has embraced the picking of pockets, making, however, the offense greater where it is committed in the night-time than where it is committed in the day, but both being felonies. Therefore, under the interpretation which must necessarily follow the legislative interpretation of its previous acts upon this subject, and the interpretation given to those acts even after the adoption of the Penal Code, we think it must be held that the evidence in this case did not authorize the conviction of the defendant of the crime of attempting to commit the crime of grand larceny in the second degree.

But we are told by the learned counsel for the people that, if this construction is sound, a known thief may pass around in a crowd, in full view of a detective officer, and place his hand in the pockets of different people, manifestly with the intention of picking pockets; because, by chapter 593 of the Laws of 1886, chapter 508 of the Laws of 1860, and chapter 374 of the Laws of 1862 have been repealed. The statement as to the repeal seems to be correct; and, if we had to depend upon the laws of 1860 and 1862 for the pun-

ishment of this offense, it certainly would be impossible to do so, because of the repeal of those statutes. But the provisions of sections 33, 34, of chapter 508 of the Laws of 1860 are still part of the law, because they are part of chapter 410 of the Laws of 1882; and they have not been repealed, and they apply to the city and county of New York, in which this crime was committed, and in which county the punishment there fixed may be inflicted. So far as this county is concerned, therefore, no such dire results will arise as is claimed on the part of the learned district attorney, although the application of the law to the other parts of the state seems to have been repealed by the wholesale repealing act above mentioned. This result, however, cannot affect the conclusion to which we must come; and, if other legislation is necessary in order to place the criminal law in the position it was before the codification, that is a question for the legislature to consider in the future.

We are of the opinion, therefore, that the defendant was wrongfully convicted in the case at bar, and that the only conviction which the evidence justified was for the crime specified in section 1447 of chapter 410 of the Laws of 1882. And, as the indictment is entirely defective upon this question, it would seem that the judgment must be reversed, and the prisoner discharged.

BARRETT, J., (*concurring*.) The question here is an interesting one. The logic of it is, in my judgment, with the view taken by the presiding justice. Independent of the statutes which he has considered, I find myself unable to resist the reasoning of the English judges in *Reg. v. McPherson*, Dears. & B. Cr. Cas. 197, and *Reg. v. Collins*, 9 Cox, Crim. Cas. 497. There are two cases in this country in conflict with these English decisions, namely, *Com. v. McDonald*, 5 Cush. 365, and *People v. Jones*, 46 Mich. 441, 9 N. W. Rep. 486. All the other cases cited by Mr. Jerome in his admirable brief (*Rogers v. Com.*, 5 Serg. & R. 462; *Josslyn v. Com.*, 6 Metc. 236; *State v. Wilson*, 30 Conn. 500; *Kunkle v. State*, 32 Ind. 220; *Hamilton v. State*, 36 Ind. 280; *State v. Beal*, 37 Ohio St. 108) referred to acts done with a particular intent, *e. g.*, assault with intent to steal, breaking and entering with intent to steal, assault with intent to kill, assault with intent to rob, and so on. The Massachusetts and Michigan cases fail to distinguish between an act done with a particular intent and an attempt to commit a specific offense. In each case the *corpus delicti* differs. The placing of one's hand in another's pocket with intent to steal is one thing. The attempt to commit larceny in the second degree is quite another thing. The criminal intent is but one element in an attempt. There must also be an act tending to effect the commission of the defined crime. If the act merely tends to show guilty purpose, but does not tend to effect the commission of the particular crime, there is no attempt, in a legal sense. We must not go astray by following dictionary definitions of the word "attempt," rather than legal. Larceny consists of the felonious taking of specific property. An attempt, therefore, to commit larceny necessarily contemplates an act tending to effect the felonious taking of specific property. There can be no such act without the subject. If that is wanting, the act can show nothing more than guilty purpose. The Massachusetts case rests upon the popular meaning of the word "attempt," and holds that a man attempts to commit a legally defined crime when he thinks he can, and acts upon the thought, though in fact no such legally defined crime as he contemplates is possible. The Michigan case proceeds upon a view of what the law should be, rather than what it is. This is the language of the court: "We fully concur in the views expressed by the Massachusetts court in *Com. v. McDonald*, 5 Cush. 365. We think this is not only the better, but the only, rule of law that could be adopted or recognized with safety to the rights of the public or of individuals." The logic of Chief Justice COCKBURN in the two English cases seems to me to be quite unanswerable. In *Reg. v. McPherson* he says: "The word 'attempt' clearly conveys with it the idea

that if the attempt had succeeded the offense charged would have been committed, * * * but attempting to commit a felony is clearly distinguishable from intending to commit it. An attempt must be to do that which, if successful, would amount to the felony charged." And in *Reg. v. Collins*, he says: "But, assuming that there was nothing in the pocket of the prosecutrix, the charge of attempting to commit larceny cannot be sustained. This case is governed by that of *Reg. v. McPherson*, and we think that an attempt to commit a felony can only be made out when, if no interruption had taken place, the attempt could have been carried out successfully, and the felony completed, of the attempt to commit which the party is charged. In this case, if there is nothing in the pocket of the prosecutrix, in our opinion, the attempt to commit larceny cannot be established." Nor is there any real conflict between these two cases and the earlier case of *Reg. v. Goodall*, 2 Cox, Crim. Cas. 40. There was no question in the latter case of an attempt. The conviction was for the offense of using an instrument upon a woman, with intent to procure a miscarriage. The statutory crime consisted simply of the act, done with the guilty intent. The prisoner there could not have been properly convicted of an attempt to commit a criminal abortion, for the reason that the subject of abortion was not present. The distinction seems clear, and I am surprised at Mr. Bishop's difficulty in reconciling the cases. 1 Crim. Law, (7th Ed.) § 741. Mr. Jerome's illustrations are apt and plausible, but hardly convincing. I agree that if we throw a stone at a piece of plate-glass, and fail to break it because the glass is too strong, there is an attempt to break plate-glass. The act tended to break it, and failed. If, however, the stone were thrown at what appeared to be plate-glass but was not, the wrong-doer might be guilty of throwing with intent to break plate-glass; but, no matter what was in his mind, he could not be guilty of an attempt to break anything save the shining object which he mistook for glass. So as to the scarecrow illustration. A man does not, in a legal sense, attempt to commit murder when, passing through a field in the dusk, he shoots at a dummy, believing it to be his enemy. He shoots with intent to kill his enemy; but that is not the crime of an attempt to commit murder. The statutes considered by the presiding justice plainly recognize this as the legislative view of attempts; and the act making the laying on of hands, with intent to steal, an assault and a misdemeanor, must have been intended as a provision for conduct which otherwise would not be punishable at all,—either as an assault or as an attempt to commit larceny. If the Massachusetts and Michigan view of attempts should prevail, I fail to see how any case can ever be brought within this "assault with intent to steal" act. For, if that act is only applicable "under such circumstances as shall not amount to an attempt to commit larceny," and if every laying of hands upon the person or clothing with the ungratified expectation of finding and taking property is larceny, then how can there ever be an assault with intent to steal? I think the presiding justice's view of these statutes is in harmony with their purpose and intent, and that the acts themselves flow from the legislative construction of what in law constitutes an attempt to commit a defined crime. I therefore concur in the reversal.

DANIELS, J., (*dissenting*.) The indictment charged the defendant with attempting to commit the crime of grand larceny in the second degree. It was alleged that he attempted to steal the property of a woman, whose name was to the grand jury unknown, from her person; and, to prove the offense charged in the indictment, a police officer testified that at the Washington market he saw the defendant, and two other persons; that he had seen them before, and followed them, and saw that he went up against a lady, and shoved his hand in her side-pocket. He watched to see if he got anything, but he did not; and after that the arrest was made. Upon this evidence, which was

not changed by the cross-examination, the defendant's counsel requested the court to direct the jury to acquit him, on the ground that the facts proved did not support the charge in the indictment. That was denied, and the defendant's counsel excepted, as he also did to the portion of the charge in which the jury were left at liberty to find from the evidence the facts alleged in the indictment, so far as they were important to make out this offense. By subdivision 2 of section 531 of the Penal Code, it has been made grand larceny in the second degree to steal any property of another of any value, by taking the same from the person; and by section 34 of the same Code it has been further declared that "an act done with intent to commit a crime, and tending but failing to effect its commission, is an attempt to commit that crime." And by the next succeeding section it has been provided that the accused may be convicted of an attempt to commit the crime, where he has been charged in the indictment with the commission of the crime itself. It has not been rendered necessary by the section defining the offense of an attempt to commit a crime that it shall be made to appear that the person making the attempt had the ability to consummate the offense itself. Neither was it by the preceding law. 3 Rev. St. (6th Ed.) p. 988, § 3. That made it an offense for any person, in the attempt to commit an offense, to do any act towards its commission, where he failed in the perpetration thereof, or was prevented, or intercepted, in executing the attempt. While the language of the preceding statute has been changed and very much abridged, the section of the Penal Code relating to the same subject has not materially changed its effect. It is still an offense for the accused to appear to have done any act with intent to commit a crime, and tending to have that effect; and the failure of the act to result in the commission of the crime is not allowed to exonerate the person from liability to punishment. The enactment has not been qualified by the failure's depending upon any contingency whatever. If the accused appears to have performed an act tending to commit a crime, with the intent to commit it, the offense is made out, under this section of the Code. In this instance the defendant intended, as the jury was at liberty to find from what the officer stated he had done, to steal the property of the person referred to in the indictment, by taking the same from her person; and he attempted to accomplish that object by putting his hand in her pocket. That was an act tending to commit the crime, and it evinced the existence of the intention on his part mentioned in the statute; and his failure to succeed, by reason of the fact that the woman may have had nothing in her pocket, did not relieve him from this criminal liability. The law has not made the offense dependent upon the fact that the person whose pocket may in that manner have been searched, had or had not property or any valuable thing in it; but it has made the offense to consist wholly upon the fact that the accused has done some act having a tendency to commit the crime, when that act has been prompted with the intention that it should be committed.

The legislation in this state providing for increased punishment for the crime of larceny from the person seems to have originated in chapter 508 of the Laws of 1860. This act related to the city of New York, and by section 33 it contained the substantial features of the present legislation defining the crime, and the attempt to commit it, of larceny from the person; for it made it the crime of grand larceny for the defendant to steal from the person of another, although the value of the property should be less than \$25, and then it generally declared that attempts under similar circumstances might be punished as for attempts to commit grand larceny. It was further provided, by the next section of the act, that every person who should lay his hand upon the person of another, or upon the clothing upon that person, in the city or county of New York, with intent to steal as a pickpocket, under such circumstances as should not amount to an attempt to rob, or an attempt to commit larceny, should be deemed guilty of an assault with intent to steal, and

punished as provided by law for the punishment of misdemeanors; and in that class of cases it should not be necessary to allege or prove any article intended to be stolen, or the value thereof, or the name of the person so assaulted. These sections were re-enacted, and made generally applicable to the state at large, by chapter 374 of the Laws of 1862; and the provisions of the section last referred to remained in force until that, as well as the preceding act, were repealed by sections 35 and 37 of chapter 593 of the Laws of 1886. But prior to this repeal the same sections had been made a part of chapter 410 of the Laws of 1882. This chapter was enacted for the consolidation of the laws relating to the city of New York, and section 1447 is the same as section 34 of chapter 508 of the Laws of 1860 and section 3 of chapter 374 of the Laws of 1862; and this enactment contained in the act of 1882 has not been affected by the repealing act of 1886, but it still continues in force,—applicable only, however, to offenses, within its provisions, committed in the city of New York. But this section is not entitled to any effect in the way of limiting or abridging the language employed in framing section 34 of the Penal Code. That section is applicable to the state at large, including offenses within its description, committed in the city of New York as well as elsewhere. It is to be construed according to the reasonable and fair effect of its language; and that construction must be the same in all portions of the state. It cannot be allowed, and could not have been intended, to have a broader or more enlarged significance in one part of the state than in another; and whatever facts would constitute a crime in other portions of the state, under this section, will be equally potent in that respect in the city of New York. It is a law of general application, to be construed and applied, in all localities to which it is applicable, with the same force and effect. Section 1447 of chapter 410 of the Laws of 1882 is entitled to no effect whatever, in the way of restricting the application of this section of the Penal Code; for it appears by its terms that it was not intended to include the case of an attempt to commit this crime. It is, as it was in the acts of 1860 and 1862, declaratory of the facts constituting a still different, though inferior, offense from that of an attempt to commit the crime; and it only makes the act a misdemeanor to lay a hand upon another person, or upon the clothing of another person, with the intent to steal as a pickpocket, under such circumstances as will not amount to an attempt to rob, or to commit larceny. This section contains no language preventing the full and appropriate effect to be given to that contained in section 34 of the Penal Code. It is a distinct and independent provision, not designed to qualify the offense of an attempt to steal from the person, but leaving the act relied upon as an attempt to be determined by the language of the section, and the construction which manifestly should be placed upon it. And, while this section of the consolidation act has declared that it should be not necessary to allege or prove any article intended to be stolen, or the value thereof, it has nowhere, by language or implication, provided that it shall be necessary to allege or prove either of those facts to make out the offense of an attempt to commit the crime of larceny from the person, but it leaves the language otherwise employed in the law to be construed by itself, and to be carried into effect according to the import it shall appear entitled to have; and that by no construction has required it to be alleged or proved that the act of the defendant in attempting to pick the pocket of another has not failed of its success by reason of the fact that the pocket contained no article of value which could be taken from it.

In *People v. Bernardo*, 1 N. Y. Crim. R. 245, it was held by the learned recorder of the city that the act of attempting to pick a pocket, containing nothing which could be stolen, was within this section of the Laws of 1862. But the decision in that case has given a more extended effect to the section of the act under which it was decided than was warranted by its language; for, as already observed, it did not include an attempt to commit the crime.

but all that this section has included is the specific act of laying a hand upon the person or clothing of another, with intent to steal. That was not the act alleged to be criminal, either in that or the present case. What the defendant has been convicted of is not placing his hand upon the person or clothing of the individual mentioned in the indictment, but of the act of inserting his hand in her pocket, with the intent to steal; which is an entirely different act from that made a misdemeanor by this section of the act of 1862, and the section still in force in the act of 1882. In the case of *Reg. v. Collins*, 10 Law T. (N. S.) 581, also, it was held that inserting the hand into the pocket of another, which contained nothing capable of being stolen, was not an attempt to commit the crime of larceny from the person; and a similar view prevailed in *Reg. v. McPherson*, 26 Law J. M. Cas. 134. But these decisions appear to be in marked conflict with the principles applied for the determination of the case of *Reg. v. Goodall*, 2 Cox, Crim. Cas. 40, and they have been subjected to the same criticism in 1 Bish. Crim. Law, (7th Ed.) 741. Beyond that, the rule upon which they proceeded has not been considered sound, or one which should be followed by the courts in this country. In *People v. Bush*, 4 Hill, 133, the conviction of the defendant was sustained under an indictment charging him with an attempt to commit the crime, when it was shown that he had solicited another to perform the criminal act, and notwithstanding the fact that this other person never intended to commit the crime. The failure there was as significant as that which followed in this case, from the absence from the pocket of money or property which could be stolen by the defendant. And this was followed in *Rogers v. Com.*, 5 Serg. & R. 463. It was there said, in the course of the opinion, that "the intention of the person was to pick the pocket of Earle of whatever he found in it; and, although there might be nothing in the pocket, the intention to steal is the same." In *Josslyn v. Com.*, 6 Metc. 236, under provisions similar to those contained in the Revised Statutes in this state, it was held that a general intent to steal would complete the offense; and that the rule would be the same if there were no goods in the building broken and entered with that intent. A still more direct application of the law is contained in *Com. v. McDonald*, 5 Cush. 365, and there it was held by the court that an attempt feloniously to steal from the person of another was not dependent for the completion of the crime upon evidence that the person assailed had property at the time in his pocket. And this construction of the law has also been followed in *State v. Wilson*, 30 Conn. 500; *Kunkle v. State*, 32 Ind. 220; *Hamilton v. State*, 36 Ind. 280; *People v. Jones*, 46 Mich. 441, 9 N. W. Rep. 486; *State v. Beal*, 37 Ohio St. 108. And so it was, also, in *Com. v. Jacobs*, 9 Allen, 274. What was there said by the court in making the decision is specially applicable to this case, and that is that "whenever the law makes one step toward the accomplishment of an unlawful object, with the intent or purpose of accomplishing it, criminal, a person taking that step, with that intent or purpose, and himself capable of doing every act on his part to accomplish that object, cannot protect himself from responsibility by showing that, by reason of some fact unknown to him at the time of his criminal attempt, it could not be fully carried into effect in the particular instance."

In this state of the law, with the evidence which was produced before the jury, they were authorized to reach the conclusion declared by their verdict, and the judgment from which the appeal has been taken should be affirmed.

WILKINS v. MUTUAL RESERVE FUND LIFE ASS'N.

(Supreme Court, General Term, First Department. November 7, 1899.)

1. INSURANCE—APPLICATION—WARRANTY—FORFEITURE.

An application for insurance warranted the answers to be full, correct, and true, and stipulated they should be part of the contract of insurance. The policy re-

ferred to the application as a part thereof, and provided that every person acquiring any interest in the contract adopted the application and statements contained therein as his own, admitted them to be material, and warranted them to be full and true. The application of the assured turned out to be untrue as to the facts of his consulting a physician, and having on two occasions been an inmate of a hospital. *Held*, that the company was relieved from liability on the policy.

2. SAME—APPLICATION WRITTEN BY AGENT.

The application warranted the answers and statements thereof, whether written by the applicant by his own hand or not, to be full and true. The policy provided that it was issued in consideration of the application, which was made a part of the contract, and in consideration of each of the statements made therein, "which, whether written by his own hand or not," every person accepting or acquiring an interest in the contract adopted as his own. *Held* that, as the assured assumed the acts of the agent, and bound himself for the truth of the statements contained in the application, he could not be relieved by the fact that the agent had acted faithlessly in filling out the application.

3. SAME—WAIVER OF FORFEITURE.

The policy provided that "no agent of the association has authority to make, alter, or discharge contracts, waive forfeitures, * * * and no alterations of the terms of this contract shall be valid, and no forfeiture thereunder shall be waived, unless such alterations or waiver shall be in writing, and signed by the president," etc. Plaintiff, the assignee of the policy, before the assignment, consulted an officer of the company as to the regularity and validity of the policy, and the agent represented the policy to be a valid security. It did not appear that at that time any information of the fact of the answers being untrue had been brought to the attention of defendant or the agent. *Held*, that the agent's representations to plaintiff would not preclude defendant from taking advantage of the untruthful statements in the application, as the agent could not waive any forfeiture.

Appeal from circuit court, New York county.

Action by Peter Wilkins against the Mutual Reserve Fund Life Association. The complaint was dismissed at the trial, and plaintiff appeals.

Argued before BRADY and DANIELS, JJ.

William G. Wilson, for appellant. *Alfred Taylor*, for respondent.

DANIELS, J. The plaintiff brought this action as assignee of a certificate of life insurance issued by the defendant upon the life of Daniel S. Sanford. By the terms of the certificate there became payable to him from the death fund of the association the sum of \$10,000 from and after the period of his decease. This certificate was assigned to the plaintiff and another person, the latter having also added a further assignment, including his own interest. The assured died on or about the 7th of February, 1886, and the ordinary notice and proofs of the fact were supplied to the defendant. The association resisted the right of the plaintiff to payment of the amount mentioned in the certificate on the ground that false representations had been made by the assured in the application for the certificate, rendering the certificate itself invalid and inoperative. These representations consisted in the answer of the assured, to the question requiring a statement of his occupation, that he was a carpenter; and, in an answer to a further question, whether he had consulted any physician regarding his health within the preceding five years, and, if so, what physician, and when, and for what disease. To this he answered, "No." The further inquiry was made whether he ever had any illness or injury not enumerated in preceding questions, or had been an inmate of any hospital; and to that he answered in the negative. By the proof the fact was established that he had at one time served as cook or steward on sailing vessels, and within five years preceding the date of the application he did consult a physician regarding his health and for disease, and that the answer made to the inquiry concerning that subject was untruthful. It was also proved that from October 3, 1882, to the 25th of the same month he had been an inmate of a hospital; and also that he was an inmate of a hospital within three years prior to the time of his application for the certificate, and that his answer that he had not been was untruthful. And these answers, under the authorities, were held at the trial to avoid the certificate. This

resulted from statements in the application signed, by the assured, that "I do hereby warrant that my answers, as written to the above questions, are full, complete, correct, and true, and the same shall be made a part of the contract of my certificate of membership in the Mutual Reserve Fund Life Association." And "It is hereby warranted by the applicant that the answers and statements in this application, whether written by his own hand or not, are full, complete, and true; and it is agreed that this warranty shall form the basis and shall be a part of the contract between the undersigned and the Mutual Reserve Fund Life Association, and are offered to said association as a consideration of the contract applied for. And the applicant further agrees that if any statements, representations, or answers made herein are not true, full, and complete, then the certificate to be issued hereon shall be null and void, and all money paid thereon shall be forfeited to said association." And from a further provision in the policy that "in consideration of the application for this certificate of membership, which is hereby referred to and made a part of this contract, and of each of the statements made therein, which, whether written by his own hand or not, every person accepting or acquiring any interest in this contract hereby adopts as his own, admits to be material, and warrants to be full and true, and to be the only statements upon which this contract is made." By these stipulations and provisions the assured warranted the truth of the representations which had been made by him; and as they turned out to have been untruthful as to the fact of his consulting a physician, and having on two occasions been an inmate of a hospital, that relieved the defendant from liability for the payment of the money mentioned in the certificate. It was, however, proposed to be proved that the assured, at the time when he made the application for the insurance, informed the agent of the defendant as to the facts being otherwise. This offer of proof was rejected by the court, and the cases of *Flynn v. Insurance Co.*, 78 N. Y. 568; *Grattan v. Insurance Co.*, 80 N. Y. 281; *Bennett v. Insurance Co.*, 106 N. Y. 243, 12 N. E. Rep. 609; and *Miller v. Insurance Co.*, 107 N. Y. 292, 14 N. E. Rep. 271,—have been relied upon as authorities establishing the incorrectness of this ruling. But they are not entitled to that effect in this case, for the reason that the assured, by the application, took upon himself the entire risk of the truth of the representations made by him, and on the correctness of which the certificate was made to depend. In neither of the cases which have been referred to were these provisions contained, and that distinguishes those authorities from this action; for in this instance the assured assumed the responsibility for the correctness of the acts of the agent in filling out and completing the application, and thereby conclusively bound himself for the truth of the statements which had been made. The effect of his agreement to accept for himself, and become bound by, the acts of the agent in filling out the application as those of his own agent, was considered in *Chase v. Insurance Co.*, 20 N. Y. 52, and also in *Alexander v. Insurance Co.*, 66 N. Y. 464; *Insurance Co. v. Fletcher*, 117 U. S. 519, 6 Sup. Ct. Rep. 837; and these authorities all agree, where the assured in this manner accepts and binds himself for the truth of the statements contained in the application, that he cannot be relieved from that result by proof of the fact afterwards made that the agent improperly, as well as untruthfully, filled out the application. Where, on the contrary, he expressly assumes the acts of the agent as his own acts, and binds himself for the truth of the statement made, then neither he nor his representatives can be relieved from the effect by proof that the agent had acted faithlessly. This results from the voluntary agreement of the insured himself, over which a court of justice has no authority by way of relief. That the application and policy or certificate may be subjected by the statements contained in them to this disability will no doubt seriously impair the value of life insurance policies. And as the court is not authorized to relieve the party from

the agreement voluntarily entered into by him in this way, the fact itself can be no further useful than to enjoin upon persons taking policies of life insurance greater care and circumspection to discover whether anything may be contained in the application or the policy which in the end will render it a fruitless source of reliance. There is a probability that this agent, in reducing the answers of the assured to writing, was faithful to the obligations of his employment, for he stated in his evidence (and that was not contradicted) that he filled out the blank from information obtained from Mr. Sanford, and that it was all in conformity with what he had stated to the agent.

The plaintiff, upon the trial, proposed to give evidence from which the position has been taken that the company had placed itself in a condition in which it could not take advantage of the untruthful nature of these answers. For this purpose it was proposed to prove, before the assignment was taken of the certificate, that the parties repaired to the office of an agent of the company, and there consulted him as to the regularity and validity of the policy, and that he substantially represented the policy to be a valid security. This evidence was rejected upon the trial, upon the ground that the agent, even though he might have been a director in the company, had no authority to change the certificate, or to prevent the company from taking advantage of these untruthful answers. It was not proposed to be shown that any information of the fact of the answers being untruthful had been brought to the attention of the defendant, or either of its officers, or to the attention of this agent, and without information to that effect the agent would naturally assume that the certificate had been obtained by truthful representations made on behalf of the assured; and in that state of the case there could be no reason for assuming or supposing that it was intended to surrender or waive any advantage that the company might be entitled to claim from the fact being otherwise. The assurance that the certificate was a safe investment, or might be relied upon as having been legally or correctly issued, would, in this state of the facts, include no more than that the conduct of the company had been such as to bind it, so far as its own proceedings went, legally and effectually for the payment of this money. It would not surrender or prejudice its right to avail itself of the objection that there had been such misconduct on the part of the assured himself, which at the time was unknown to the company or its agent, as rendered the certificate invalid, and relieved the company from this obligation. As much as this was in fact provided for in the certificate itself, declaring that no agent of the association has authority to make, alter, or discharge contracts, waive forfeitures, extend credit, or grant permits, and no alteration of the terms of this contract shall be valid, and no forfeiture thereunder shall be waived, unless such alteration or waiver shall be in writing, and signed by the president and one other officer of the association, and of the extent of which the plaintiff, as assignee, is chargeable with notice. That precluded the agent, even though he might have been a director of the company, (*Bridge Co. v. Bachman*, 66 N. Y. 261,) from the exercise of such authority over this certificate as would exclude the right of the company to make the defense which proved successful upon the trial, for it was there provided that no forfeiture should be waived unless the waiver was in writing, signed by the president and one other officer of the association. It was not proposed to be proved that any waiver of this description had taken place, and without it the evidence which was rejected would have been entirely useless. As the case was made to appear, the plaintiff was not entitled to recover, and the judgment should be affirmed.

WOLF et al. v. STRAHL et al.

(Supreme Court, General Term, First Department. November 7, 1889.)

1. PARTNERSHIP—EVIDENCE.

In an action for the price of goods sold, it appeared that defendant, in order to compromise plaintiff's claim against his son, represented to them that he would go into partnership with his son, and that plaintiffs could then sell them goods. Afterwards, goods were ordered by the son. *Held*, that there was no evidence to render defendant liable as his son's partner.

2. SAME—ACTIONS—PLEADING.

An allegation in the complaint that goods were sold to defendants is supported by proof that they were sold to one of defendants while conducting a business in which both were partners; and an allegation as to their copartnership is unnecessary.

Appeal from circuit court, New York county.

Action by Baruch and Herman Wolf against Harris Strahl and another, for goods alleged to have been sold to defendants. After trial, in which Harris Strahl alone defended, judgment was rendered, dismissing the complaint, with costs. Plaintiffs appeal.

Argued before VAN BRUNT, P. J., and BRADY and DANIELS, JJ.

W. F. Severance, for appellants. *Max Klein*, for respondent.

VAN BRUNT, P. J. This action was brought to recover for goods alleged to have been sold to the defendants by the plaintiffs. To support this allegation, the plaintiffs attempted to prove that the defendants were, or that the defendant respondent—who is the only person who defends the action—had represented to the plaintiffs that they were, copartners; and that it was relying upon this representation that the credit was given. This representation was made in the month of March, 1886, at a time when the respondent was endeavoring to effect a compromise of a claim which the plaintiffs then held against the son of the respondent, the non-defending defendant. As an inducement to the acceptance of the offer, the respondent said that he was going into copartnership with his son, and that then the plaintiffs would be able to sell them a lot of goods. In July the goods in question were ordered by the son, and one of the plaintiffs swears that he told his salesman to sell the goods; and then follows in the testimony the following: "He was in already. He told me that he was helping his son along. He said at that time that he was going into a full partnership with his son, to help him along." It seems to be clear that any statement that he was going into copartnership with his son at some time in the future could not bind him as a partner, and the only piece of evidence which could possibly have that effect would be the use of the words "he was in already." An examination of the testimony does not show that the witness intended to state that the respondent made any such statement, but rather meant it as a deduction from what the respondent did tell him, viz., that he was helping his son along. In fact, upon looking over the evidence, it seems to distinctly appear that the only representation made by the respondent was that he was going into partnership; which is inconsistent with the interpretation of the words first above referred to, that it was a representation that he was already a partner. Upon cross-examination the witness made no similar statement; and the other plaintiff, who testified, did not pretend that he heard any such statement. The respondent had nothing to do with the sale of the goods, and there is no evidence that he had any knowledge of their purchase. There being no proof of partnership, the disposition made of the case by the court below was right.

There was no necessity for any amendment of the complaint by adding the allegation as to copartnership of the defendants. Proof that the goods were sold to one of the defendants while conducting business in which both were

copartners together would have proved the allegation in the complaint that the goods were sold to the defendants. The judgment appealed from should be affirmed, with costs. All concur.

In re HOWARD'S ESTATE.

(Supreme Court, General Term, First Department. November 7, 1889.)

COLLATERAL INHERITANCE TAX—ERRONEOUS PAYMENT—RESTITUTION.

Laws N. Y. 1887, c. 713, directs collateral inheritance taxes to be paid to the comptroller for the benefit of the state. Section 21 requires him to pay them over to the state treasurer. Section 12 provides that when a tax has been erroneously paid to the state treasurer he may, on satisfactory proof made to the comptroller by the county treasurer, refund the money. After money was received by the comptroller and properly paid over to the treasurer, the decree requiring the tax to be paid was reversed. Code Civil Proc. § 1823, authorizes the appellate court, on reversing a judgment, to make restitution of property lost by the judgment. *Held* that the tax-payer's remedy was under the tax act, and not under the Code.

Motion for an order for the restitution of moneys paid to the comptroller of the city of New York for collateral inheritance taxes.

Argued before VAN BRUNT, P. J., and BRADY and DANIELS, JJ.

S. B. Brownell, for the motion. *R. E. Selmes*, opposed.

DANIELS, J. The money for which restitution has been applied for was paid over to the comptroller of the county of New York by the ancillary executors of the estate of John P. Howard, deceased. This payment was made under an order or decree of the surrogate, holding the estate to be liable to taxation under chapter 713 of the Laws of 1887. On appeal from the order or decree to the general term it was reversed, and the decision is reported as *In re Tulane*, 4 N. Y. Supp. 36. The executor's motion is made upon the fact of this reversal, for restitution of the money under section 1323 of the Code of Civil Procedure, providing that "when a final judgment or order is reversed or modified, upon appeal, the appellate court, or the general term of the same court, as the case may be, may make or compel a restitution of property, or of a right lost by means of the erroneous judgment or order." But this section of the Code cannot be held to include the present application; for, by the provisions contained in the law under which the payment was directed to be, and was in fact made, the tax so paid never became any part of the money or property of the city and county of New York. It was, on the contrary, paid to and received by the comptroller for the benefit of the state, and under the act it has been made a state tax, and the comptroller was required by section 21 to pay over the amount so received by him to the state treasurer. This section has required taxes obtained in this manner to be reported to the state comptroller on the first Mondays of March and September in each year, and they are required to be paid by the comptroller of the county to the state treasurer at the times mentioned in this section of the act. It has not been asserted that the comptroller of the city and county has in any manner failed to discharge this duty. But it has been stated without contradiction that the money was so paid over by him as that was directed to be done by this statute prior to the time when the order or decree of the surrogate was reversed by the general term. He accordingly has no fund or money in his hands out of which restitution can be ordered, and the act does not contemplate that he shall be required to return it to the party who may become entitled to receive it, after it has been paid over to the authorities of the state. A different remedy has been prescribed by the act for the reimbursement of the money. That has been created by the twelfth section, declaring that "when any amount of said tax shall have been paid erroneously to the state treasurer it shall be lawful for him, on satisfactory proof rendered to the comptroller by said county treasurer or comptroller of such erroneous payment, to refund and pay to the ex-

executor, administrator, person or persons, who have paid any such tax in error, the amount of such tax so paid, provided that all such applications for the payment of such tax shall be made within five years from the date of such payment." This is a simple and available proceeding, afforded to the party entitled to the reimbursement of the money paid for the tax, and it was without doubt intended to be exclusive for this object. This statute, and the law preceding it, have created a new liability not previously existing under the laws of the state, and a remedy by this section of the act of 1887 has been provided, and it is complete and effectual, to obtain the money after the reversal of the order or decree under which it may have been paid, and was intended, without doubt, to be the only mode of proceeding which should be adopted and followed for that purpose; for it could not have been intended that the law should receive such a construction, or that an obligation should be imposed upon the person paying over the money under its directions to the state authorities, as upon the reversal of the proceeding on appeal the officer in this manner paying it over should be bound to reimburse to the party making the payment to him the money so disposed of, under the authority and direction of the statute. His duties have been wholly confined to receiving the money, reporting, and paying it over, and by discharging these duties in the manner provided by the act he will relieve himself from all responsibility or liability to refund it upon a reversal of the order or decree requiring its payment. The case, in this respect, is similar in its principle to *Dewey v. Supervisors*, 62 N. Y. 294. There the county of Niagara was sued for the recovery of moneys which had been raised by assessments to pay the expenses of draining certain lowlands. The assessment proceeding had been reversed upon *certiorari*, but the money had been paid out and disposed of as the law directed it to be by the treasurer of the county, before the action was commenced, and that was held to constitute a defense and prevent a recovery against the county. The same principle should be applied here, not only from the nature and provisions of the statute, but from the rule, also, in this manner maintained by the court. The motion will accordingly be denied. All concur.

In re HALL'S ESTATE.

(Supreme Court, General Term, First Department. November 7, 1889.)

1. APPEAL—RECORD—CERTIFICATE.

An appeal from a surrogate's decree will be dismissed on the court's own motion where there is no certificate with regard to the record from the surrogate's court.

2. COLLATERAL INHERITANCE TAX—ERRONEOUS DECREE—RESTITUTION.

The mode of obtaining restitution of a collateral inheritance tax, which was paid under an erroneous decree of the surrogate, is that pointed out by the inheritance tax act (Laws N. Y. 1887, c. 713, § 12,) and not by appeal under Code Civil Proc. § 2587, authorizing the appellate court to enforce the decree appealed from or award restitution, as the case may require, but the decree must be decided erroneous by appeal before restitution can be awarded under the act.

Appeal from surrogate's court, New York county.

David A. Hall, sole legatee and devisee under the last will and testament of David F. Hall, deceased, appeals from an order of the surrogate, directing the ancillary executor to pay a collateral inheritance tax, amounting to the sum of \$12,419.94, with interest.

Argued before VAN BRUNT, P. J., and DANIELS and BARRETT, JJ.

E. G. Ducall, Jr., for appellant. Geo. W. Eastman, for respondent.

BARRETT, J. This is evidently a friendly appeal arranged between the legatee and the ancillary executor for the purpose of obtaining restitution of the sum paid under the surrogate's decree. This decree was made in October, 1887, upon the authority of a general term decision (second department) handed down in July of that year. *In re Enston*, 46 Hun, 506. It was there held

that property within this state, which passed by will from a non-resident decedent to collateral relatives, was taxable under the Act of 1885, c. 483. Mr. Hall, the present legatee, was fully heard before the making of the decree. The ancillary executor, in November, 1887, paid the tax to the comptroller of the city of New York and to the treasurers of Kings and Queens counties. Thus the decree was completely executed. The matter stood in this way until April, 1889, when the court of appeals reversed the *Enston Case*, (21 N. E. Rep. 87,) and held that, under the circumstances there disclosed, the property within this state was not taxable under the act of 1885. Thereupon Mr. Duvall, as attorney for Hall, admitted service of a copy of the surrogate's decree as of the date of June 24, 1889, and within 80 days from the latter date (namely, July 10, 1889) he took the present appeal. He seems to have served notice of this appeal upon the attorney general and the district attorney of this county, but not upon the comptroller of the state or of the city of New York, nor upon either of the county treasurers above referred to. A case upon appeal seems to have been made up by agreement between Mr. Duvall and Mr. Eastman, for there is no certificate with regard to the record from the surrogate's court; and the appeal papers contain a stipulation *dehors* the record to the effect that the ancillary executor duly paid the tax as already stated; and to this stipulation is appended the receipts of the respective officials. It would be sufficient for the due disposition of this matter, as thus irregularly presented, to say that the record, properly certified, is not before us, and that therefore the appeal cannot be heard. Such, indeed, must be the disposition of the case, and such would have been its disposition without investigation but for the fact that it was submitted without argument. As, however, the case had to be examined before the irregularity pointed out could well be discovered, we may as well suggest to the learned counsel some difficulties which became apparent before this irregularity was realized. The question of restitution, it seems to us, cannot come up as part of the hearing and decision of the appeal. The record, properly certified, will not show the execution of the decree, and the question whether such decree should be affirmed or reversed must be independently determined. If it shall be reversed, the mode of obtaining restitution is pointed out by the collateral tax act (Laws 1887, c. 713, § 12) for the ordinary practice under the Code, § 2587 is inapplicable where the money has actually been paid into the state treasury. Another question which counsel must consider before again asking us, even upon a correct record, to review this decree, is whether the comptrollers of the state and city, and the treasurers of the two counties, must not be made parties to the appeal under section 2573. The state of New York, the city comptroller, and the two county treasurers, seem to have interests which are directly affected by the decree. The tax has doubtless long since been paid into the state treasury, and 5 per cent. for collection retained by the officers under section 22 of the Act of 1885. The question of the proper method of obtaining restitution from the state was considered by this court in the late case of *In re Howard*, ante, 594, and it was there held that the remedy was under section 12 of the Act of 1887, c. 713. But first there must be a decision on the question of affirmance or reversal, and that decision can only be made upon a duly certified record, and probably upon a compliance with section 2573, as to the proper parties upon the appeal. As the matter now stands the hearing is dismissed, and the appeal stricken from the calendar, without prejudice. All concur.

In re VOORHIS' WILL.

(Supreme Court, General Term, First Department. November 7, 1889.)

1. WILLS—COMPETENCY—EVIDENCE.

The facts that testatrix, who by will left her property to charitable institutions, was of advanced age, unable to read or write, of a capricious disposition, and that

she had stated an intention of leaving everything to her relatives, it being shown that she was excitable, and easily took offense at her relatives, do not suffice to establish the incompetency of testatrix, where it appears that she understood the contents of her will, and designed it to be her testamentary act.

2. SAME—DUE EXECUTION.

In support of a will leaving all testatrix's property to charitable institutions, to the exclusion of her nieces, who were her nearest relatives, it was proved by her attorney that the instrument in question was the one which he had drawn up as her will, at her request, and according to her instructions, and read to her; and the two subscribing witnesses testified that testatrix had signed the instrument in their presence, and that they had signed the same as witnesses, on being told it was decedent's will, and requested to sign it, either by decedent herself or by her attorney, in her presence; and it was also proven that decedent had told an acquaintance that she had left her property to charitable institutions. *Held*, that the proper execution of the will was established.

3. SAME—REVOCATION.

The fact that testatrix, who had made a will leaving everything to charitable institutions, before her death became dissatisfied with it, and had another will drawn up, leaving everything to her relatives, intending to execute it, but, before the time assigned for the execution became unconscious, and remained so until her death, is not a sufficient revocation of the first will, under 3 Rev. St. N. Y. (6th Ed.) p. 63, § 40, which provides that, to constitute a revocation of a previous will, there must be some other will in writing, or some other writing declaring the revocation, etc., or that the instrument has been burned, torn, canceled, etc.

Appeal from surrogate's court, New York county.

Application by Harriet B. Evans to vacate and annul the probate of the will of Ann Voorhis, deceased. There was a decree denying the application and confirming the probate of the will, from which the said Harriet B. Evans appeals. For motion to dismiss appeal, see 5 N. Y. Supp. 948, *mem*.

Argued before VAN BRUNT, P. J., and BARRETT and DANIELS, JJ.

H. M. Whitehead, for appellant. *C. E. Tracy* and *D. M. Helm*, for respondent.

DANIELS, J. The will which is in controversy in this appeal was executed on the 20th of December, 1879, and the testatrix died on the 30th of January, 1882. At the time of the execution of the will she was of the age of 79 years. She had no children, parents, brothers, or sisters. Her relatives were nephews and nieces, and grand-nephews and grand-nieces. Her relations with most of them were friendly and agreeable. But when she came to dispose of her estate by the will, after disposing of a small part of it in the way of legacies, she devised and bequeathed all the rest, residue, and remainder to the American Bible Society and the American Home Missionary Society. The application for the revocation of the probate of the will was made by Harriet B. Evans, who is a niece of the testatrix; and it proceeded upon the allegations that the paper which had been admitted to probate as the will of the testatrix had not been signed by her; that she did not acknowledge it, and was not of sound mind and memory at the time of its date, or capable of making a will, and did not understand or intend the execution of this instrument as her will; and that the formalities required by the statute to be observed to authenticate it as a will had not been complied with. To sustain the application, evidence was given of statements, made at different times by the testatrix, that she did not intend or design to leave any part of her property to societies, but that it should be disposed of among, or for the benefit of, her relatives; and from this evidence it is entirely reasonable to conclude that at the times when these statements were made she did entertain that design. But she was further shown to have been capricious and changeable in her disposition, and had obtained wills, drawn under her direction, which never were executed by her. She was sensitive and excitable, and easily took offense at trivial acts of her relatives, which she regarded or considered to be slights upon herself. She was an illiterate person; and further evidence in support of the application to revoke the probate of the will was

given, to the effect that she was not able to read or write. But neither this evidence, nor her capricious disposition or her advanced age, precluded her from making a valid will, if it appeared that she understood its contents, and designed it to be her testamentary act; and in support of this will very direct evidence to that effect was given upon the hearing. The instrument in controversy was prepared as the will of the testatrix by Hamilton Wallis, who was sworn and examined as a witness in its support. He testified that he received instructions from the testatrix, either at his office or at her house, and that he took down those instructions as they were given to him by her; that he then prepared a draft of the will, which he afterwards read to her, at her residence, several days before the execution of the instrument in controversy; that alterations were made in the draft during the time it was read to the testatrix; and that the instrument admitted to probate was an exact copy of the draft, with the alterations suggested by her. This evidence sustained the conclusion that the instrument was drawn in pursuance of the authority and instructions of the testatrix, and that it conformed to those instructions, and was understood by her in the dispositions it directed should be made of her estate. Before the time of its execution, she requested the two persons who subscribed as witnesses to the will to repair to her house, at a time designated for that object, to witness her will. They met at her residence at that time; and both testify that the instrument which was produced was signed by the testatrix, and by themselves as witnesses. The evidence of Mr. Noe, one of the subscribing witnesses, is that Mr. Wallis asked Mrs. Voorhis if she wished these gentlemen to witness her will, and she said "Yes," and then "she signed the will herself, in my presence." "I saw her sign." Mr. Wallis' evidence as to the same fact, as it is contained in the printed case, is incomplete; but it is probable that it was intended to authenticate the fact as it was stated by Mr. Noe. His testimony was that "Mrs. Voorhis signed her name to it,—and the two gentlemen,—after I had asked her if she had signed and sealed this paper, and published and declared it as her last will and testament; and requested these gentlemen to execute it as witnesses, and they then signed it as witnesses." The other subscribing witness, Joseph A. Sterling, was by no means so clear in his recollection as to the request to the witnesses to sign the will as was Mr. Noe. But he stated that the lawyer, or Mrs. Voorhis, said it was a will. And he thinks she gave the paper to Mr. Noe, and then he sat down and signed it at the table; and then this witness sat down in his place, and also signed it. He further stated that it was said to be Mrs. Voorhis' will. He thought the lawyer said so; and it was understood so, because he was asked to go there. The paper, he said, was given to him, and he was asked to sign it, as Mrs. Voorhis' will. The statement was: "There is Mrs. Voorhis' will. Will you sign it?" Mrs. Voorhis was present when that was signed, and his evidence is that it had already been signed by her. From this evidence it is entirely natural to conclude that she understood the contents of the instrument, and designed it to be her will, and also, in substance and effect, either by her own direct request or that of the attorney, in her presence, and acting in her aid and assistance, requested these two persons to subscribe it as her will, and as subscribing witnesses. And that conformed to what was essential for this purpose, as the statute had prescribed and directed it. *Gilbert v. Knox*, 52 N. Y. 125. After the instrument had in this manner been executed, the witness Nancy R. Howard testifies that she had a conversation with Mrs. Voorhis, who told her that she had willed most of her property to charitable institutions, and said that her nieces would not get as much as they expected. This was still further evidence in proof of the fact that Mrs. Voorhis understood the substantial contents of the instrument, and that it had been drawn and executed in such a manner as to carry her intention and design into effect; and it was not overcome by the testimony given on behalf of the contestant, and was not sub-

stantially inconsistent with that evidence. For, while it is entirely probable that her disposition generally was to distribute her property among her relatives, yet, at the time when this instrument was signed by her and these witnesses, she entertained a different purpose; and that was to dispose of the bulk of her estate for the benefit of these two societies. She may not have been aware of the extent of her property; although she probably was, as her money must have been put into the tin box, where it was found, by herself. But at this time she evidently intended to bestow it, whatever it was, upon these societies, after satisfying the legacies previously mentioned by her. That she complained of the insufficiency of her income, when she had a large sum of money in her immediate possession, will not invalidate her act. She was, without doubt, a penurious person,—not only frugal, but actually denied herself luxuries which she had the ability to obtain and enjoy. But these were not controlling circumstances in the case, as long as it appeared satisfactorily from the other evidence that she had directed the instrument to be drawn as it was, and executed it, intending to make the disposition which it directed of the residue of her estate.

After this instrument was in this manner subscribed, and shortly before the time of her own decease, she became dissatisfied with it, and intended to execute another, distributing her property among her relatives. This appears from the evidence of the appellant, as well as of that of Mr. Ridley, who drew another instrument, to be executed by the decedent. That was still more complicated in its details than the instrument here in controversy; but the evidence warrants the belief that it conformed to her intentions, and was understood by her. But before the time assigned for its execution she became unconscious, and remained so to the period of her decease; and on that account this instrument was not executed, and did not go into effect as a will. What is proved to have transpired, although indicating a final intention on her part different from that contained in the instrument executed, did not work its revocation. Dissatisfaction on her part with the directions contained in it for the final disposition of her estate could not be attended with that result, as long as the instrument, at the time when it was made and published, truly expressed her design for the disposition of her property. To constitute a revocation because of dissatisfaction with a previous testamentary disposition, the law has required some other will in writing, or some other writing, declaring the revocation or alteration, executed with the same formalities with which the will itself is required by law to be executed, or that the instrument so executed has been burned, torn, canceled, obliterated, or destroyed, with the intention and effect of revoking it, by the person executing it, or by another person in his or her presence, acting by his or her direction and consent. 3 Rev. St. (6th Ed.) p. 63, § 40.

Various exceptions were taken on the part of the contestant to rulings made by the surrogate excluding evidence which was offered in the course of the hearing. But all the evidence which was strictly pertinent and relevant to the case seems to have been received. If that which was rejected had been also added on the hearing, no different result would have been reached in the case. As full and complete a statement of the inclinations, ability, disposition, and acquisitions of the testatrix was received as could be of any service to the contestant. And, upon the consideration of all the evidence, the surrogate was clearly warranted in reaching the conclusion which he did, that the controverted instrument was in fact as well as in law the last will and testament of the decedent. There is no ground presented upon which this decision can be interfered with, but the decree should be affirmed, without including costs against the appellant, inasmuch as the final intention of the testatrix was to have made a different disposition of her property.

BARRETT, J., concurs.

VAN BRUNT, P. J. I do not think the court has any right to consider the evidence of Mr. Wallis as to instructions received by him, etc., as these were communications to which he had no right to testify. Without his evidence, there was ample proof to sustain the conclusions arrived at by Mr. Justice DANIELS. Concur in the result.

MCALLISTER v. CASE *et al.*

(Common Pleas of New York City and County, General Term. December 2, 1889.)

APPEALABLE ORDERS.

An appeal will be granted to the court of appeals from a decision of the general term of the common pleas that a person who has filed a mechanic's lien under Laws N. Y. 1885, c. 342, § 6, and is made a party defendant to a foreclosure suit by another lienholder, need not file a *lis pendens* in order to continue his lien, as the act is general and the question may be controverted.

On application for leave to appeal to the court of appeals.

For opinion on the merits, see 5 N. Y. Supp. 918.

Argued before LARREMORE, C. J., and DALY and VAN HOESEN, JJ.

John J. Hahn, Jr., for appellant. George A. Strong and Frederick M. Littlefield, for respondents.

DALY, J. The question in this case is whether a person who has filed a mechanic's lien, and is made a party defendant to an action brought by another lienor to foreclose, must file a notice of pendency of action in order to continue his lien. Chapter 342, Laws 1885, § 6. Our general term has held that he need not, (5 N. Y. Supp. 918,) and we are requested to permit an appeal to the court of appeals. As the act is general, and there may be a difference of opinion in the state on the question, I am in favor of facilitating its settlement by the court of last resort. All concur.

MAHON v. SEWELL.

(Common Pleas of New York City and County, General Term. December 2, 1889.)

APPEAL—REHEARING.

An application for reargument will be denied, where the applicant does not show that any decisive question has been overlooked by the court, nor that the decision conflicts with any express statute or controlling decision.

On motion for reargument. For former report, see 6 N. Y. Supp. 662.

Argued before LARREMORE, C. J., and DALY and VAN HOESEN, JJ.

John McCrone, for appellant. Robert J. Mahon, for respondent.

DALY, J. The appellant does not bring himself within the rule for granting rearguments as laid down by the court. *Curley v. Tomlinson*, 5 Daly, 283. He does not show that any question decisive of the case has been overlooked by the court, nor that the decision is in conflict with an express statute, or with a controlling decision of the court. This is an application to reargue the case upon the points and authorities upon which it has been already heard and disposed of. The application should be denied, with \$10 costs. All concur.

REICH v. MCCREA.

(City Court of New York, General Term. October 3, 1889.)

NEW TRIAL.

Where the trial judge refuses a motion for new trial, a new trial cannot be granted on affidavits by another judge.

Appeal from special term.

Action by Alonzo Reich against Alice S. McCrea, to recover the amount of an alleged loan. After verdict for plaintiff on a trial before Justice EHRLICH, the latter denied defendant's motion for a new trial. Afterwards a motion by defendant for a new trial was made and heard on affidavits before Chief Justice MCADAM, who granted a new trial, and plaintiff appeals.

Argued before NEHRBAS and MCGOWN, JJ.

Abram Kling, for appellant. *Clarke Bell*, for respondent.

PER CURIAM. From an examination of the proceedings upon the trial before Justice EHRLICH, and of the affidavits used upon the motion before Chief Justice MCADAM, it seems that in furtherance of justice, and in order to allow an opportunity to the defendant to present a full defense before a jury, which she claims she was deprived of upon the trial before Justice EHRLICH by reason of her sudden illness during the trial, and by reason of the overconfidence of her counsel, and to correct any error or manifest injustice, that the order appealed from should be affirmed; yet, following the ruling of the general term of the supreme court in *Knapp v. Post*, 10 Hun, 35, it is clearly our duty to reverse the order. In the case above cited a similar question arose. A motion for a new trial had been made upon the minutes of the justice before whom the action was tried, and by him denied. Another justice having entertained and granted another motion to set aside the judgment on the ground of "error and manifest injustice," it was held to be error, and that a new trial can only be granted in such cases upon an appeal from the first order. In that case GILBERT, J., in his opinion, at page 36, says: "We are of opinion that the proceeding is altogether erroneous. It was nothing more than a retrial of the cause upon affidavits. If the practice here pursued should be authoratively established, few verdicts would stand. It costs defeated parties little effort to show by *ex parte* affidavits that their defeat is attributable to error and manifest injustice, rather than their own neglect and mistakes; and it is far easier to get rid of a verdict and judgment in that way than by appeal. But the law does not allow such a practice. * * * The last motion was simply an appeal from Judge BARNARD to Judge DYKMAN, unless, indeed, 'error and manifest injustice' in a judgment may be shown by affidavit, which, as already said, the law does not allow. The remedy of the party injured by such error and injustice is by appeal." See Code, § 1002, as amended in 1884.

- Following the ruling in the case above cited, the order appealed from must be reversed, with costs.

ANDERSON v. JOHN HANCOCK MUT. LIFE INS. CO.

(City Court of Brooklyn, General Term. November 25, 1889.)

1. APPEAL—REVIEW—WEIGHT OF EVIDENCE.

Where there is a conflict of evidence, a verdict for plaintiff, on a charge fair and liberal to defendant, will not be disturbed.

2. SAME—REFUSAL TO CHARGE.

A refusal to charge as requested is not error, where the court has already substantially charged the same proposition.

Appeal from trial term.

Action by Hilda Anderson against the John Hancock Mutual Life Insurance Company, on an insurance policy held by plaintiff, for her benefit, on the life of her child. Judgment for plaintiff, and defendant appeals.

Argued before CLEMENT, C. J., and OSBORNE, J.

Hirsh & Rasquin, for appellant. *John S. Griffith*, for respondent.

OSBORNE, J. Plaintiff took out a policy with the defendant, for her benefit, on the life of her child, Minnie. The premium, at the rate of five cents per week, was to be paid weekly to defendant's collector, who was in the habit

of calling at plaintiff's house for it. Plaintiff regularly paid the premium to the defendant's collector from October 28, 1885, to March 15, 1886. From the last-mentioned date up to April 26, 1886, the collector failed to call for the weekly premiums. On this date, plaintiff testifies that she went to defendant's office, in this city, and complained that the collector did not call regularly for the premium; that she then paid up the balance due, and was requested to sign a paper for the money that she paid, which she did; that she did not read or write in English; that she was ignorant of the contents of the paper; that it was not read or explained to her; that no inquiry was made as to whether the child was sick. Defendant's testimony is to the effect that when plaintiff called at its office she was informed that the policy had lapsed, but that it would be reinstated on condition that the child was in good health; that plaintiff stated that the child was in good health; that the paper signed was read to her; that she said she understood it, and thereupon signed it; and thereafter the policy was reinstated. The paper in question provided for a reinstatement of the policy on condition that the statement therein contained, that the child was then in good health, was true. There is no dispute but that the child was sick at the time plaintiff signed the paper. It will thus be seen that the whole case turned on the question as to what took place at the time of the signing of the reinstatement paper. If plaintiff's statement was true, that she made no representation as to the child's health, but simply paid the balance of premium due, and signed the paper, supposing it to be a receipt, and that thereby the policy was reinstated; and that she knew, or was told, nothing of the contents of the paper,—she is entitled to recover. This question of fact was left to the jury to decide, on a charge from the learned trial judge that was fair and liberal to the defendant. The jury have found for the plaintiff, and we can see no reason for disturbing its verdict.

The exception to charge as requested at folio 81 is not well taken. The learned trial judge had already charged substantially the same proposition at folio 79, and he was not called upon to repeat it. Judgment and order denying new trial affirmed, with costs.

HOURLNEY v. BROOKLYN CITY R. Co.

(City Court of Brooklyn, General Term. November 25, 1889.)

1. JURY—PROVINCE OF—DISPUTED FACTS.

Where, in an action for injuries to a passenger caused by a collision between defendant's car, and another, plaintiff's testimony that he was riding on the front platform, and not on the guard-rail in front of the car, is contradicted by two witnesses of defendant, the question of his position is for the jury.

2. HORSE AND STREET RAILROADS—NEGLIGENCE.

Evidence that defendant's car was driven rapidly, and that the morning was foggy, and admissions of the driver that at a distance of 25 or 30 feet he heard the bell of the other car, which he knew was crossing at right angles to his own, are sufficient to warrant the submission of the question of negligence to the jury.

3. SAME.

It is not negligence *per se* for a passenger to ride on the front platform of a horse-car.

Appeal from trial term.

Action by John Hourney against the Brooklyn City Railroad Company, for injuries sustained by plaintiff from a collision between defendant's car, on which he was riding, and another. From a judgment for plaintiff, and an order denying a new trial, defendant appeals.

Argued before CLEMENT, C. J., and VAN WYCK, J.

Morris & Whitehouse, for appellant. *Thomas E. Pearsall*, for respondent.

CLEMENT, C. J. It was conceded at the trial that the plaintiff was a passenger on one of the cars of the Flushing-Avenue line of the defendant; and it was also conceded that the car on which plaintiff was riding collided with a

car of another line, which crossed Flushing avenue at right angles; and it was further admitted that the plaintiff sustained injuries as the result of the collision. The main question of fact, which was sharply litigated at the trial, was as to the position of the plaintiff when the collision occurred. Hourney testified that he first got upon the rear platform, and, finding it crowded, went to the front of the car, and that, when the cars were about to come together, he was standing on such platform near the dash-board; that he was crowded by the other passengers; and that, in order to save himself from falling off the car, he threw himself round so that one foot rested on the rod in front of the dash-board, with the result that he was crushed between the two cars. On the other hand, the theory of the company on the trial was that the front platform was crowded, and that the plaintiff was not riding there, but upon the guard-rail in front of the dash-board, and with his back to the horses. Other questions of fact arose in the case which will be referred to hereafter. The verdict of the jury is conclusive that the plaintiff was riding on the front platform, and not upon the guard-rail in front of the car. The plaintiff was contradicted by the conductor, who was corroborated by the testimony of one Felton. We have, therefore, a case where there was one witness for the plaintiff and two for the defendant. The verdict on this question was clearly not against the weight of evidence. The jury believed the testimony of the plaintiff, rather than that of the driver and Felton. There was a witness for plaintiff,—Holland, the driver of the Throop-Avenue car,—who partially corroborated the testimony of plaintiff; but it is claimed by the defense that he so contradicted himself that no credit should be given to him. Without passing on this point, it is sufficient to say that, without his testimony, the question whether plaintiff was riding on the platform or on the guard-rail was one of fact, and for the jury. Assuming, therefore, that plaintiff was riding on the front platform, there was testimony tending to show that the driver of the Flushing-Avenue car was grossly negligent, and there was also testimony tending to show that there was no negligence on his part. The driver admitted that he heard the bell of the other car at a distance of 25 or 30 feet; that he knew that the bell was on a car of a line crossing at right angles. It was argued that the morning was foggy, and for that reason it could be fairly argued to the jury, on behalf of the plaintiff, that the driver was bound to exercise greater care, for the reason that he could not see another car until he was very near to it. Fog or no fog, it would seem, on the driver's testimony, that the jurors could find him negligent, because he admitted that he heard the other car at a distance of 25 or 30 feet, and did not stop in time to prevent a collision so severe as to crush the leg of a passenger. There was also testimony that the car of the defendant's line was driven at a rapid rate of speed, which fact alone, in view of the fog, was sufficient evidence of the negligence of the driver to require the submission of the question to the jury.

It was not negligence *per se* for the plaintiff to ride on the front platform, within the authorities. *Nolan v. Railroad Co.*, 87 N. Y. 63, and cases there cited. And the only other questions raised in the points for the appellant are exceptions to refusals to charge and to modifications of requests. We have examined each exception to which our attention has been called, and we see no error. There were 27 requests to charge on the part of the defendant. Some were pertinent to the issue; others were theoretical,—as, for example, the fifteenth, which was charged, viz.: "That the defendant is not reponsible for the foggy condition of the weather, or its effect upon its rails at the time of the accident." Applying the rule laid down by Chief Judge CHURCH in *Caldwell v. Steam-Boat Co.*, 47 N. Y. 282, 286, we think that the appellant has no reason to complain of the instructions given by the learned trial judge.

Judgment and order denying new trial affirmed, with costs.

VAN WYCK, J., concurs.

BUFFALO STONE & CEMENT CO. v. DELAWARE, L. & W. R. CO.

(Superior Court of Buffalo, General Term. November 19, 1889.)

1. RAILROAD COMPANIES—CONSTRUCTION OF FARM CROSSINGS—DAMAGES.

In an action to compel defendant to construct a farm crossing over its tracks it appeared that defendant's tracks traversed plaintiff's farm along-side the tracks of another company which had previously constructed a crossing at the point desired by plaintiff. At this point defendant's tracks were 13 feet above grade, on a solid embankment, and in order to get across defendant's tracks it was necessary for plaintiff to pass between the two railroads a distance of 550 feet, to a crossing erected by defendant at the point where its tracks entered the farm. *Held*, that evidence of the value of the farm, and the cost of hauling by reason of the location of the crossing by defendant, was competent as bearing on the question whether the court should exercise its equity power, and order a crossing, or give such damages as plaintiff had sustained by reason of failure to place a crossing at a suitable and convenient point, in case defendant's erecting such crossing should be disproportionate to the value of the property.

2. SAME—LOCATION OF CROSSING—RIGHTS OF OWNER.

The fact that defendant constructed a crossing at a remote and inconvenient point is no reason why it should not be required to build one where it is most convenient and useful. Although the right to locate a crossing is with the defendant, the interest and convenience of the owners are to be considered.

3. SAME—ESTOPPEL—CONDEMNATION PROCEEDINGS.

The proceedings taken by defendant to condemn the land, and damages paid to the owner for the right to cross, do not preclude plaintiff from suing to compel the construction of a crossing, and the compensation for damages does not include or provide for the inconveniences suffered from failure to build the crossing.

4. SAME—EVIDENCE—FINDINGS OF COURT.

Several witnesses testified to the fact that defendant's tracks were 13 feet above the level of the tracks of the other road at the point where the latter road had erected the crossing, and that defendant's tracks were on an embankment about 13 feet high. *Held*, that the evidence sustained the finding by the court that it is impossible for a team and wagon to cross defendant's tracks at this old farm road as the defendant's embankment now is, and that said old farm road had been used as an outlet to said farm for many years.

5. SAME.

As the evidence showed that plaintiff could not get to the crossing as located by defendant without passing 550 feet over the lands of defendant or the other railroad, a finding that he was "completely cut off from all connection with the easterly portion of his farm" without trespassing on the lands of another was proper.

6. SAME—ADJOINING OWNER—INTERVENING LANDS.

The fact that the lands of the other railroad intervene between the lands of defendant and those of plaintiff on one side does not prevent plaintiff from being within the statute as "proprietor of lands adjoining such railroad."

7. SAME—FOREIGN CORPORATION.

The fact that defendant is a foreign corporation does not exempt it from the obligation to erect farm crossings imposed under the laws of New York.

8. SAME—DUTY OF LESSEE.

Defendant was a lessee of the railroad under a lease which provided that it should use and operate the railroad, and "do and perform the acts and things which the [lessor,] as owner of the property and franchises, * * * would be bound by law to do and perform had this indenture not been made." *Held*, that the duty of the lessor to construct a farm crossing became the duty of defendant, as lessee, and the latter could be compelled by a farm owner to build the crossing.

9. SAME—SALE OF LAND—RIGHTS OF VENDOR.

Defendant was not absolved from liability to build the crossing by the fact that the person who owned the farm at the time the railroad was built had sold it to plaintiff, as the duty to construct the crossing was not owing to the owner as an individual, but to him as the owner of the farm benefited by the crossing, and no release of the obligation to build the crossing had been executed.

Appeal from special term.

Argued before **TITUS** and **HATCH, JJ.**

Royers, Locke & Milburn, for appellant. *Strong & Brendel*, for respondent.

TITUS, J. This action is brought to compel the defendant, the Delaware, Lackawanna & Western Railroad Company, to construct a suitable crossing across the tracks of the railroad operated by it within the city of Buffalo. It

appears from the case that the action was originally commenced by Mary Schultz, and that subsequent to the commencement of the action she sold the premises described in the complaint to the Buffalo Stone & Cement Company, which was substituted as plaintiff in the action, and the action ordered continued in its name. At the time of the commencement of the action Mary Schultz was the owner of a farm of about 93 acres, fronting on Main street, and extending back to the Williamsville road, which, at this point, has not been opened to the public. Across this farm, extending from Main street back, many years ago, a road was laid out and opened for farm purposes, and is now known as "Hewett Street." Some years after this road was laid out the Erie Railroad Company built its road across this farm, entering upon it at the south-east corner and passing along in a northerly direction to Main street about 1,300 feet. It enters through a cut some 8 feet deep, which gradually lessens until at Hewett street, some 550 feet distant, the tracks are at grade, where the crossing was constructed by the Erie, which enabled the plaintiff's grantors to pass to and from the back end of the farm to that portion of it lying south of the tracks and next to Main street. The tracks of the defendant enter upon this farm immediately east and adjoining the lands of the Erie, and continue along parallel with the tracks of that company across the farm. The defendant's tracks enter onto the plaintiff's land at grade, and as it proceeds northerly it crosses Hewett street on an embankment 13 feet above grade. No farm crossing was made by defendant at Hewett street, and the farm-road crossing to the rear of plaintiff's land was blocked at this point by the embankment on which the road of the defendant was built. Near where the defendant's tracks enter the plaintiff's land, or 550 feet from Hewett street, the defendant constructed a crossing at grade. The Erie Railroad, at this point, has no bridge over the cut through which its tracks run, so that in getting across the tracks at this point, in going onto the back part of the farm, it is necessary to cross the Erie tracks at Hewett street, then pass along the embankment between the tracks of the two roads, over their lands 550 feet to the crossing prepared by the defendant at the south-east corner of this farm. It is claimed by the defendant that error was committed on the trial of the action in allowing the plaintiff to make proof of the value of the farm and of the cost of hauling stone over this railroad by reason of locating the crossing at the point indicated. It seems to me this proof was competent as bearing upon the question whether the court should exercise its equity power and order a crossing, or give the plaintiff such damages as he has sustained by reason of the failure to place a crossing at a suitable and convenient point, in case the company's erecting such a crossing should be disproportionate to the value of the property. *Wademan v. Railroad Co.*, 51 N. Y. 571. Whether the present crossing is conveniently and properly located, and whether it properly accommodates the plaintiff in the ordinary use of his farm, were questions of fact for the trial court. By stipulation of the parties the judge who tried the case personally inspected the crossing, and the proposed crossing, and all of the surroundings, to aid the court in determining whether such a crossing was necessary, and could without great expense be made, and presumably he was somewhat influenced in his determination of the question by his own observation; and it would be difficult for this court to say that he erred in his judgment as to the proper location of the crossing, and the necessity for one where the plaintiff now insists it should be. *Jones v. Seligman*, 81 N. Y. 190. Aside from the fact that the judge who tried the case personally inspected the locality, sufficient evidence appears in the case to warrant the conclusion reached by the court in ordering the crossing. The fact that the railroad company have constructed a crossing at a remote and inconvenient point is no reason why it should not be required to build one where it is most convenient and useful, all the surroundings considered. While the right to locate a crossing is with the railroad company, still the in-

terest and convenience of the land-owners are to be considered in the selection of a site for a farm crossing. *Wheeler v. Railroad Co.*, 12 Barb. 227.

The proceedings taken by a railroad company to condemn the land, and the damages paid to the owner for the right to cross, do not preclude the plaintiff from maintaining the action to compel the corporation to provide a suitable and proper crossing, and the compensation for damages does not include or provide for the inconveniences suffered from the failure to build a crossing where one should properly be located. *Jones v. Seligman, supra*; *Smith v. Railroad Co.*, 63 N. Y. 58. The fact that there is a valuable stone quarry on the place, located on both sides of the railroad tracks, cannot prejudice the plaintiff's right to a suitable, proper, and conveniently located farm crossing, and the plaintiff may be entitled to it independent and in spite of that fact. The counsel is mistaken in his criticism of the ninth and tenth findings in saying there is no evidence to support either of them. The ninth finding is absolutely true if I correctly read the evidence. The witness Schultz, in his testimony, says: "At the point where the Erie crosses, and where Hewett street crosses the Lackawanna tracks, it is some thirteen feet above the level of the Erie track, higher than this Erie road. The embankment of the Lackawanna runs so much higher than the track of the Erie. * * * It is a solid fill from Hewett street to Main street. * * * The Lackawanna embankment at Hewett street is about thirteen feet high." The other witnesses testify to the same fact. Not only is the fact found by the court, viz., "that it is impossible for a team and wagon to cross defendant's tracks at this old farm road as the defendant's embankment now is, and that said old farm road had been used as an outlet of said farm to said Main street for many years," fully and completely shown by evidence, but there is no evidence in the case from which an inference can be drawn that such is not the fact. The tenth finding is equally well established by the evidence. It cannot be claimed from the evidence that the plaintiff can get to the crossing as now located without passing 550 feet over the lands of the defendant, or over the lands of the Erie Company, which he has no right to do if either company over whose lands he passes forbids it, because in going from Main street east he must cross the Erie tracks over the crossing which is provided at Hewett street, then pass up along between the tracks of the Erie and the Lackawanna roads 550 feet, to the crossing provided by the defendant. So he is "completely cut off from all connection with the easterly portion of his farm" without trespassing upon the lands of another. It is claimed by the defendant's counsel that the plaintiff is not within the statute as "proprietor of lands adjoining such railroad," but that, inasmuch as the lands of the Erie Railroad Company intervene between the Lackawanna and the lands of the plaintiff on the southerly side, they do not adjoin, or are not adjacent to, the railroad of the defendant, and hence the plaintiff is not entitled to the relief. It seems to me that the plaintiff is the proprietor of "lands adjoining such lands" within the meaning of the statute. It appears that the Erie Railroad Company owns all of the land up to the lands of the defendant corporation, and has provided a crossing over its lands at Hewett street across which the defendant has thrown an embankment. It can make no difference whether the plaintiff's right of way is reserved in the deed conveying the land or voluntarily made under the statute providing for a farm crossing. It is owned by a railroad corporation, across whose lands the plaintiff's right of way exists up to the lands of the defendant. No person owns the lands between the lands of the plaintiff on the east of his lands on the west of the railroad tracks. It is the property of the Erie and Lackawanna Railroad Companies. Such a construction as contended for would defeat the object of the statute in providing for farm crossings, if, because the railroad built its tracks along-side the lands of another railroad, it should be held that the owner of the lands lying on both sides of the railroad was not the adjoining owner. The case of *People v. Colgate*, 61 N. Y.

512, cited by the defendant's counsel, does not bear out his claim. In that case the owner of lands applied to the land commissioners for lands lying under water. It was held that inasmuch as the statute provided that "the commissioners of the land-office shall have power to grant * * * lands under the waters of navigable rivers * * * for the beneficial enjoyment of the same by the adjacent owner; but no such grant shall be made to any person other than the proprietor of the adjacent lands, and any such grant that shall be made to any other persons shall be void," the defendant in that case did not own any upland, and was not the proprietor of the lands adjacent; that a street intervened between the lands and the river, and as the commissioners were limited by statute to adjacent owners of the uplands, they had no power to make the grant, and it was consequently void. *Schools v. Risley*, 10 Wall. 91, is to the effect that where the lands of a person are separated from a river by a public road or passage such person is not a riparian owner, nor entitled to the accretions occasioned by the alluvial deposits, but that if the land of such person extended to the river he would be entitled to such accretions as the owner of the adjacent lands. *Saulet v. Shepherd*, 4 Wall. 502, holds that before there can be a right to accretion there must be an estate to which the accretion can be attached, and the right depends upon the fact of the contiguity of the estate to the river. In *Banks v. Ogden*, 2 Wall. 57, it is held that accretions from Lake Michigan belong to the proprietor of the land bounded by the lake. These cases are illustrations of the well-known rule of the common law relating to the rights of riparian owners, and are not applicable to the rights of the party under the railroad law requiring the railroad to maintain farm crossings for the use of proprietors of land adjoining such railroads.

The defendant claims that the obligation imposed upon the corporation created under the laws of New York does not extend to the defendant corporation, which is an organization under the laws of Pennsylvania. There does not seem to be any good reason why a foreign corporation, operating a road in this state, should not be subject to its laws, and liable like a domestic corporation for omission to conform thereto, or for any neglect of duty or negligence in its performance. It has been held by the courts that a foreign railroad corporation is liable for negligence the same as a domestic corporation. *Purdy v. Railroad Co.*, 61 N. Y. 358; *Traoy v. Railway Co.*, 88 N. Y. 493. It is not claimed that the defendant's lessor, the New York, Lackawanna & Western Railroad Company, in a proper case, could not be compelled to construct a farm crossing, but it is insisted that the defendant, being a foreign corporation, is not within the statute. I have not been referred to any authority sustaining this view, and am not prepared to adopt it. It is claimed by the defendant's counsel that the defendant, as lessee, is not liable for the failure by the lessor to comply with the statute in constructing a road, in providing a farm crossing. Under the lease from the New York, Lackawanna & Western Railroad Company the defendant assumed to perform all acts and things which the lessor would be bound by law to perform. In article first of the lease printed in the case it is provided that "the said party of the second part shall during the continuance of this indenture use and operate the said railroad, and do and perform the acts and things which the party of the first part as owners of the property and franchises hereby demised would be bound by law to do and perform had this indenture not been made." These are public corporations, and the conditions imposed upon the lessee inure to the benefit of the public. The duty of the lessor becomes the duty of the lessee, and if the lessor would be bound to provide farm crossings that duty is devolved upon the lessee corporation for the benefit of all persons whose rights the statute had in view. It is claimed that this statute does not go to the extent of requiring the lessee to perform the statutory duty of the lessor in building the road. This provision of the lease as between the defendant and the

public has the force of law, and was intended to relieve the lessor from all further liability as owner of the railroad, and to impose all its incomplete duties as well as liability in operating the railroad upon the defendant. If this is not the true meaning of this clause, then such a provision would seem unnecessary to protect the lessor from liability of the lessee's negligence in operating the road, for it has been repeatedly held in this and many other states that such a provision is not necessary to charge the company operating the road with negligence. In *Ditchett v. Railroad Co.*, 67 N. Y. 425, the company operating the railroad was held liable. The court says, in speaking of the liability of the lessor to erect and maintain a fence as required by the statute along the line of the railroad: "It may well be doubted whether the lessor of a railroad, who had parted with the possession, could be held liable for the negligence of the lessee under the statute in question." In *Wasmer v. Railroad Co.*, 80 N. Y. 212, it was held that where the lessor, in laying tracks in a street, permitted them to be raised so much above the level of the street as to cause an injury to a person in driving over them, while the railroad was in the possession of the lessee, the lessee, and not the lessor, was liable in damages for the injury. This case, it is true, bears more particularly upon the duty of the company in operating the road, but the defendant is lessee of the property, rights, powers, and franchises of the lessor for the full term of its corporate existence, and is practically the owner of the road, and the lessor has nothing to do with maintaining, repairing, and operating it. It is a mere construction company, disposing of its property and franchises as soon as it had completed its railroad, and would not, as has already been intimated, be liable for damages from causes incident to operating the road had no such clause been inserted in the contract. It seems to me, therefore, that the action was properly brought against the Delaware, Lackawanna & Western Railroad Company, and that the statutory duty of providing farm crossings can be enforced against it. The defendant also claims that because of the sale of the property by Mary Schultz, who was the owner at the time the railroad was built, to the plaintiff, the defendant is absolved from liability to perform the statutory requirement. The duty to construct a farm crossing is not one owing to the individual, but to him as owner of the farm benefited by the crossing, and hence the fact that Schultz, who was the owner of the farm at the time the railroad was built, has since sold his land to the plaintiff, does not affect the question of enforcing upon the defendant the duty imposed upon it by the statute. Undoubtedly the owner could release the company from its obligation to build a crossing, and so he could make any other lawful agreement with the company by which his property would become charged or burdened, and it would pass down to his grantee with such charge or burden attached; but so long as he has not released the company from its obligation it attaches and passes to the grantee, with the title of the fee, and the defendant has not, by reason of a change of title to the lands, been relieved from the obligation imposed by the statute to build farm crossings. It therefore follows that the judgment appealed from should be affirmed, with costs.

IRELAND v. GARDNER.

(*Supreme Court, General Term, Fifth Department. October 19, 1889.*)

MASTER AND SERVANT—DEFECTIVE APPLIANCES—OBVIOUS DEFECTS.

Where a car-coupler has for some time been employed in a railroad yard, it is error to submit to the jury the question whether the danger of having his foot caught in an unblocked guard-rail is so apparent and obvious that he is chargeable with notice of its existence, although he had been at work only three or four days in that part of the yard where the injury occurred. Following *Appel v. Railroad Co.*, 19 N. E. Rep. 93. *MACOMBER, J.*, dissenting.

Appeal from circuit court, Monroe county.

Action for personal injuries, by Adelbert E. Ireland against G. Clinton Gardner, receiver of the Buffalo, New York & Philadelphia Railroad Company. Plaintiff obtained a verdict for \$30,000, and from a judgment thereon, and an order denying his motion for a new trial, defendant appeals.

Argued before *BARKER, P. J.*, and *DWIGHT and MACOMBER, JJ.*

John A. Milburn, for appellant. *William S. Oliver*, for respondent.

PER CURIAM. The submission of the case to the jury to find a verdict for plaintiff on the sole ground that the guard-rail was not blocked was error, under the case of *Appel v. Railroad Co.*, 111 N. Y. 550, 19 N. E. Rep. 93. Judgment and order reversed, and new trial granted, costs to abide the event.

MACOMBER, J. (*dissenting.*) At the time of receiving the injuries for which this action is brought, the plaintiff was engaged in what is known as "breaking up" a train, in the yards of the defendant, near the city of Rochester. This process consisted of uncoupling and taking out freight-cars from the train, and shifting them respectively to their proper places on other tracks. The plaintiff was required to go between the cars while the train was in motion, in order to disconnect them by pulling the coupling-pin. Taking hold of a pin for such purpose, he found that he could not raise it, because it was bent, whereupon he reached forward, to pull the other pin in the opposite coupling. At this instant one of his feet went into the wedge-shaped space between the main rail and the guard rail, where he was caught and held, while the car threw him down, the wheel crushing his left leg and arm, which subsequently had to be amputated,—the one at the thigh, and the other at the shoulder. At the time of receiving these injuries the plaintiff had worked at this particular business three or four days only. For some time prior thereto he had been engaged in coupling cars, which required him simply to couple the coming car to the car standing still; while the pulling of pins, in the process of cutting out cars and shifting them from one track to another, required him to enter between the moving cars, and to pull the pins while they were thus in motion. A coupler was required only to step in between the standing car and the coming car, and drop the pin when the moving car came up. In that work there was no requirement for the operator to walk upon the tracks. The plaintiff had no experience with this guard-rail which caused his injuries, before the time when this accident happened. He had no particular knowledge of the location of the guard-rail. He had no experience in cutting out a car, or pulling a pin, over such a dangerous place. His attention never had been called to the fact that this guard-rail and frog, or that any guard-rails or frogs, were dangerous.

The main exception on this appeal arises upon the submission by the trial judge of the question to the jury whether the danger arising from the position of those two rails, and the want of a "block" between them to prevent the entry of a foot, was apparent and obvious, so that the plaintiff was chargeable with knowledge of the existence of the danger. Under the facts testified to by the plaintiff, in which he is in part corroborated by the witnesses called by

the defendant, the jury was justified in reaching a conclusion favorable to the plaintiff upon this proposition. While actually engaged in this work he could not have seen the place where his foot was caught.

The decision of *Appel v. Railroad Co.*, 111 N. Y. 550, 19 N. E. Rep. 93, is pressed upon our attention as being an authority against the right of the plaintiff in this action to recover for the injuries so received by him. In that case, however, it appeared that the plaintiff's intestate had been in the defendant's employ for some years, and for quite a long time in and about the yard where the accident happened, and was actually acquainted with the frog, and knew that it was not "blocked." Under these circumstances, the court held that in accepting and continuing in the employment he assumed the hazard of all known and obvious dangers, and that he was chargeable with notice of the difficulty in removing the foot when caught in a frog, and of the danger to be apprehended therefrom; and, therefore, that a cause of action was not made out, and a refusal to nonsuit was error. The court there say: "We feel quite sure that one who worked among these rails daily for months and years necessarily was familiar with their shape and general construction, and must have known of the difficulty of removing a foot caught in the space between the rails, and the danger of the situation arising therefrom. We cannot believe that any one could thus work, and yet, while familiar with the frog, its purpose and use, and with its apparent form and condition, and that it was unblocked, (with all of which knowledge the learned court below correctly charged the deceased,) could still be ignorant that there was danger to be apprehended by getting his foot caught between the rails, and that there was a liability to have it thus caught. * * * We can have no doubt that the danger was obvious and known to the deceased." In the case before us, however, the chief employment of the plaintiff had been and was in the south end of the yards of the defendant, a place which was between 80 and 100 rods from the spot where he was injured, which is shown to be at the north end of the yard. The business to which the plaintiff had been put was new to him. His attention had not been called to its peculiar dangers. Under these circumstances, it seems to me that the case is distinguishable from that of *Appel*, and that it was not error for the trial judge to submit the question to the jury whether the apparent and obvious condition of the tracks gave him knowledge of its dangerous character. The question of want of ordinary care was, in this instance, under the testimony, one for their consideration. Their decision of that question is supported by sufficient evidence. I am unable to say, therefore, as it was said by the court of appeals in the *Appel Case*, that the dangers were apparent to the plaintiff, and that he was necessarily chargeable with knowledge thereof. Furthermore, had the pin in the coupling which the plaintiff first seized been in good condition, so as to be released from the coupling, in all probability the plaintiff would have avoided these injuries; but, as the same did not yield to his clutch, on account of its being bent, he was required to resort to the coupling on the other car, which took some little time,—so long, indeed, as that he traversed 65 feet while so engaged in trying to wriggle out the pin. It appears, therefore, that the plaintiff entered between the cars at a point where there was no danger by reason of the rail and the frog, and under ordinary circumstances would have come out without injury before reaching this particularly dangerous spot. While going along with the cars in motion he could not see that his foot was likely to be put into this dangerous place. This fact, in connection with his want of knowledge or information of the location of the "unblocked" frog, did, in my judgment, justify the jury in rendering a verdict for the plaintiff, in the absence of evidence of a proper inspection of the coupling.

The only other question in the case that merits comment is the proposition that the damages were excessive. There is nothing to indicate that the jury,

in rendering this verdict, were actuated by any prejudice or passion. On the contrary, while thus liberal in their award which they have made, they cannot be said to have gone beyond actual damages. The injuries incapacitated the plaintiff for work. He was rendered helpless. He even at the time of the trial required assistance in locomotion. He not only suffered the pains of the injuries and the subsequent amputations, but much of such pain has followed him to the present time, and will attend him while he lives. The evidence shows that before the injury he was receiving \$45 a month as wages; that he was a strong, healthy, whole, man, from which condition he was dismembered nearly to a torso. Under these circumstances I am unable to say that the sum awarded was excessive.

I have examined the several exceptions in the case not hereinbefore considered, and do not find in them any error that would warrant a reversal of the judgment. The judgment should be affirmed.

BACH *et al.* v. TUCH.

(*Supreme Court, General Term, First Department. November 7, 1889.*)

Sale—Rescission of Contract—Replevin.

In an action for the price of goods sold, an attachment was issued on an affidavit which alleged that the sale was made in reliance on defendant's representations as to his financial condition; which representations were false, and must have been known by defendant to be false when he made them. The attachment was issued on the ground that defendant had made an assignment in fraud of his creditors. Plaintiffs afterwards discontinued this action, and brought replevin for the goods. *Held*, that plaintiffs' right to maintain replevin depended solely on whether they knew, when they sued for the price of the goods, that defendant had purchased the same with a fraudulent intent; and an instruction which went beyond this, and made plaintiffs' right to depend partly on their knowledge of their legal right to rescind the sale, and partly on the fact whether plaintiffs were aware of their remedy by replevin, was erroneous.

Motion for new trial on exceptions.

Replevin by Elias Bach and another, survivors, against Simon Tuch, for a quantity of merchandise alleged to have been purchased by defendant's assignor by fraudulent representations. Defendant moves for a new trial, on exceptions ordered to be first heard at the general term.

Argued before VAN BRUNT, P. J., and BRADY and DANIELS, JJ.

B. F. Einstein, for plaintiff. *Alfred P. W. Seman* and *Edmond E. Wise*, for defendants.

DANIELS, J. This action was before this court, upon an appeal by the plaintiffs, in 1888, and the judgment which had then dismissed the complaint was reversed, and a new trial ordered. *Bach v. Tuch*, 47 Hun, 536. It was then considered that the right of the plaintiffs to maintain the action depended upon a question of fact, to be submitted to the jury. It was brought to recover the possession of 21 cases of leaf tobacco, which had been sold by the plaintiffs' firm to Rudolph Moeller, the assignor of the defendant, Tuch; and 17 of these cases had been replevied in the suit. To maintain the action, evidence was given tending to show that the assignor had misrepresented his financial circumstances at the time when he applied to the plaintiffs' firm for the purchase of the tobacco, and that, instead of being a man of responsibility, he was at the time insolvent. The defense in the action consisted of the fact that the plaintiffs' firm commenced an action in December, 1885, for the purchase price of the tobacco, and issued an attachment in that action against the property of the purchaser. In the affidavit upon which the attachment was issued, it was stated by one of the firm that the purchaser had represented that he was worth the sum of \$12,000, over and above his debts and liabilities, and was perfectly solvent; and that the sale was made in reliance upon the truth of that representation. It was then added "that said statement and

representation, so made as aforesaid, were false and untrue in every particular; and this defendant must have known that the same were untrue when he made the same to deponent." The attachment was not issued on this ground, but it was issued upon the charge that the debtor had made a fraudulent assignment to cover up his property and remove it beyond the reach of his creditors, and for the protection of himself and his wife, who was preferred to the extent of \$10,000; and that he had thereby removed and disposed of his property with the intent to cheat and defraud his creditors. The action in which the attachment was issued continued to be pending until the 20th of February, 1886, and then it was discontinued; and after that this action was brought for the recovery of the possession of the tobacco.

By these proceedings it has been contended, as it previously was, that the plaintiffs' firm had elected to recover the price of the tobacco, and by such election had deprived themselves of the power afterwards to rescind the sale and recover the property; and no doubt has at any time been entertained but that this was the legal result, if the firm had become aware of the fact, when the action for the debt was commenced, that the purchase had been fraudulently made by the assignor. *Foundry Co. v. Hersee*, 103 N. Y. 25, 9 N. E. Rep. 487; *Hays v. Midas*, 104 N. Y. 602, 11 N. E. Rep. 141. But, while the affidavit upon which the attachment was issued stated that the representations were false in every particular, and must have been known to be so by the purchaser when he made the purchase, it was nowhere stated that there was any intention whatever on his part to deceive, or thereby defraud, the firm. That, it is true, could well be inferred from the fact that the representations were untrue, and were known to have been so by the purchaser of the tobacco. But that inference was neither ascertained nor stated by the member of the firm who made the affidavit upon which the attachment was issued; and it therefore did not appear that he, or his firm, had discovered, or in any manner come to the knowledge of, the fact that this fraudulent intent existed on the part of the purchaser; and that was essential, to conclude the firm by the action brought for the recovery of the debt. Without that discovery, and without that being the fact, the firm could not maintain an action to recover the possession of the tobacco; and it may be inferred not to have been made by the firm until the action in which the attachment had been obtained was discontinued. And, if that had not been previously discovered by the firm, or either of its members, it was not concluded, by the action for the debt, from taking proceedings upon its discontinuance for the disaffirmance of the sale. And whether the fact had come to the knowledge of, or been discovered in any form by, the plaintiffs that the purchaser was actuated by an intent to deceive and defraud them in the purchase of the tobacco, was the sole question required to be submitted to the jury for the disposition of this part of the plaintiffs' action. In its submission to the jury the direction extended beyond this. And the right of the plaintiffs to maintain the action was in part made dependent upon their knowledge of their legal ability or right to disaffirm the contract. In that direction the court proceeded further than the plaintiffs were entitled to have the jury instructed. It was also added, in answer to an inquiry made by the jury, that it was a question of fact whether or not the plaintiffs were aware of their remedy by replevin, when they brought their action by attachment. To these propositions submitted to the jury the defendant excepted; and these exceptions were well taken, for the ability of the plaintiffs to maintain the action to recover the possession of the tobacco was in no respect dependent upon the absence of their knowledge of the legal remedy which might be instituted and pursued for the recovery of the possession of the property. What was in the case, and all that was in it, on this part of the controversy, was the simple question whether this was a fraudulent purchase of the tobacco by the assignor, and whether the firm, or either of its members, had discovered the fraud at the time when the action for the

recovery of the debt was brought and the attachment was issued, or, after that discovery, proceeded with its prosecution. It is upon this inquiry, as a matter of fact, that the right of the firm to maintain the action has become dependent. Whether it was known to either of its members what the particular remedy would be through which the possession of the tobacco might be obtained, was not of the slightest consequence; and, as their knowledge of the existence of the remedy was in this manner brought into the case, and the verdict probably proceeded upon it, the verdict should be set aside, and a new trial ordered, with costs to the defendant, to abide the event.

VAN BRUNT, P. J. I concur in the result. I am of the opinion that the averments of the affidavit in the attachment suit show that the plaintiffs knew of the fraud at the time that action was commenced, and hence, having sued for the purchase price with knowledge of the fraud, cannot now be permitted to rescind the sale.

BRADY, J., concurs.

FURBER v. MCCARTHY *et al.*

(Supreme Court, General Term, First Department. November 7, 1889.)

SET-OFF AND COUNTER-CLAIM—UNDERTAKING ON ARREST.

An undertaking executed to obtain the arrest of the maker of a note for false representations is a statutory indemnity in the nature of a penalty, and not a contract, and in an action thereon by the assignee of the maker of the note the obligors cannot counter-claim the note assigned to them by the promisee.

Appeal from circuit court, New York county.

Action by Arthur Furber against Alexander L. McCarthy and another on an undertaking executed to obtain the arrest of plaintiff's assignor. From a judgment dismissing the complaint after trial by the court plaintiff appeals. For former reports, see 4 N. Y. Supp. 274; 5 N. Y. Supp. 947.

Argued before VAN BRUNT, P. J., and BRADY and DANIELS, JJ.

Arthur Furber, pro se. E. P. Johnson, for respondents.

VAN BRUNT, P. J. The facts are as follows: In February, 1884, one De Berg gave his note of \$261.25, for value, to the firm of Shufeldt & Co., payable at four months after date, and which has never been paid. Subsequently Shufeldt & Co. sued De Berg for damages because of false representations. De Berg was arrested in that action, and for the purpose of obtaining the order of arrest Shufeldt & Co. procured the defendants herein to execute an undertaking in the form required by law. The action was tried in June, 1885, and the defendant was successful, and on June 6, 1885, a judgment was entered in his favor for \$122.45 costs. On June 8th Shufeldt & Co. assigned, and transferred said note to the defendants. Other costs were awarded in the action, amounting to \$94.98. In November, 1885, De Berg assigned the said undertaking, and the cause of action which had arisen thereunder, to the plaintiff herein. On November 24, 1885, Shufeldt & Co. paid said two bills of costs to De Berg's attorney, and the judgment therefor was satisfied. De Berg became insolvent before the maturity of the note, and is still so insolvent. The plaintiff had knowledge of the existence of the note, and that it was unpaid, but he had no knowledge, nor had De Berg, of the transfer of said note to the defendants until service of the answer in this action. The plaintiff, as assignee of the said undertaking, brought his action to recover thereon from the defendants, the obligors in the undertaking. The defendants sought to counter-claim the note, which was allowed by the court, and from the judgment thereupon entered this appeal is taken.

The sole question involved upon this appeal is whether the defendants could

counter-claim this note to the liability which had arisen upon the undertaking. The solution of this question seems to depend upon the question as to whether the undertaking was a contract or not. That it was not a contract seems to be apparent when we consider what are the elements necessary to constitute a contract. A contract is defined to be "a deliberate engagement between competent parties upon a legal consideration to do, or to abstain from doing, some act." The undertaking in question is not a contract, because it is unilateral, and the party for whose benefit it was given had no volition in the matter. It is merely a statutory obligation, having no consideration to support it, the only obligation arising under it being because of the provision of the statute. De Berg was not a party to it, and in no way consented to it. The undertaking is a statutory indemnity, in the nature of a penalty, which the obligees in the undertaking incur because of the wrongful act of the parties for whom they have become the sureties. The case seems to come distinctly within the principles laid down in the case of *McCoun v. Railroad Co.*, 50 N. Y. 176, where a contract was defined to be "a drawing together of minds until they meet, and an agreement is made to do or not to do some particular thing." The court also held that "a statutory liability wants all the elements of a contract,—consideration, mutuality, as well as the assent of the party." It seems to be reasonably clear that, the undertaking in question not being a contract, an action upon it is not an action upon contract to which a liability upon another contract can be set up as a counter-claim. The judgment appealed from should be reversed, and a new trial ordered, with costs to the appellant to abide final event. All concur.

DRAPER v. PALMER *et al.*¹

(*Supreme Court, General Term, First Department. November 7, 1889.*)

1. DEED—CONSTRUCTION—TRUST-DEED.

Where a grantor executes a deed conveying land in trust for two of his grandsons, in which he directs that if either of them should die under 30 years of age, leaving no child surviving him, his share should be conveyed, assigned, and delivered to his surviving brother, the property on the death of one of the grandsons is to be conveyed directly to the survivor, though he is a minor.

2. SAME—ACCUMULATIONS.

A deed conveying land in trust for J. and R., in which it was directed that the trust fund should, on the death of either without children, go to the survivor, provided, further, that the trustee should receive the rents and profits of one-half of the trust property, and apply them for the support of J., and that any surplus should be allowed to accumulate for J.'s benefit, and be paid over to him on his becoming 21 years of age. *Held*, that such accumulations vested immediately in J., and became his property, and did not constitute part of the trust fund which, on J.'s death, would go to his surviving brother.

Appeal from special term, New York county.

Action by Maryanna Palmer Draper, trustee, against Richard Suydam Palmer, and others, to settle the accounts of a trust-estate. Both parties appeal. For former report see 1 N. Y. Supp. 116.

Argued before VAN BRUNT, P. J., and BARRETT and DANIELS, JJ.

John L. Cadwalader, Lewis Sanders, and Frederick P. Foster, for plaintiff and others. James C. Carter and Lewis Cass Ledyard, for defendants Haven and others. Henry Sanger Snow, guardian *ad litem*, for Richard Suydam Palmer.

DANIELS, J. This action, in its theory, was brought to settle the accounts of a trust-estate, of which the plaintiff has been appointed and acted as the trustee. But, for the purpose of settling the accounts and ascertaining the rights of the parties to an accumulating fund, it became necessary to place a con-

¹ Modifying 1 N. Y. Supp. 116.

struction upon deeds executed by Cortlandt Palmer, conveying two undivided one-eighth parts of his real estate in trust for the benefit of John Arnot Palmer and Richard Suydam Palmer, who were his grandchildren. It is to be inferred from the deeds at different times executed by Cortlandt Palmer that he designed to provide through their instrumentality for the disposition of his property, for the benefit of his children and their descendants, after his own decease. The deeds made by him included various parcels of real estate, in all of which a life-estate for himself during his life was reserved; and, after his decease, trusts were created for the benefit of his children in undivided portions of this property. One undivided part was originally conveyed in this manner on the 26th of May, 1857, to Oliver De Forest Grant, for the benefit of the grantor's son, Richard Suydam Palmer. In this, as well as the other deeds, the power was reserved for further and additional declarations of trust by him, provided that the trusts should be for the benefit wholly of his children or lineal descendants, or some of them. Before the time of the decease of Cortlandt Palmer, the grantor, this son, Richard Suydam Palmer, died, leaving his wife and two children—John Arnot and Richard Suydam Palmer—surviving him; and, to meet and provide for this change, and under the authority in this manner reserved in the deeds for the benefit of his son, he, together with Cortlandt Palmer, Jr., and Charles Phelps Palmer, who were trustees succeeding the trustees appointed under the first deed of this one-fourth of the real estate, executed and delivered a further conveyance of the property to Henry Draper, for the benefit of these two surviving children of his deceased son, Richard Suydam Palmer. Two other deeds affecting the property were afterwards made, the object of the second being, apparently, to secure the power to place a mortgage upon a portion of the land; and, after that was accomplished, the third deed was executed and delivered, to revest the property, and, in like manner, again declare the trusts, in the same trustee, Henry Draper. And it is upon the construction to which the first and third trust-deeds should be subjected that the disposition of the action has been made dependent; for, after the decease of Cortlandt Palmer, and on the 5th of November, 1885, John Arnot Palmer, one of the beneficiaries in the trusts declared by these deeds, departed this life, leaving his brother, Richard Suydam Palmer, and his mother, Fannie Arnot Palmer, surviving him. At the time of his decease, both himself and his brother were infants, under the age of 21 years, and his mother intermarried with George C. Haven; and they, upon his decease, were appointed administrator and administratrix of the estate of John Arnot Palmer, deceased.

By the deeds affecting this part of the property of Cortlandt Palmer it was declared by him that if either of these two grandsons should depart this life before attaining the age of 30 years, leaving a child or children him surviving, the half part of the land, premises, and trust fund should be conveyed, assigned, and delivered to his child or children, or such of them, and in such shares or proportions, as he should by his will or written appointment direct; and, in default of such will or appointment, then in equal shares, for their own use, forever. And, in case either of these grandsons should die under 30 years of age, leaving no child him surviving, then his share was directed to be conveyed, assigned, and delivered to his surviving brother then living; and, if there should be no such survivor, then to the children surviving him, in equal shares, etc. John Arnot Palmer died unmarried, and leaving no child or children to whom his share in this estate could pass under any direction contained in the deeds. This share, consequently, by the direction which has just been referred to, passed to his surviving brother, Richard Suydam Palmer; and, although he was an infant at the time, as no other or further trust was created, or directed to be created, in this share of the property, in the event of his survivorship, and no direction was given under which the trustee was authorized to hold or continue in its possession or management,

it was to be conveyed and passed directly to this surviving brother. For its disposition the directions contained in the deeds were wholly unqualified, and evince the intention of the grantor of the property to be that it should absolutely vest in the surviving brother, upon the contingency which in this manner is shown to have taken place. These directions are clear and explicit, and leave no reasonable ground for doubting what the grantor in the deeds intended should be the disposition of this share of the estate, upon the decease of his grandson John Arnot Palmer.

It has been urged that a trust continued in the trustee of this part of the property by reason of a direction in the deeds "that if any person other than the said John Arnot Palmer, or Richard Suydam Palmer, second, shall become entitled to take any share or interest in said lands or said trust fund, and shall then be under the age of twenty-one years, such share shall be held by the said party of the third part, and his successors, and they shall apply the rents and profits thereof to the use of such person, until such person shall attain the age of twenty-one years." But this direction in the deed excludes the case of this surviving brother. It was by its language made to comprehend only the case of some person other than one of these two brothers becoming entitled to the share or interest in the estate provided for the deceased brother. Why the grantor should have framed the direction in this manner does not appear. But it is sufficient for the purposes of the case that he did so frame it, and provided by this direction only for the continuance of the trust, when the person becoming entitled to the estate should be an individual different from John Arnot or Richard Suydam Palmer. The expression of this intent has been so clearly made as to produce the immediate vesting of the share of this deceased brother, upon his decease, in his surviving brother. As to that, it has declared no continuation whatever of the trust in this share of the property, during the minority of this survivor. But the share of the deceased brother was designed to vest at once, and absolutely, in him. And the fact of his minority at the time of such decease was not made in any respect a qualification of his right to the absolute title. It may very well be that the grantor of the estate did not anticipate the occurrence of the death of either of these sons during the minority of the survivor. But the direction for the disposition of the share of the deceased brother has been given in such general language as to include and provide for this event, even though it occurred, as it did, within the minority of the surviving brother. The fact that the survivor, being an infant, could not be discreetly intrusted with the estate, is of no moment. For, as to that, the law has provided the means by which it shall be managed and possessed, and the interests of this surviving brother be cared for and protected.

The deeds in controversy provided and directed that the rents and profits of one-half part of this quarter of the property should be received by the trustee, and applied to the use of John Arnot Palmer during his life. This, however, was subjected to the further qualification that upon his attaining the age of 30 years, and with the consent in writing of his mother, if she should then be living and capable of giving such consent, this equal, undivided, eighth part of the property, and all of such additions as might theretofore have been made to it, should be conveyed, signed, transferred, and delivered to him in fee-simple absolute, for his own use forever. It was further directed that the rents and profits of this part of the estate should be applied to the use of this grandson. And, if there should be a surplus not required for his necessary, proper, convenient, and full support, education, improvement, and comfort, then "such surplus shall accumulate for his benefit; and, on his attaining the full age of twenty-one years, the whole of such surplus, with its accumulations, shall be paid to him, for his own use absolutely. And after he shall have attained the age of twenty-one years, and thenceforth until he shall attain the age of thirty years, the whole of his one-half of such rents and profits

shall be paid to him, for his own use absolutely, upon his receipt or order, in writing, as the same shall accrue from time to time." There was a surplus of these rents and profits accruing from this part of the estate during the life of John Arnot Palmer; and the more seriously controverted part of this case has been made to include the disposition of this surplus. It was considered at the special term that it should be retained until the surviving brother, Richard Suydam Palmer, attained the age of 21 years, and then be paid over to him. But this determination derives no substantial support from any direction contained in the deeds, or in those antecedently made for the benefit of Richard Suydam Palmer, the father of these two sons. It was held by the court, and has again been insisted upon on the argument of the appeals, that the expression "trust fund," employed with more or less frequency in each of the deeds, was designed to include these accumulations. But this phrase does not appear to have been so employed in the framing of the deeds. When the owner of this property endeavored to dispose of it by the deeds made by him, it was anticipated that additions might afterwards be made to so much of his estate as in the first instance was conveyed in trust for his son, Richard Suydam Palmer, and after his decease for the benefit of these, his two sons. And, when reference was made in the deeds to the property, that reference was expressed in language so broad as to include, not only that which was described in the deeds, but that which might afterwards be added to it by Cortlandt Palmer, the original grantor, or otherwise. And it was to express the contemplated increase in the capital of the estate that this phrase was employed by him. And that it was appropriately employed in this manner appears from the concluding portion of the fourth paragraph of the deed executed in May, 1857; for by that paragraph the surplus rents and profits of the share of the property mentioned in the deed were permitted to be loaned upon bonds and mortgages on improved and productive real estate. And these bonds and mortgages the trustee was directed to hold and apply to the use of the testator's son, and the principal of the fund was then made subject "to all the provisions above contained in respect of said premises, as herein mentioned, and constituting the original trust fund, in all the respective events above mentioned." Authority was at the same time given to make similar investments in other real estate, which was to be added, in like manner, to the capital of the trust. And, in referring to these two sources of increase, the grantor in the deed designated the other property, which consisted wholly of real estate, by the employment of this phrase, as "the original trust fund." In the succeeding paragraph the intention that this phrase should include only the property held in trust was plainly again repeated, for it was referred to as "the said premises, and all additional property, real and personal, acquired or added to the trust funds." A repetition of the same understanding was made in the eighth paragraph of the deed, providing for improvements in the property. And they, together with any other means which the son himself should provide, were mentioned and referred to as the "trust fund." The deed, by its ninth and tenth paragraphs, created a power to partition or exchange. The property and moneys which might be received for equality of partition were directed to become a part of the trust fund. This phraseology was in like manner followed in the deed of the 9th of November, 1867, and contemplated the execution of the same intention on the part of the grantor of the property. At that time no addition had been made to this share of the estate. And this phrase was plainly employed as the equivalent of the property described in the deed, in the concluding part of its second paragraph, for there it was referred to as a share of the said property, or trust fund. And that this phrase was designed to include only the estate conveyed in trust, with the additions to it, appears still further, and unequivocally, from the language of the fourth paragraph of the deed, where the description has been given by the language of "the said premises, and all additional property, real

and personal, acquired or added to the trust fund, in pursuance of these presents." In the eighth paragraph of this deed, providing for a partition, payment was again directed to be made or received, to include equality of partition, from the trust funds, or into the trust funds. And, further, by the succeeding paragraph, the trustee was directed to receive moneys provided for equality of partition "into the trust fund." The same expressions are contained in the deeds now more especially in controversy. In the first of these deeds the property is mentioned as "the said real estate, and all additional property, real and personal, acquired or added to the trust fund, in pursuance of the said trust-deed." And the request was made therein of the preceding trustees to convey and transfer "the said real estate, and all additional property added or acquired to the trust fund, as aforesaid," etc. And, in providing the contingent power of a partial conveyance upon the attainment of the age of 30 years, the property to be conveyed was "one equal, undivided half part of said above described fourth part of said land and premises, and the equal, undivided half part of all such additions as may have theretofore been made to the trust fund, as by these presents provided." And, in providing an annuity for the widow of his son, the property out of which it was to issue was described as "the said rents and profits of said one-fourth part of said lands and premises and said trust fund;" and, in further declaring the employment of the rents and profits they were mentioned as those "of said trust premises and fund." And similar directions to those already mentioned, concerning moneys received for equality of partition, were also inserted and contained in this deed. And, for the benefit of the widow, if there should be a widow of this deceased son, it was directed, while she continued to be his widow, that "so much or such part of the said trust-estate or trust fund as shall be convenient or necessary for the raising of the said seven thousand dollars a year" should be reserved for this object.

It is needless to pursue or add to these extracts by making others, expressed in the same general manner in the final deed, made on the 22d November, 1872; for they all equally evince the understanding of the grantor of the property to have been that this phrase should be applied, as it certainly was employed, to refer only to such additions as might, under the conveyances, be made to the capital of the trust itself. And no different construction of the language will be justified by the general intention expressed in the deed, that the changes to be made by him should be for the benefit only of his lineal descendants; for the reservation of the authority to make these changes referred in each instance to the property conveyed by him by virtue of the deeds, and that which might afterwards be added to it, and not to such an accumulation of rents or profits as has become the subject of this controversy. In all instances in which he reserved the power of giving different directions, and where they have been restricted to such as should be made for the benefit of his lineal descendants, the subject to be affected has, by clear expression, been confined to the trust-estate, as distinguished from its accumulations, with the exception of such surplus as should be added to it by reason of loans or investments in other real estate, in which instances the additional property, as well as the securities, were made a part of the capital of the trust. In the directions given for the accumulation the grantor strictly confined himself to the power provided for that object by the statute; for the accumulation was directed to be for the benefit of the son out of whose share or interest it arose during his minority. And that followed the language of the statute itself, providing that "an accumulation of rents and profits of real estate for the benefit of one or more persons may be directed by any will or deed sufficient to pass real estate, as follows: *First*, if such accumulation be directed to commence on the creation of the estate out of which the rents and profits are to arise, it must be made for the benefit of one or more minors then in being, and terminate at the expiration of their minority." 2 Rev. St. (6th Ed.) p.

1108, § 37. And, as no additions in the way of securities or other personal property were made to this trust-estate, the accumulation is wholly controlled by this part of the statute. And it was required to be, as it was directed in the deed it should be, for the benefit of this minor grandson. And, having been declared in the deeds to be solely for the benefit of this deceased grandson, as far as the accumulation of the rents and profits of his share were made, the rents and profits so accumulated belonged to him. They were unqualifiedly to be for his benefit. And he was in no manner afterwards directed to be deprived of that benefit, but it was to be ultimately secured by paying over the accumulations to him on his attainment of the age of 21 years. The object of the statute, as well as of this language of the deed, in confining the accumulations to the benefit of the minor, was to vest the right to the moneys, as they accumulated out of the share of the estate appropriated for him by the deeds, in him. And it is conformable in this respect to what the court, on general principles, held in *Manice v. Manice*, 48 N. Y. 308, holding that where a present gift appears to have been contemplated, although subjected to a future time for the payment, the interest in the subject of the gift becomes at once vested in the donee. This subject was examined fully in *Pray v. Hegeman*, 92 N. Y. 508, where it was said, in the opinion of the court, that the statute "treats rents and profits authorized to be accumulated under section 37 as the property of the minor, the enjoyment of which has been postponed." Id. 516. And so absolutely is this direction to be observed, that it was held that the accumulations could be no otherwise directed to be applied for the benefit of the infant on the attainment of his majority than by the payment over to him, in that event, of the moneys accumulated; in this respect overruling *Meserole v. Meserole*, 1 Hun, 66. And this seems to have been the understanding of the grantor of the property in these deeds; for in no instance has he undertaken to give any direction for the disposition of rents and profits accumulated in this manner. But the directions given by him, and the powers reserved to him, in the second deeds have been made to include no more than the property itself, which it was provided should be held in trust. The case of *Wood v. Mitcham*, 92 N. Y. 375, has been largely relied upon as supporting the position that these rents and profits should be held for the benefit of, and finally paid over to, the survivor of these two brothers. But neither that case, nor any other authority, sustains this argument. What was chiefly there decided was that, where a will is capable of two interpretations, that one should be adopted which prefers those of the blood of the testator to strangers. And the same principle of construction would be equally applicable to these deeds. But they do not present grounds for two different constructions. They are, on the contrary, wholly in one direction; and that direction upon this subject proceeds no further than that the surplus rents and profits should be accumulated for the benefit of the deceased brother, and paid to him on the attainment of his majority. It was the payment, and not the right, which was in this manner postponed. With the contingency of his decease after the accumulations commenced, and before reaching his majority, the deeds have given no direction; but they have left the case wholly to the application of the settled rules of law concerning the disposition which should be made of the accumulations. And, as they became the property of the deceased minor, for whose benefit the moneys were accumulated, when he departed this life, they were necessarily left by him, as part of his estate, to be distributed and disposed of, under the directions of the statute, to his next of kin. And, so far as the judgment has directed a different disposition to be made of these accumulations, it was erroneous, and should be reversed.

In the disposition of the case, costs and allowances were provided for by the judgment. The allowances are by no means unreasonable in the amounts for which they have been made; and they, together with the costs, are directed to be paid out of this accumulated fund. The litigation has been principally di-

rected to the disposition of this fund. No contest otherwise appears to have arisen concerning the settlement of the plaintiff's accounts. The items contained in it are not disputed; but it is the disposition which should be made of this part of the estate that has been made the substantial ground of controversy. And no injustice, therefore, can exist in directing this fund to bear the burdens of the litigation. The judgment should be modified by reversing so much of it as determined the accumulations to belong to the surviving brother of John Arnot Palmer, and as directed his share of the estate to remain in trust until the surviving brother, Richard Suydam Palmer, should attain his majority. And the further direction should be added to the judgment, declaring the share of the trust-estate held for the benefit of John Arnot Palmer to have vested at the time of his decease in his surviving brother, Richard Suydam Palmer, and requiring the same to be conveyed to him, and directing the accumulations of this share of the estate to have vested as they accrued in this deceased brother, and to have been his property at the time of his decease, and payable to his administrator and administratrix, to be distributed among his next of kin. And, with these changes and modifications, the judgment should be affirmed, with costs of the appeal to be in like manner paid to the parties out of the fund. All concur.

BOESSNECK *et al.* v. COHN.

(*Supreme Court, Special Term, New York County. October 18, 1889.*)

1. FRAUD—PRESUMPTION—CHATTEL MORTGAGES.

In the absence of circumstances showing bad faith, the assignment of \$50,000 of personality to secure \$18,000 of debts does not raise a presumption of fraud.

2. TRUSTS—ASSIGNMENT TO SECURE DEBTS.

An assignment of personality to a creditor as security, and a subsequent assignment to other creditors of the surplus that may arise, do not make the first assignee a trustee for the other creditors; nor does the transaction create a trust.

3. ASSIGNMENT FOR BENEFIT OF CREDITORS—WHAT CONSTITUTES.

An assignment of personality by a debtor to one of his creditors, and a subsequent assignment of any surplus that may arise to other creditors, do not constitute a general assignment within the general assignment act of 1877, (Laws N. Y. 1877, c. 466,) and are not void under Laws N. Y. 1887, c. 503, amending said act, and providing that "in all general assignments preference created therein shall not be valid except to the amount of one-third in value of the assigned estate."

At chambers. Motions to vacate attachments.

Blumenstiel & Hirsch, for plaintiffs. *Townsend, Dyett & Einstein*, for defendant.

O'BRIEN, J. These motions to vacate, made upon the papers upon which the attachments were granted, being in all five cases, substantially alike, may be considered together. The debtor transferred all his property, on September 4th, to the Importers' & Traders' National Bank, to secure the payment of his indebtedness to them, with a reservation of the surplus to himself. This indebtedness was about \$18,000 and the property transferred is variously stated at from \$50,000 to \$150,000, the former estimate, however, being nearer the correct estimate. The instrument by which the transfer was made to the bank is as follows: "Whereas, I, Meyer Cohn, am indebted to the Importers' and Traders' National Bank of the city of New York, in the sum of \$18,370.08, and whereas, I have heretofore assigned to said bank certain choses in action to secure payment of my indebtedness to it, including the amount above specified, and the said bank has realized thereupon sufficient to reduce my said indebtedness to the sum above specified, and still holds some of the said choses in action as security as aforesaid, now, for the purpose of further securing payment of the said indebtedness, I hereby assign to the said bank all the goods, wares, and merchandise, manufactured and unmanufactured,

in the store occupied by me, No. 334 Canal street, New York city, and in the premises occupied by me at Nos. 13 and 15 Lispenard street, New York city, and I hereby authorize the said bank to sell all the said goods, wares, and merchandise hereby assigned, at public or private sale, for the best price it can obtain therefor, and out of the proceeds of said sale it deduct the lawful expense thereof, and to retain and pay to itself the amount of my indebtedness to it, with such interest as it may be entitled to, or so much thereof as may not be realized by it from the choses in action aforesaid heretofore assigned to it, rendering the overplus, if any, to me or to my assigns." This document was executed on September 4th. Under and by virtue of this instrument it appears the bank took possession of the entire stock thus transferred. The affidavit further shows that the attorney for the debtor stated that the said debtor had in addition to the instrument of transfer to the bank on the same day made various other transfers of the surplus or assets that might arise after paying the Importers' & Traders' Bank to four other creditors, including the wife of the defendant. These facts are alone necessary to be considered, for it is evident that the balance of Mr. Blumenstiel's affidavit, which is made up of legal assumptions and conclusions, can add no weight to the facts themselves, which must be considered in determining the question.

By the affidavits it is made to appear that on the day in question the debtor discontinued business, and by these various transfers disposed of his property. The question is, was this transaction valid as against his creditors? It may be assumed that when a debtor determines to discontinue business, and yield control of his estate, it is immaterial into how many parts the transaction may be divided. All transfers made in pursuance of a common intent will be construed together, and treated as one transaction. Applying this rule here, it is claimed the attachments can be supported on several grounds. These grounds relied upon to uphold the attachments may be separately considered.

First. That the delivery of the property, largely in excess of the debt due the bank, creates a strong inference of fraud. There is little force in this argument, unless we are prepared to hold, with reference to personal property, that a substantial excess between the property transferred and the amount of the debt to be secured, in the absence of circumstances showing bad faith, are sufficient to raise a presumption of fraud. All are familiar with the general rule that prevails in commercial life with reference to personal property when given as security, to exact an amount greatly in excess of the debt to be secured; and, in the absence of bad faith, the courts will hesitate to hold that \$50,000 of personal property, which upon a sale forced or otherwise may net a much less sum, when given to secure an indebtedness of \$18,000 raises a presumption of fraud.

Second. The next ground relied upon is that the transfer to the bank, and the subsequent assignment, to particular creditors, of the surplus, considered as one transaction, is in conflict with the statute relating to personal trusts. In disposing of this there are certain general principles so well settled that they may be stated without referring to authorities. A debtor, whether solvent or insolvent, may transfer a portion of his property to a creditor in payment of or as security for a *bona fide* debt. He may pay one or more creditors in money, and he may transfer property of a fair and reasonable amount to such creditors. A debtor may mortgage a portion or the whole of his property to secure a *bona fide* debt. It may be also regarded as settled law what is stated as *dicta* in *Knapp v. McGowan*, 96 N. Y. 75, "that a conveyance by a debtor, whether solvent or insolvent, of all his property to trustees to pay a portion of his creditors, with a provision that the surplus shall be returned to him, leaving his other creditors unprovided for, is fraudulent and void as to the latter. A debtor, whether solvent or insolvent, may, acting in good

faith, mortgage a portion or the whole of his property to secure existing claims against him, and also future loans and advances." The first question to be determined is whether the instrument to the bank, when received by itself, or in connection with the subsequent assignments of the surplus to other creditors, was to be regarded as a mortgage or as creating a trust. There can be no doubt that the instrument to the bank, alone considered, was a mortgage. The fact that subsequently, though on the same day, the debtor, without any privity or agreement with the bank, assigned to other creditors his interest in the surplus, does not, in my opinion, make the bank a trustee for such other creditors, nor does the entire transaction, considered as a whole, create a trust. The words of the opinion in *Brown v. Guthrie*, 110 N. Y. 441, 18 N. E. Rep. 254, are here applicable: "In form it was an absolute sale upon a chattel mortgage given for a fixed and agreed consideration, and while, nevertheless, such a sale, in spite of its form, may be proved to be an assignment in trust, (*Britton v. Lorenz*, 45 N. Y. 51.) yet, in the present case, we are unable to discover any such proof." Again, on page 442, 18 N. E. Rep. 255: "He held no part of the property in trust for the debtor, but solely as mortgagee entitled to its proceeds till his debt was paid, and then bound to restore any surplus realized to the mortgagor or those claiming under him. Such provision never hinders creditors, for they may pay the mortgage and take the property, or fasten upon the surplus. Such was not only the form of the transaction, but also the actual fact." See also, *Leitch v. Hollister*, 4 N. Y. 211, and *Dunham v. Whitehead*, 21 N. Y. 181.

Third. It is asserted that the transaction constituted a general assignment of all the debtor's property, with preferences to four or five creditors, in violation of the statute restricting preferences to one-third in amount of the assets. There are two answers to this: (1) That the act does not make a general assignment void for excessive preferences, but would only invalidate the preferences to the extent of the excess of assets, (Laws 1887, c. 503;) and (2) there are no elements adequate in disregard of the form of the instruments to turn them into a general assignment of an insolvent debtor. As stated in *Wheel Co. v. Fielding*, 101 N. Y. 504, 5 N. E. Rep. 431, the general assignment act of 1877, (chapter 466, Laws 1877,) does not include or apply to a specific assignment of a debtor for the benefit of one or a portion of his creditors. The reasoning of that case is not affected by the amendment subsequently made to the general assignment act.

In concluding it may be noted that the validity of the claims of the bank and the other creditors is not assailed, nor have we any definite information as to the exact form of the assignment of the surplus given by the debtor to the creditors subsequent to the bank. Upon all the facts, therefore, there being no assertion of fraud in fact, and the entire transaction not creating a trust in contravention of the statute, the affidavits upon which the attachments were granted are, in my opinion insufficient, and for that reason the attachments themselves should be vacated, with costs. But in view, however, of the novelty and doubt connected with the questions involved, and the fact that a contrary opinion was reached by one of my learned associates, all proceedings after the entry of the order upon this motion should be stayed until the hearing and determination of an appeal therefrom, provided the same is taken within 10 days, and prosecuted with reasonable diligence.

SMITH v. PRYOR *et al.*

(City Court of New York, General Term. October 31, 1889.)

APPEAL—REVIEW—WEIGHT OF EVIDENCE.

Where the evidence is conflicting, and the verdict does not indicate passion, prejudice, or corruption, a judgment entered thereon will not be disturbed.

Appeal from special term.

Action by Charles G. Smith against S. Morris Pryor and others. From a judgment entered on verdict in defendants' favor, and from an order denying a new trial, plaintiff appeals.

Argued before MCADAM, C. J., and EHRLICH and HOLME, JJ.

Saunders, Webb & Worcester, for appellant. *Lourey, Stone & Auerbach*, for respondents.

PER CURIAM. To reverse this judgment would imply that the plaintiff ought to have had a verdict in his favor as of course. The difficulty is that the plaintiff was not necessarily entitled to a verdict. The trial judge would not have been justified in directing a verdict in the plaintiff's favor. There were several questions of fact that the trial judge had to submit to the jury, and upon which they were required to pass. These were submitted without exception. Among the other questions was one whether the plaintiff's assignor did not agree that he was to be governed in his transactions with the defendants by the rules and regulations of the Consolidated Exchange,—one of which was that if, after the sale of any stock by defendants, there was any discrepancy or trouble in connection with the delivery thereof, the defendants had the right, within 10 days thereafter, to return the certificate of stock, and declare the sale off. There was trouble about the delivery of the stock sold by the defendants. The purchaser refused to accept it, on the ground that it was not stock of the "Standard Mining Company," located in California,—a marketable security, listed on the exchange,—but stock of a company bearing a similar name, located in Colorado, not listed, and having no marketable value. The defendants evidently believed they were selling the listed "Standard" stock, and not that which was unknown in the market; and the purchaser evidently acted under the same supposition. So far as they were concerned, it was clearly a case of mutual mistake; and the sale was properly declared off. Whether the plaintiff was in any way responsible for the mistake is not clear. The evidence was that of interested witnesses, whose testimony had to go to the jury, and they were to say what credence was to be given to it. In addition to this, the rules of the exchange in regard to discrepancy or trouble in the delivery seem to be sufficiently broad to cover the mistake in question, which made all the trouble respecting the delivery to the purchaser. The jury, no doubt, weighed the evidence, and came to a conscientious conclusion, and reached a result they had a right to arrive at. Their verdict does not evidence passion, prejudice, or corruption, and is sufficiently sustained by the evidence.

We have examined the proofs, and are satisfied that the verdict is not against the evidence, or the weight of evidence, nor are we willing to say that we would have reached a different result. Upon the entire case, it follows that the judgment and order denying the motion for a new trial, both of which were appealed from, must be affirmed, with costs.

CHADWICK v. MANNING.

(City Court of New York, General Term. November 4, 1899.)

ATTORNEY AND CLIENT—ESTOPPEL TO DENY AUTHORITY.

A party, by availing himself of a bond procured by his attorney to open up a default, thereby ratifies the act of his attorney, and is liable to the sureties for the amount they are obliged to pay on their undertaking.

Appeal from special term.

Action by Julian W. Chadwick against Jerome F. Manning. From a judgment entered on verdict in plaintiff's favor defendant appeals.

Argued before MCADAM, C. J., and EHRLICH and HOLME, JJ.

Philip Carpenter, for appellant. *William J. Weldon*, for respondent.

PER CURIAM. The defendant was sued in the United States circuit court, and a default was taken against him, which was opened by order of the court upon condition that the defendant executed to the plaintiff an undertaking, with one or more sureties, conditioned to pay, upon demand, all costs which might be awarded against the defendant in the action, not exceeding \$100. The plaintiff, at the request of the defendant's attorney in that action, executed the required bond. The defendant availed himself of the order opening the default, and thereby ratified and approved of the giving of the undertaking that secured him this benefit. He subsequently tried the cause in the United States circuit court, and was defeated. The plaintiff was obliged to pay \$50 costs upon his undertaking, and the present action is to recover this sum as so much money paid to the defendant's use. It is too late now for the defendant to dispute the authority of his attorney in procuring a bondsman for his benefit. See *Palen v. Starr*, 7 Hun, 422. The defendant, by availing himself of the plaintiff's act, ratified the authority under which it was done, (Story, Ag. §§ 252-260; *Meehan v. Forrester*, 52 N. Y. 277,) and is liable for the consequences. The law, in the absence of an express promise on the part of the principal to indemnify the surety, implies a promise of indemnity to prevent injustice. Baylies, Sur. 340. Both sides requested the direction of a verdict, (*Green v. Shute*, ante, 69,) and the trial judge properly directed it in favor of the plaintiff. The direction was clearly right, and the judgment entered upon it must be affirmed, with costs. All concur.

BURNS v. MONELL.

(City Court of New York, Special Term. October 21, 1889.)

SLANDER—PLEADING—RES JUDICATA.

Defendant, in an action for slander, in calling plaintiff a "perjuring thief," admitted that he made the charge, but alleged that it was true, and that theretofore, in an action between them, plaintiff had willfully testified falsely, by reason of which judgment was rendered in his favor. Held, that the finding of the court in said action in favor of plaintiff did not make the question of plaintiff's perjury *res adjudicata*, and judgment could not be given for plaintiff on the answer.

Action by James P. Burns against Joseph A. Monell, for slander in calling plaintiff a "perjuring thief." Defendant admitted the charge, and in justification alleged that it is true, and that, in a civil action between them, plaintiff willfully and corruptly testified falsely, by reason of which judgment was rendered in his favor. Plaintiff moves for judgment on the answer.

James Flynn, for plaintiff. *Henry C. Batty*, for defendant.

MCADAM, C. J. The denial that the charge was false creates no issue. The plaintiff was presumably innocent of crime, and required no evidence to prove his innocence in the first instance; for presumption is proof. The defendant undertook to justify by alleging in his answer that the charge was true. If he had done this, and nothing more, the defendant, after proving his plea, would have destroyed the presumption previously existing, and required proof from the plaintiff that he was innocent. But the defendant goes further, and alleges that the perjury was committed in an action to which the parties to the record here were likewise parties there. The justice judicially found that the plaintiff told the truth, and had consequently given judgment in his favor. But this finding does not make the question of perjury *res adjudicata*, either in a civil or criminal proceeding, for that was not the issue litigated and decided there. The justification is certainly as broad as the charge, is stated with the precision required in an indictment, and, if legally proved, furnishes a complete defense. The defendant did not call the plaintiff a "thief," but a "perjuring thief," meaning a person who robs by means of perjury, and not by means of larceny, or other act; so that the

crime of perjury is alone comprehended by the charge. The facts are not pleaded in mitigation, because the allegation of the answer is that the plaintiff's testimony was "willfully and corruptly false." Such a charge would maintain an indictment for perjury; whereas, if these words had been omitted, the plea would have been regarded as in mitigation only. *Spooner v. Keeler*, 51 N. Y. 527. The defendant's plea is a bold, if not dangerous, one, for the defendant has no right to take away the character of the plaintiff, unless he is in a position to prove the truth of the charge he has made, and under oath reiterated. See *Hopkins v. Smith*, 3 Barb. 599; *Downing v. Brown*, 3 Colo. 571; *Spruil v. Cooper*, 16 Ala. 791; *Ransons v. Christian*, 56 Ga. 351, 49 Ga. 491; *Steinman v. McWilliams*, 6 Pa. St. 170; *Crandall v. Dawson*, 1 Gilman, 556. The defendant has seen fit to call his justification a plea "in mitigation;" but this is a misnomer, for it sets up a complete, and not a partial, defense to the action. If the answer is true, the plaintiff ought to be in state-prison, rather than a suitor claiming damages in a court of justice. It follows that the motion for judgment must be denied, with \$10 costs, to abide the event.

TAYLOR v. BROOKLYN EL. R. CO.

(City Court of Brooklyn, General Term. November 26, 1899.)

1. TENDER—PAYMENT INTO COURT—COSTS.

Code Civil Proc. N. Y. §§ 731-734, provide that, in actions for money only, defendant may, before trial, tender plaintiff the amount he conceives to be due him, with costs, but the tender shall not avail unless the money is accepted, or paid into court; and that where plaintiff proceeds in the action after tender, and recovers no more than the sum tendered, he shall pay costs from date of tender, and, where he recovers a greater sum, the amount paid into court shall be deducted therefrom. Before trial of an action for damages, defendant made a tender to plaintiff, which being refused, the money was by defendant paid into court. On a verdict being found for plaintiff, both parties asked an order for the money. *Held*, that it was properly awarded to plaintiff, though she had no knowledge of its payment into court after she declined the tender.

2. SAME—AWARD—CONTRACT.

The statutes and Code of New York make no distinction between tender on award and tender in an action on contract.

Appeal from special term.

Action to recover damages for negligence, by Frances M. Taylor against the Brooklyn Elevated Railroad Company. Before trial, defendant made tender of a sum of money to plaintiff, which, being refused, was deposited by defendant in court. On trial, there was a verdict for plaintiff, and thereupon both parties applied for the money. From an order awarding it to plaintiff, defendant appeals.

Code Civil Proc. N. Y. § 731, provides: "Where the complainant demands judgment for a sum of money only, and the action is brought to recover a sum certain, or which may be reduced to certainty by calculation; or to recover damages for a casual or involuntary personal injury, or a like injury to property,—the defendant, or his attorney, may, at any time before the trial, tender to the plaintiff, or his attorney, such a sum of money as he conceives to be sufficient to make amends for the injury, or to pay the plaintiff's demand, together with the costs of the action to that time." Section 732 provides that the tender shall not avail unless the money is accepted or paid into court, and notice served on plaintiff within 10 days thereafter, and before trial. Section 733 provides that, if it appear on trial that the tender was sufficient, defendant shall pay no costs from date of tender. Section 734 provides that if plaintiff proceeds in the action after tender, and recovers no more than the sum tendered, he shall pay costs from date of tender, and if he recover a greater sum the amount paid into court shall be deducted therefrom.

Argued before CLEMENT, C. J., and OSBORNE, J.

v.7N.Y.s.no.13—40

Hoadley, Lauterbach & Johnson, for appellant. *Dailey & Bell*, for respondent.

OSBORNE, J. Plaintiff brought this action to recover damages for the alleged negligence of the defendant. On February 18, 1889, and prior to the trial of this action, defendant tendered to plaintiff \$200 in liquidation of her claim, and \$65 for accrued costs. This tender was refused; and thereupon, on the same day, defendant obtained an order by which it was "ordered (1) that the defendant have leave to bring into court, and deposit with the clerk thereof, the sum of two hundred dollars, admitted by it to be due the plaintiff herein, together with sixty-five dollars, plaintiff's costs to date; (2) that thereupon, unless the plaintiff shall accept the sum in full discharge of this action, the same shall be deducted from any recovery thereon, and the sum shall be paid out of court to the plaintiff or her attorney," etc. Said sum of \$265 was accordingly deposited with the clerk of this court, pursuant to said order. Subsequently, this action was tried, and plaintiff had a verdict. After the trial, defendant applied for an order directing that said deposit be returned to it; and about the same time plaintiff sought to obtain an order for the payment of said sum to her. Both applications coming on to be heard at the same time, an order was made directing the payment of the amount so deposited to the plaintiff; and from that order defendant now appeals.

Defendant's proceedings as to this tender and deposit were taken under sections 731-734 of the Code of Civil Procedure. These sections are substantially a re-enactment of the provisions as to tender formerly contained in the Revised Statutes, (*vide* 2 Rev. St. 553, §§ 20-23,) with the further requirement that the money tendered must be paid into court, and notice thereof given, (section 732.) Under these provisions of the Code, plaintiff has a right to draw out the money so deposited, and to proceed with his action; leaving the question of costs subsequently accruing to be determined by the result of the action. There is nowhere any such change of these provisions as to alter the force of the decisions heretofore made as to the title to, or ownership of, the fund deposited. In *Stack v. Brown*, 13 Wend. 390, the court say, (page 396:) "When money is brought into court, the plaintiff is at all events entitled to it. Any other construction would be unjust;" citing *Birks v. Trippet*, 1 Saund. 33, note 2; 2 Archb. Pr. 203. In *Dakin v. Dunning*, 7 Hill, 30, the court say: "The sum brought into court belongs to the plaintiff in any event." In *Becker v. Boon*, 61 N. Y. 317, the court say, (page 322:) "The object of payment into court is to place the money tendered where plaintiff will be sure to get it. It then becomes the plaintiff's money, and the defendants cannot dispute his right to it." *Wilson v. Doran*, 39 Hun, 88, contains a carefully considered opinion, citing many authorities, on the question of tender. In that case, defendant had a verdict; yet the court say: "If that [the alleged tender] was made, and the money brought into court, the plaintiff was entitled to it, notwithstanding the verdict. * * * At common law, payment of money may, when tender has been made before suit, and when no tender has been made, be paid into court, and, when so paid into court, the money becomes that of the plaintiff, and the defendants cannot, in any event of the action, take it out." While it is true that the judgment in this case was reversed in the court of appeals, (110 N. Y. 101, 17 N. E. Rep. 688,) yet the opinion of that court sustains the conclusions of the general term as to the right of the plaintiff to the sum tendered; the reversal being on another point. It seems to us plain, from the above-cited decisions, that the right of the respondent to the amount deposited cannot be successfully questioned.

The learned counsel for the appellant, in his very elaborate brief, attempts to draw a distinction between tender and tender of awards. It is a sufficient answer to his argument that neither the Revised Statutes nor the Code make any such distinction. The provisions as to both are precisely the same, and

we can see no reason why the decisions above quoted are not as applicable to tender of awards as to tender in an action on contract.

A further point is made by the learned counsel for the appellant, that, by proceeding with the trial, plaintiff waived the benefit of the tender. This point cannot be sustained. By the Code, plaintiff had a right to proceed with the trial, and to prove the circumstances under which she claimed to hold defendant liable in damages to an amount greater than the sum tendered. Nor was it, in any sense, a waiver, as contended, because plaintiff failed to request the trial court to charge the jury that she was in any event entitled to the moneys in question. In the *first* place, the order under which the deposit was made, prohibited plaintiff on the trial from giving any evidence of the tender, so that it could not be before the learned trial judge; and, *secondly*, section 734 of the Code prescribes the practice to be adopted in such cases. It is to be noted that in the order appealed from, prepared by appellant's counsel, the sum deposited "is admitted by it to be due the plaintiff herein;" and it is further provided "that the sum shall be paid out of court to the plaintiff or her attorneys." We have, however, in our conclusions, laid no stress on the phraseology of the order appealed from, preferring to base our judgment entirely on the law as we find it to be. Nor was the tender a nullity, as claimed, because notice of the payment into court was not given the plaintiff. In *Wilson v. Doran*, *supra*, the court of appeals held that "it is undoubtedly competent for the plaintiff to waive the service of the statutory notice." Defendant had another course open to pursue, of which it might have availed itself, to attain the end sought by the tender and deposit. It could have offered to allow judgment for the sum it admitted to be due, with costs. It endeavors to explain its failure to do this, in its affidavit, by alleging that there was not sufficient time between the tender and the anticipated day of trial to make a valid offer pursuant to the Code. If this be the case, defendant has only itself to thank for its present position, as by an earlier preparation for trial it would undoubtedly have been able to avail itself of the provision as to offer to allow judgment, if so advised. We are accordingly of the opinion that the order appealed from should be affirmed. Order affirmed, with costs.

CLEMENT, C. J., concurs.

PEOPLE *ex rel.* NOSTRAND v. WILSON *et al.*

(City Court of Brooklyn, General Term. November 25, 1889.)

MANDAMUS—CORRECTION OF ASSESSMENT ROLLS.

Mandamus will lie to correct clerical errors in the assessment rolls of the city of Brooklyn, while yet in the hands of the assessor.

Appeal from special term.

On application of the relator, Ellen Nostrand, an order was made at the special term for a peremptory writ of *mandamus* against Thomas A. Wilson and others, of the board of assessors, for correction of the assessment roll; and from this order defendants appeal.

Argued before CLEMENT, C. J., and OSBORNE, J.

Almet F. Jenks, for appellants. *Sidney V. Lowell*, for respondents.

CLEMENT, C. J. The relator owns land on the corner of Myrtle avenue and Ditmars street, in this city, and the board of assessors, by mistake, included such property in the assessment district for the repaving of Bushwick avenue from Myrtle to De Kalb avenues. At special term said relator applied for a peremptory writ of *mandamus* against the assessors, to strike her property from the list, and against the collector of taxes and assessments, to make the proper entry, which motion was granted; and from the order entered thereon, this appeal is taken. No affidavits denying the facts were filed by

the appellants on the motion, and the only point raised on the appeal is that *mandamus* is not the proper remedy. We think that the error of the assessors was clerical, and that they had the power, and that it was their duty, to make the correction of the list in accordance with the facts, pursuant to section 10, tit. 10, of the Revised Charter, (chapter 583 of the Laws of 1888.) The clause at the end of the fifth subdivision of section 10, "until it shall have been certified to by the comptroller, and the collector of taxes and assessment," does not mean that the comptroller and collector shall certify to the correction before it is made, but that it shall be certified to them after the assessors rectify the error. See section 21, tit. 4, same charter. Independent of the provisions of the charter, the remedy by *mandamus* has been used to strike non-residents from the roll, (*People v. Assessors*, 44 Barb. 148; *Barhyte v. Shepherd*, 35 N. Y. 238, 255,) and also to strike off non-taxable property, (*People v. Olmsted*, 45 Barb. 644.) The assessors admit that they made a mistake, and now claim that they should not correct the same, except by an action against the city, to which it is conceded there would be no defense. There is no merit in this appeal, and the order granting a *mandamus* should be affirmed, with costs and disbursements.

CATALANOTTO v. CONEY ISLAND & B. R. Co.

(City Court of Brooklyn, General Term. November 25, 1889.)

NEGLIGENCE—EVIDENCE—VERDICT.

In an action for personal injury to plaintiff while riding in one of defendant's horse-cars, it appeared that, as the car was passing over a draw-bridge, a key and pole, weighing about 800 pounds, fell, one end of the pole projecting about three feet into the car, and causing the injury. The pole and key, when not used for operating the draw-bridge, were hung up on two railroad spikes, driven in a slant into the trestle-work near the track. The evidence was conflicting, but tended to show that the undue rate of speed of the car caused the bridge to oscillate, and dislodge the key and pole. The driver testified that he "was always afraid of an accident,—was always afraid it would fall;" and that he knew, if he "went over on a trot, it would shake the bridge," and "the faster you go the more it will shake the bridge." Held, that a case was made calling for submission to the jury of the question of the negligence of defendant's driver.

Appeal from special term.

Action to recover damages for personal injury, by Christopher Catalanotto against the Coney Island & Brooklyn Railroad Company. On trial by jury, a verdict was returned for plaintiff; and from the judgment entered thereon, and the order denying a motion for a new trial, defendant appeals.

Argued before OSBORNE and VAN WYCK, JJ.

Bergen & Dykman, for appellant. *Thos. E. Pearsall*, for respondent.

OSBORNE, J. On December 14, 1888, plaintiff was a passenger in one of defendant's horse-cars; being seated at the front end of the car, on the right-hand side. The route of the car was over the Ninth-Street bridge crossing Gowanus canal. This bridge is a draw-bridge, about one hundred feet long, having passage-ways in the center for cars and other vehicles, with footways at each side, which are separated from the carriage-way by trestle-work. An iron key is used for opening the bridge, which is fastened on a pole about sixteen feet long, about four inches thick in the center, and tapering at each end to about one and a half inches; the key and pole weighing, together, between two and three hundred pounds. When not in use, this key and pole are placed or hung up on two ordinary railroad spikes driven into the trestle-work above mentioned, and along-side the car track. The spikes are driven in on a slant, and project about three inches from the trestle-work. As defendant's driver was driving the car across the bridge, the key and pole fell, and one end of the pole was forced about three feet into the car, through two panels, each five-eighths of an inch thick, striking the plaintiff, breaking one of his ribs,

and otherwise bruising him. Plaintiff brought this action to recover damages for the injuries so received, and obtained a verdict of \$1,000. From the judgment entered thereon, and the order denying a motion for a new trial, this appeal is taken.

Plaintiff's claim is that the driver of the car was crossing the bridge at an undue rate of speed, that such undue speed caused the bridge to oscillate more rapidly than it would otherwise, that the key and pole were dislodged by such rapid oscillation, and that the accident was caused by the negligence of defendant's driver. The evidence was somewhat conflicting as to the rate of speed at which the driver was going in crossing the bridge. That the driver was called upon to exercise care in crossing this bridge is plainly evident from his own testimony. On his cross-examination, he testified: "I knew that, if I went over the bridge on a trot, it would shake the bridge. * * * The faster you go, the more it will shake the bridge;" and again he testified as follows: "*Question.* Was you afraid? *Answer.* I was always afraid of accident,—always afraid it [referring to the key] would fall. I thought it was dangerous. If it should fall, it would make a bad accident." Again, on his redirect examination, he testified: "*Question.* Now, wasn't that [referring to the time of the accident] the first time that your fears of this key falling were aroused? *Answer.* My fears was always of an accident crossing any bridge,—crossing the bridge. *The Court.* Well, as to the key falling down is the question. Well, the key is the same thing. It belongs to the bridge." Defendant proved that the oscillation of the bridge did not exceed half an inch, regardless of the rate of speed at which a car or vehicle was driven. It also offered evidence going to show that no similar accident ever happened before; and the learned counsel for the defendant contends that this was one of that class of accidents which defendant could not have foreseen or guarded against, and that, as it had no charge or control of the key, it was not responsible if the key had been insecurely hung. We are of the opinion, however, that a case was made, calling for the submission to the jury of the question as to negligence of the defendant's driver. There was some evidence of undue speed in crossing the bridge. There was the further fact that the pole was driven three feet into the car, through two five-eighths inch panels, and was so firmly lodged there that, in order to remove it, the horses had to be hitched to the rear of the car, and the car started, some men holding on to the other end of the pole, before it could be dislodged, as some indication of the speed at which the car was moving, and the apprehension of the driver, above quoted, as to the danger and risk of accident from this pole. In the charge of the learned trial judge the question of the negligence of the driver, as affecting the liability of the defendant, was squarely put before the jury to decide. He charged as follows: "If this driver, Miller, was negligent or careless, then the company is liable. If he was not careless, if he did all that he could do, exercised ordinary care to avoid injury to the plaintiff, then the company is not liable." Under the law as thus laid down, the jury have found against the defendant. There is evidence to sustain their finding, and we do not think the verdict should be disturbed. We have carefully examined the exceptions to the requests to charge as presented by the learned counsel for the defendant, and we fail to find any error in the refusals. Some of them contain propositions of law that are unquestionably sound, but they do not apply to this case as presented on the evidence.

In our minds the salient point is that defendant's driver, whose route lay across this bridge, and who was familiar with it, and with the manner in which the key was suspended, showed himself cognizant of the fact that there was a lurking danger from this key while crossing this bridge. That fact imposed upon him the duty to be careful and vigilant in guarding against accident. The jury have found by their verdict that he was negligent, and the defendant cannot shield itself from its liability for such absence

of care and vigilance by any assumption that the key was securely hung, or that, because an accident of a similar character had never occurred before, it was relieved from its duty. For the reasons above stated we think that the judgment and order appealed from should be affirmed. Judgment and order denying motion for a new trial affirmed, with costs.

PEOPLE *ex rel.* TUCKER v. ENNIS, Commissioner of Fire Department.

(City Court of Brooklyn, General Term. November 26, 1889.)

MUNICIPAL CORPORATIONS—REMOVAL OF FIREMEN—TELEGRAPH OPERATORS.

A telegraph operator of the Brooklyn fire department is a member of the "force for extinguishing fires," and not a clerk, within Laws N. Y. 1880, c. 877, § 7, (City Charter of Brooklyn,) providing that the commissioner may remove clerks under certain conditions, but that no person on the force for extinguishing fires shall be removed without cause, and then only after a public trial by the head of the department.

On application for *certiorari*.

William Tucker, a telegraph operator of the fire department in the city of Brooklyn, was dismissed, without trial, by John Ennis, the commissioner of the fire department, and brings *certiorari* to review the proceedings.

Argued before CLEMENT, C. J., and VAN WYCK and OSBORNE, JJ.

E. F. O'Dwyer, for relator. Almet F. Jenks, for respondent.

CLEMENT, C. J. This matter comes before us by writ of *certiorari*, and the respondent, who is the commissioner of the fire department of this city, admits in his return that the relator, William Tucker, was, on or about July 30, 1878, appointed a fireman in the department; that on the 17th day of September, 1878, he was promoted to the office of bell-ringer; and that on or about July 9, 1880, he was again promoted, to the office of telegraph operator; and, further, that on the 27th day of February, 1886, he was dismissed from the department, as such telegraph operator, without a trial,—and the sole question we have to decide is whether the commissioner had power, by virtue of chapter 377 of the Laws of 1880, to remove him without a trial, or was he protected by section 14, tit. 13, Laws 1873.

Section 14, tit. 13, of the Charter of 1873 provides that the commissioner shall have power, on conviction of a member of the fire department for certain offenses therein mentioned, to punish the member by reprimand, or by withholding his pay for a period not exceeding 10 days, or by dismissal. The court of appeals have decided that under this section a member could not be convicted until charges had been preferred, and a trial had thereon. The cases of *People v. Commissioners*, 106 N. Y. 64, 12 N. E. Rep. 641, and of *People v. Commissioners*, 103 N. Y. 370, 8 N. E. Rep. 730, are directly in point. It is claimed by the counsel for the city that said section 14 was repealed by chapter 377, Laws 1880, and in the latter act is found this provision: "Sec. 7. The officer or officers at the head of any department may appoint and remove his or their clerks and assistants and other subordinates, and fix their salaries: provided, however, that, on and after the expiration of thirty days from the time when a new officer or officers shall have been appointed as such head of department, he or they may remove clerks or assistants only upon filing in writing the reasons for any removal with the city clerk, which reasons shall not be questioned in any other place; except that foremen, inspectors, and laborers temporarily employed under the department of city works may be removed at any time, at the pleasure of the head of such department. No person employed on the police force, or on the force for extinguishing fires, shall be removed without cause, and then only after a public trial by the head of his department, and after having been found guilty of misconduct or neglect of duty, or having been adjudged incapable of performing his duty.

The evidence on such trial shall be taken in full, and kept as a public record." The contention that a telegraph operator in the fire department is not protected from removal without a trial is expressly upheld in the *Case of Crafts*, 28 Hun, 495. The decision in that case was put on the ground that the words "force for extinguishing fires," in section 7 of the law of 1880, did not include telegraph operators, because the charter of the city defines the phrase "police force," (Laws 1873, c. 868, tit. 11, §§ 6, 7,) and such definition does not include superintendent, operators and assistant operators of the telegraph; and that, following the rule of *noscitur a sociis*, the legislature did not intend to include the same officers or men by the expression "force for extinguishing fires." The opinion was based on the charter as it then existed, but since that decision the charter has been amended. By chapter 246, Laws 1887, telegraph operators were included in the police force; and the same provision is re-enacted in the Revised Charter, tit. 11, § 4, (chapter 583, Laws 1888.) To now apply the rule laid down in the *Crafts Case*, telegraph operators would be members of the fire force. The relator can fairly argue that the legislature intended to correct the mistake in the charter whereby telegraph operators were protected in the fire department, and not in the police force. There is also another reason why we cannot follow the law as laid down in the *Case of Crafts*. The court seemed to treat the last clause of section 7 of the law of 1880 as making a change, as to removals, in the prior law. The court of appeals have since held that it did not change the law, but applied the old law to the new state of things. *People v. Commissioners*, 106 N. Y. 64, 12 N. E. Rep. 641. Under the Charter of 1873, tit. 13, there was a department of fire and buildings, consisting of a president and two commissioners, and by the law of 1880 two separate departments were constituted,—one of fire, and the other of buildings,—each with a single head; and by section 7, before quoted, the head or any department of the city government may appoint and remove his clerk, assistants, and other subordinates, but with the proviso at the end that no person employed on the police force, or force for extinguishing fires, shall be removed without a trial. We think that the provision "force for extinguishing fires" meant fire department, and that any one who was a member of the department was entitled to a trial after the passage of the law of 1880, in the same manner as before the passage of the act. Referring now to the charter of 1873, we find that by section 6 of title 13 the common council were required to provide fire telegraphs, and by section 14 the commissioners of the fire department were required to make regulations under which the officers and men should wear uniforms and badges, and by section 9 the commissioners should have power to appoint as many officers, clerks, firemen, engineers, drivers, inspectors, and bell-ringers as should be deemed necessary by the common council, and the same should be under the control of the commissioners at all times, and perform such duties as should be imposed upon them. Telegraph operators are as necessary in the fire department as men to light fires of the steam fire-engines; and the operator who sounds the alarm may accomplish more in the extinction of a fire than the engineer who starts the engine for the purpose of throwing water. There is no reason in protecting the bell-ringer of the olden time and in leaving out the telegraph operator, for their duties are alike, viz., to sound the alarm; and the charter should not be so construed, unless the letter of the law so requires. The spirit of the charter is to protect all members of the fire department from removal, except upon conviction of misconduct, after a fair trial, just so long as they are able physically to perform their duties. Such a construction is not to be narrowed by any technicality, but should be favored on broad principles. The charter provides that officers, engineers, firemen, drivers, and bell-ringers are members of the fire department. It is admitted in the return that Tucker was appointed to the office of telegraph operator, and it is evident that, under such appointment, he was subject to the control of the commissioners, and could be com-

pelled to wear a badge and uniform. The expression "telegraph operator" is not used in section 9 of title 13; but as there was necessity for operators, because fire telegraphs were provided for in the same title, we think that they were included in the word "officers," and this construction is borne out by two facts—*First*, by the return it appears that the telegraph operators in the fire department were paid a higher salary than firemen; and, *second*, in the police department now, by the charter, vacancies in the telegraph bureau are required to be filled from the other members of the force. Whatever the effect of the passage of the law of 1880,—whether it repealed the prior law or not,—it is certain that a telegraph operator is not a clerk, assistant, or other subordinate, performing duties clerical in their nature, and is a member of the force for extinguishing fires. The proceedings of the commissioner must be reversed and annulled, with \$50 costs and disbursements.

VAN WYCK and OSBORNE, JJ., concur.

RICE v. MADDOCK *et al.*

(Common Pleas of New York City and County, General Term. December 2, 1889.)

APPEAL—RE-OPENING AFFIRMANCE BY DEFAULT—COSTS.

A referee's decision finding in plaintiff's favor on questions of fact, but holding her cause of action barred by the statute of limitations, and rendering judgment against her for costs and disbursements of the action, was affirmed on appeal by default, which was afterwards ordered to be opened on her payment of costs of motion, and the giving of a bond to pay the judgment should it be affirmed on the hearing, but on account of her poverty she was unable to procure satisfactory bondsmen. *Held*, that the default should be opened on plaintiff's payment of costs of motion, and the giving of such a bond as she is able to procure.

Motion to modify an order of the general term imposing terms as a condition for opening defendant's default. See 5 N. Y. Supp. 958.

Argued before LARREMORE, C. J., and DALY and VAN HOESEN, JJ.

Backus & Manne, (Robt. G. Ingersoll, of counsel,) for appellant. *Alex. Lamont*, for respondents.

PER CURIAM. The appeal in this cause was set down for argument on May 16, 1889, but appellant failed to appear, and judgment of affirmance was ordered by default. A motion was subsequently made to the general term to open the default, returnable on the first Monday of June. The papers were submitted to the court, and on June 20th it was ordered that the default be opened on the payment of \$10 costs, and upon plaintiff's giving a bond to pay the amount of the judgment should it be affirmed. The judgment was for the sum of \$743.72 for costs and disbursements of the action. The plaintiff, who is a widow, and without means, has not been able to secure bondsmen and comply with the conditions imposed, and she now asks for a modification of the order. The action is brought for an accounting against the defendant, as a co-partner of plaintiff's deceased husband. The referee found the existence of the co-partnership, but held the plaintiff's action to be barred by the statute of limitations. Under the circumstances I am in favor of modifying the order by striking out the provision as to security, and allowing the default to be opened upon the payment of the said \$10 costs, and of any costs imposed by any subsequent orders, and upon the giving of the undertaking, which appellant has already served and offered as the best she can do. The judgment of affirmance of the orders of the special term will be vacated upon complying with the above terms and paying \$10 costs for this motion.

MERWIN et al. v. ROGERS.

(Common Pleas of New York City and County, General Term. December 2, 1899.)

1. RES ADJUDICATA.

A decision that a justice of the district court is not liable in damages to plaintiff for adjourning a case when no verified answer is interposed, is not in conflict with a decision that such unauthorized adjournment is reversible error.

2. APPEALABLE ORDERS—LIABILITY OF JUDGE.

Where, in an action for such damages, the justice admits, by demurring to the complaint, that his refusal to give judgment was arbitrary, willful, and oppressive, as alleged therein, an appeal to the court of appeals will be granted from a decision holding him not liable. VAN HOESEN, J., dissenting.

On motion for reargument, or for leave to appeal to the court of appeals. For former opinion, see 6 N. Y. Supp. 882.

Argued before LARREMORE, C. J., and DALY and VAN HOESEN, JJ.

J. Homer Hildreth, for appellants. James C. De la Mare, for respondent.

DALY, J. There is no ground for allowing a reargument of this appeal. No fact or point in the case was overlooked. Our decision that the justice of the district court was not liable in damages to the plaintiff for adjourning a cause, where no verified answer had been interposed, is not in conflict with our decision in *Ahrens v. Burke*, 68 How. Pr. 50, where we reversed a judgment entered after such unauthorized adjournment. We held in this case that an unauthorized adjournment was error, and that a judgment rendered thereafter would be reversed on appeal. Both cases may stand.

As to the application for leave to go to the court of appeals, I am in favor of granting it. We decided the case upon the authority of *Horton v. Auchmoody*, 7 Wend. 200. In a recent case, (*Evarts v. Kiehle*, 102 N. Y. 296, 6 N. E. Rep. 592,) where a justice of the peace failed to render judgment and enter it within four days, as required by statute, and was sued for damages, it was held that rendering judgment was a judicial act, and that "it is a general rule that a person is not liable to an action at the suit of an individual for what he does, or fails to do, as judge." No distinction is made between judges of courts of record and judges of courts of special, limited, or inferior jurisdiction. None, in principle, ought to be made. It is claimed by the appellant, however, that the force of this decision by the court of appeals is affected by the consideration which the court gives to the fact that the justice in that case was excusable, by reason of illness, from performing his duty; while in the present case the justice admitted by his demurrer the allegation of the complaint that his refusal to give judgment was arbitrary, willful, and oppressive. Motion for leave to appeal to court of appeals should be granted.

LARREMORE, C. J., concurs.

VAN HOESEN, J., (*dissenting.*) I am opposed to allowing the case to go to the court of appeals. The law is, in my judgment, settled against the plaintiffs.

TIFFT v. CITY OF BUFFALO.

(Superior Court of Buffalo, General Term. November 19, 1899.)

1. PUBLIC IMPROVEMENTS—ASSESSMENTS.

The charter of Buffalo, (title 9, § 18,) as originally passed, provided that no work or improvement, the probable cost whereof exceeded \$500, should be ordered until notice of intention to order it should first be published six times in the official paper. Section 19 prohibited the city from entering into a contract for any work exceeding said sum until a notice had been published in the official paper inviting sealed proposals for the work, or until the assessment should be confirmed. Laws 1873, c. 896, amended section 19 so that, in case a majority of the property owners on the street where the work was to be done petitioned for the improvement, publi-

cation of such notice might be dispensed with, and the contract might be let before confirmation of the assessment. Laws 1879, c. 486, excepted from the requirements of section 19, as to publication of notice for proposals and confirmation of assessments, contracts for street sprinkling, but Laws 1885, c. 181, repealed this provision, and left the section as it stood before 1879. *Held*, that a notice of the intention to provide for sprinkling the streets was essential to the validity of an assessment for that purpose, as the amendments mentioned did not affect section 18.

2. **SAME—CLOUD ON TITLE.**

Though an assessment is no lien on land until the roll is delivered to the city treasurer, as provided by the charter, (title 7, § 1,) equity will enjoin its enforcement, if illegal, as a cloud on title may be prevented as well as removed.

3. **SAME.**

As proof of publication of the notice mentioned need not be attached to the assessment roll, and there is nothing in the roll to indicate a non-compliance with the statute, the assessment apparently constitutes a lien, and the rule that equity will not relieve against that which is not apparently a lien does not apply.

Appeal from special term, Erie county.

Action by W. F. Tiff against the city of Buffalo. Judgment was entered for defendant, and plaintiff appeals.

Argued before BECKWITH, C. J., and TITUS, J.

Stilwell & Hill, for appellant. *William F. Worthington*, for respondent.

TITUS, J. This action was brought to vacate and set aside an assessment exceeding \$500, for sprinkling Allen street, on which the plaintiff owns land assessed for the work. No resolution of intention was adopted by the common council before ordering the work, and no notice of intention was published in the official paper. It is claimed by the plaintiff that such work cannot be ordered by the common council without such preliminary proceedings being had. It thus becomes necessary to examine the provisions of the charter applicable to such work to determine the question. Sections 18 and 19 of title 9, as originally passed by the legislature, read as follows: "Sec. 18. No work or improvements specified in this act, except those mentioned in section seven of this title, the expense of which shall be estimated by the common council, to exceed five hundred dollars, shall be ordered unless by the vote of two-thirds of all the members of the common council, after publication in six successive numbers of the official paper, of the intention to order such work or improvement. Sec. 19. The city shall not enter into a contract with any person for the doing or making a work or improvement, at a price exceeding five hundred dollars, until they shall have published a notice in five successive numbers of the official paper, inviting sealed proposals to do the work or make the improvement, pursuant to the plans, specifications, or other proper description of the work or improvement on deposit in the office to be specified in the notice, nor until the assessment therefor shall have been confirmed." As the charter then stood, before the contract could be let by the city, or the work done, the expense of which exceeded \$500, it was necessary—*First*, to publish, for six successive times, in the official paper, notice of the intention to order the work; *second*, to order the work by a vote of two-thirds of all the members of the common council; *third*, before entering into a contract for such work to publish notice inviting sealed proposals; and, *fourth*, to make and confirm the assessment for such work. By chapter 395 of the Laws of 1878 section 19 was amended so as to read: "The city shall not enter into any contract with any person for the doing of any work or improvement at a price exceeding two hundred dollars, until it shall have published in five successive numbers of the official paper, inviting sealed proposals to do the work or improvement, except upon a petition of a majority of the owners of property fronting that portion of the street or alley along which such improvement is to be made, when the city may grant the prayer of the petitioners, omitting the publication above specified, and shall not enter into a contract for doing or making any such work or im-

provement for a price exceeding the sum of five hundred dollars, until the assessment therefor has been confirmed, except upon a majority petition of property owners, as provided by section eight of this title, when the city may contract for such work upon ordering the improvement petitioned for."

It is clear to my mind that this section, as amended, did not dispense with the ordering of the work in the manner specified in section 18, nor was it at all inconsistent with the provisions of that section. I am not aware that any case ever arose under the section as amended in 1878, or that any construction was ever given to it by a judicial tribunal; but it must have been considered as not authorizing the city to enter into a contract for such work without first complying with the provisions of section 18, as the legislature, in the following year, again amended this section, giving the city the power now contended for. By chapter 486 of the Laws of 1879 a radical change was made in this section 19, by excepting from its requirements, as to publishing for sealed proposals, and confirming the assessment before entering into a contract, the work of sprinkling and watering streets, in the following explicit language: "The common council may order any street sprinkled or watered, and the city may enter into a contract therefor, upon the petition of a majority of the resident owners upon said street, before the assessment therefor shall have been confirmed." If it is claimed that the work of sprinkling and watering streets could be done without publishing notice of intention, by virtue of the amendment, and a compliance with the provisions of section 18 dispensed with, which seems to me doubtful, then it would follow that the amendment which was passed in 1885 (chapter 181) took away the power therein conferred upon the common council, and restored the section. The amendment of 1885 struck from the section the language last above quoted, and left it, so far as the power of the city to contract without previous publication of the notice of intention to order the work is concerned, substantially as it was after the amendment of 1878. The reference in section 18 to section 7 does not relieve the difficulty, for clearly the provisions of that section were not intended to apply to the work of sprinkling and watering streets, because it was in the charter, as originally enacted, before the question of sprinkling the streets had been introduced. Besides, it particularly specifies what work may be done on petition. If the legislature had intended to include the sprinkling of streets it would have manifested such intent either in general or particular language, but no general words or phrases are used. The things which may be done on petition are mentioned, and nothing is left to inference or speculation. If the intention of the legislature is to be gathered from the course of legislation upon this subject, it seems clear that by repealing the clause which gave authority to the city by the amendment of 1879 it intended to restrict the common council in the exercise of such power, and to require a compliance with the provisions of section 18 before making the assessment. If I am right in the construction given to these two sections, then the omission to publish notice of intention is not a mere irregularity, but a failure of the common council to pursue the method prescribed by the charter in making the assessment by the omission of a very important step in ordering the work done. The city can only exercise such power in assessing and collecting taxes as the statute confers, and in the exercise of such power it must follow the requirements of the statutes in all things essential. *Mushitt v. Silverman*, 50 N. Y. 360; *Merritt v. Village of Portchester*, 71 N. Y. 309. It will not, I think, be claimed, if the construction here given is correct, that the city had any power to order the work or make a valid assessment without first complying with the provisions of section 18. *Stuart v. Palmer*, 74 N. Y. 183; *In re City of Buffalo*, 78 N. Y. 362. It is no answer to the requirement of the statute that a compliance with it would cause delay in doing necessary work. The publication only requires one week's time, and certainly an unimportant work like sprinkling streets would not suffer by such a delay. Besides, the desire

for haste should not lead us to overlook or omit an important requirement of the statute in levying taxes and assessments upon the property of the citizen. While the statute, as I conceive it to be, may be an unnecessary hindrance, so long as it is a part of the charter, a compliance with it is the only safe and proper course; nor should the fact that the amount of the plaintiff's tax is small influence the disposition of the case, when the results which follow are of so much importance to every tax-payer. If the common council has acted without authority, the error cannot be corrected too soon.

The defendant claims that the assessment is not a lien on the plaintiff's property until the assessment roll is delivered to the city treasurer, and consequently the action was prematurely brought. Section 1, tit. 7, charter. I do not think the objection is well taken. A court of equity may entertain a suit, not only to remove a cloud upon title, but also to prevent it. *Sanders v. Village of Yonkers*, 63 N. Y. 489. The counsel for the defendant insists that if the notice of intention to order the work should have been published, then the invalidity appears upon the face of the assessment, and a suit in equity will not lie to remove what is not an apparent lien. *Wells v. City of Buffalo*, 80 N. Y. 253; *Association v. City of Buffalo*, 43 Hun, 127. This statement of the law is undoubtedly correct, but the difficulty lies in its application to the facts of this case. It is not clear how the invalidity could appear on the face of the assessment. Proof of publication is not required to be attached to the roll, and nothing to indicate that the statute has not been complied with appears. The common council had authority to order the work and make a valid assessment, and the only way its invalidity could be made to appear would be by proof *altunde* the record. The case does not purport to contain all the evidence given on the trial, but it seemed to be assumed that evidence was given to establish the invalidity of the assessment, and the trial judge so finds in his report of the findings. It follows from what has been said the judgment should be reversed, and as to this plaintiff the assessment vacated and set aside, with costs.

VAN FLEET v. NEW YORK, C. & H. R. R. Co.

(*Superior Court of Buffalo, General Term. November 19, 1889.*)

1. DAMAGE—PROXIMATE CAUSE—INFLAMMABLE STRUCTURE.

Defendant erected a shanty, of pine boards, close to plaintiff's building; the intervening space being insufficient to allow a person to pass through. The shanty contained a small iron stove, in which was burned soft coal; and oil cans, waste, and oil lamps were kept in the shanty. The shanty caught fire and burned; the flames being communicated to plaintiff's premises, which were damaged. There was no direct evidence as to the origin of the fire. *Held*, that the burning shanty was the direct and proximate cause of the damage to plaintiff's premises.

2. NUISANCE—INFLAMMABLE STRUCTURE—NEGLIGENCE.

While the erection of the shanty and its proper use would be legal, the character of its construction and manner of use presented a question for the jury, to say whether or not such acts were done in such careless and improper manner as to render defendant liable for creating and maintaining a nuisance; and the jury were justified in finding that defendant was liable.

Appeal from trial term.

Argued before BECKWITH, C. J., and TITUS and HATCH, JJ.

White & Simons, for plaintiff. *Charles A. Pooley*, for defendant.

HATCH, J. The complaint in this action alleges that the defendant negligently, carelessly, wrongfully, and unlawfully erected, maintained, and used upon its premises a wooden house or shanty, in an unsafe, imperfect, and dangerous condition; and that by reason thereof the same was destroyed by fire, which communicated to the property of plaintiff and inflicted damage. The action, therefore, in its nature, is for damages for the creation and maintenance of a nuisance. It appeared upon the trial that the building and

premises of which plaintiff is lessor joined lands owned by defendant, upon which land defendant had erected a flag shanty, in such close proximity to plaintiff's building that the intervening space was insufficient for a person to pass through. The shanty was constructed of pine boards, was about eight feet square and eight feet high. It was furnished with a small iron stove, with cover on top; an iron pipe from which ran through the roof. The shanty caught fire and burned down at about 6:30 A. M. of December 25, 1888, inflicting the damage sued for. Plaintiff's lessor testified that he had seen the shanty before the burning, described the stove, and further said that "there was a bench around this shanty. There was also oil cans, waste, and oil lamps." It further appeared that soft coal was burned in the stove. There was no direct evidence as to the origin of the fire. Defendant offered no evidence. The jury rendered a verdict for plaintiff. Defendant now insists that plaintiff should have been nonsuited.

"Any unwarrantable, unreasonable, or unlawful use by a person of his own property, real or personal, to the injury of another, * * * renders the owner or possessor liable for all damages arising from such use." *Heeg v. Licht*, 80 N. Y. 582. As stated by BRONSON, C. J., in *Vandenburgh v. Truax*, 4 Denio, 464: "It may be laid down as a general rule that when one does an illegal or mischievous act, which is likely to prove injurious to others, and when he does a legal act in such a careless and improper manner that injury to third persons may probably ensue, he is answerable, in some form of action, for all the consequences which may directly and naturally result from his conduct. * * * It is not necessary that he should intend to do the particular injury which follows; nor, indeed, any injury at all." *Id.* 465, 466. In *Campbell v. Seaman*, 68 N. Y. 577, Judge EARL enunciates a like doctrine, and holds that what is reasonable use must depend upon the circumstances of each case. Applying the rule of law thus laid down to the facts in this case, we find that the defendant constructed a small building of inflammable material, with a stovepipe running through the roof, and inside of which it kept highly combustible substances, which would ignite at once, upon coming in contact with flame, and which has been found to possess the qualities of spontaneous combustion. The character of such inflammable substances is presumed to be known by persons of mature years and ordinary intelligence. *Lanigan v. Gas-Light Co.*, 71 N. Y. 29. While the erection of a shanty, and its proper use, would be undoubtedly legal, yet, the character of its construction and manner of its use, together with the surrounding circumstances, we think, presented a question for the jury, to say whether or not such acts were done in such a careless and improper manner as to produce the result found here. It being therefore a question for the jury, their verdict furnishes everything essential to sustain the judgment. *Barrick v. Schifferdecker*, 48 Hun, 355, 1 N. Y. Supp. 21. It is suggested that the testimony of the owner that waste and oil were kept in the shanty was not sufficiently definite, as it very well might have related to a long time prior thereto, and not at the time of the occurrence of the fire. We think otherwise; that the jury were warranted in drawing the inference that such a condition as described by the witness existed at all times, and so existed at the time of the fire, and was the cause of it. If it were otherwise, the defendant could easily have shown it by the flagman, who was in its employ, and who was present at the trial. The omission to do so was a circumstance which the jury were entitled to consider. *Bleecker v. Johnston*, 69 N. Y. 309; *Schwier v. Railroad Co.*, 90 N. Y. 558-564; *Bruce v. Kelly*, 39 N. Y. Super. Ct. 27.

The defendant also insists that no action will lie for the damages here sustained in any event. In support of this claim it relies upon *Ryan v. Railroad Co.*, 85 N. Y. 210. There the defendant had negligently fired a woodshed upon its premises, and the fire communicated to plaintiff's property, 130 feet away. The court held the damage too remote. It, however, admits lia-

bility when the damage is the proximate result of the act; and that such proximate result would exist when the damage occasioned was the ordinary and natural result of the fire. In the present case it needs but a statement to show that this case is easily distinguishable. The shanty was immediately adjoining the structure injured. One could scarcely burn without the other being damaged to a greater or less extent. It is therefore seen that the burning shanty was the direct and proximate cause of the damage complained of. In *Webb v. Railroad Co.*, 49 N. Y. 425, Judge FOLGER says: "It certainly is not a novel proposition that he who by his negligence or misadventure creates or suffers a fire upon his own premises, which, burning his property, spread thence onto the immediately adjacent premises of another, and there destroys the property of the latter, is liable to him in an action for the damage which he has suffered." The same principle is affirmed in *Louery v. Railway Co.*, 99 N. Y. 158, 1 N. E. Rep. 608; *Briggs v. Railroad Co.*, 72 N. Y. 26. These cases furnish ample authority upon which to sustain the judgment upon this point. There being no other questions involved, the judgment is affirmed, with costs. All concur.

CHILOTT *et al.* v. CITY OF BUFFALO.

(*Superior Court of Buffalo, General Term. November 19, 1890.*)

1. TAXATION—IRREGULAR ASSESSMENT—WHEN A DEFENSE.

Under Laws N. Y. 1890, c. 275, § 9, providing that every assessment made shall be presumed valid and regular until the contrary appears, and that its invalidity or irregularity shall not be a defense to any action for its collection, commenced after the expiration of one year from the delivery of the roll, unless an action to test the validity or regularity of such assessment shall have been commenced within the time hereinbefore limited for its commencement, and shall be still pending, or such assessment shall have been adjudged irregular and invalid,—an action to vacate an assessment cannot be maintained after the expiration of a year from the delivery of the roll to the treasurer, even though another person, assessed on the same roll, has procured judgment canceling his assessment.

2. SAME—WAIVER OF OBJECTIONS.

Under the city charter of Buffalo, title 6, §§ 12, 13, providing that when an assessment roll is delivered to the clerk he shall cause a notice thereof to be published, and, unless objections to the roll be filed within 10 days by some person interested therein, it shall be deemed confirmed, failure to file objections as provided is a waiver of any irregularity in the proceedings upon the assessment.

BECKWITH, C. J., dissenting.

On demurrer to defendant's answer.

Action by Robert Chilcott and another against the city of Buffalo, to annul an assessment.

Argued before BECKWITH, C. J., and HATCH and TITUS, JJ.

Giles E. Stillwell, for plaintiffs. *Frank C. Laughlin*, for defendant.

HATCH, J. The complaint in this action contains three paragraphs, the first of which alleges the ownership by plaintiffs of certain property, giving its location. The second alleges that defendant is a municipal corporation. The third, that heretofore, and in 1885, the common council of the defendant adopted a resolution of intention to pave Hamburg street, in said city, according to certain plans and specifications then on file in the engineer's office; that at the said time there were no plans and specifications, with respect to said pavement, on file in said office; that the said plans and specifications were prepared after the adoption of said resolution by the engineer, but that they were in many respects changed from the provisions of the resolution, and, as finally prepared, bids were advertised for sealed proposals for paving said street; that thereafter proposals were received for doing said work, at a stated price, and that thereupon the common council adopted two resolutions, one of which ordered Hamburg street paved in accordance with the said plans

and specifications, and the other that the expense thereof be assessed upon the real estate benefited by such improvement, in proportion to the benefits resulting thereto; that upon the passage of said resolution the same was taken to the mayor's office, and, he being absent, some person wrote across the face thereof, "Approved August 31st. MICHAEL CALLIHAN, Acting Mayor;" that said resolutions were not presented to the mayor until September 4, 1885, and were not approved by him until September 14, 1885; that on the 1st of September, 1885, the assessors of defendant completed said roll, and the same was on file in their office, and caused the same to be published, on six successive days in September, in the official paper, commencing on the 2d and ending on the 7th, and on no other days; that in and by said roll plaintiffs' lands were assessed, naming the sums respectively; that said sums included a large part of the cost of building a retaining wall; that said roll was not spread in accordance with the principle laid down in the charter. It then alleges the manner in which said principle was violated; and that, by reason thereof, plaintiffs and others were injured by being assessed an unjust proportion of the cost of such paving. It then alleges that the roll is irregular and void, but that upon its face it is apparently regular and valid; that the defendant, its agents and servants, are now proceeding to enforce payment of said assessment; that said property will be sold, and plaintiffs will suffer irreparable injury; that heretofore one John Lyth, assessed upon said roll, commenced an action in the supreme court to set aside said assessment against his property, on the ground that the same was irregular and void; that such proceedings were had; that the cause was tried, and a judgment obtained declaring said roll null and void. And plaintiffs demand judgment—*First*. "That said roll, and the assessments therein contained, are null and void." *Second*. "That the defendant, its officers, servants, and agents, be forever restrained from taking any steps towards collecting the same; and that the comptroller be directed to cancel and discharge from the records any and all of such assessments; and for such other and further judgment or relief as to the court shall seem just and right." It is thus seen that the complaint is based upon two theories—*First*, that the roll is void for certain irregularities, which it specifies; and, *second*, that a judgment has already been obtained, declaring said roll null and void.

The first defense of the answer demurred to pleads a statute of limitations, and has for its basis section 9, c. 275, Laws 1880. This statute, so far as applicable here, is as follows: "It shall be presumed that every tax levied and assessment made is valid and regular, and that all the steps and proceedings required by law were taken and had, until the contrary shall be made to appear. * * * The invalidity or irregularity of any tax or assessment shall not be available as a defense to any action or proceeding, commenced after the expiration of one year from the delivery of the roll, as aforesaid, for the collection of the said tax or assessment, or for the enforcement of any right or title, by virtue of any sale thereunder, unless an action or proceeding to test the validity or regularity of such tax or assessment shall have been commenced within the time hereinbefore limited for commencing the same, and shall be still pending, or such tax or assessment shall have been adjudged to be irregular and invalid." It is thus seen that affirmative actions for relief from an invalid and illegal assessment must be commenced within one year from the delivery of the assessment roll to the treasurer of defendant; and that such irregularity and invalidity may not be availed of as a defense against proceedings, after the lapse of one year, for its enforcement. Upon the lapse of time occurring, the statute makes the presumption of validity conclusive; but it is excepted from such result in the event that the tax shall be adjudged irregular and invalid. It may be regarded as the law that affirmative actions to vacate and annul irregular and invalid assessments must be brought within one year after the delivery of the roll to the treasurer, and may not be

maintained after that time by a person affected thereby, even though another person, assessed upon the same roll, and for the same tax, has successfully maintained an action, and procured judgment canceling his assessment. *In re Delancey*, 52 N. Y. 80; *Wilkes v. Mayor, etc.*, 79 N. Y. 621; *Moore v. City of Albany*, 98 N. Y. 409. Here the allegation of the answer is that more than a year has elapsed since the delivery of the roll to defendant's treasurer, and the time of the commencement of the action. If this allegation be true, then it furnishes a perfect defense to all the allegations of the complaint, wherein it alleges, and seeks to take advantage of, irregularities; and this, even though a judgment vacating certain assessments for the same irregularity has been obtained by another person. If it were true, as claimed by plaintiff, that the only question presented by the complaint is based upon the judgment declaring the roll null and void,—which he seeks to use as a defense against the defendant's efforts to enforce it,—it would present an entirely different question; for, while he may not use such adjudication as a weapon of attack, he may use it for defense. *Chase v. Chase*, 95 N. Y. 380. But here the plaintiffs have sought to use the whole, and, in part, to demand affirmative relief based upon alleged irregularities, as to which the statute furnishes a complete defense. It was therefore properly pleaded.

The second defense demurred to alleges that the assessors, as to this particular roll, acted in a *quasi* judicial capacity, and that their determination is in the nature of a judgment, and, consequently, not reviewable in this action, and that, if any irregularities in the proceedings have been committed, they have been waived by the failure of plaintiff, or any person interested, to file objections to said roll, so that the same might have been corrected by the common council; and, in consequence, plaintiffs are estopped from questioning the regularity of the proceedings. The first part of the answer is, perhaps, unnecessary, as defendant could urge it as matter of law, upon the facts appearing in connection with the proceedings; but, as to the last clause, it alleges a fact, viz., that plaintiffs failed to appear at the proper time, and file objections. By section 12, tit. 6, of the charter, it is provided that when the assessment roll is delivered to the clerk he shall cause a notice thereof to be published; and that objections thereto may be filed within 10 days, by any person interested therein. Section 13 provides, if no objections be filed, the roll shall be deemed confirmed. Section 14 provides that if objections be filed the city clerk shall lay the roll, with the objections filed, before the common council, who shall hear the objections, and confirm the roll, or annul it, or refer it back to the assessors, to make a new assessment. Under these provisions, and like ones, it has been held that such failure to appear as provided for was a waiver of any irregularity. *Lyth v. City of Buffalo*, 48 Hun, 180. *People v. Mayor of Brooklyn*, 4 N. Y. 421-442. It is therefore quite apparent that both defenses demurred to, if true, constitute a complete defense to a portion of the allegations relied upon in the complaint. The demurrer is therefore overruled, with costs.

TITUS, J., concurs. BECKWITH, C. J., dissents.

SANDERS v. NEW YORK EL. R. CO. *et al.*

(Common Pleas of New York City and County, General Term. December 2, 1889.)

ABATEMENT AND REVIVAL—WHAT ACTIONS MAY BE REVIVED.

An action for an injunction, in which incidentally damages for the maintenance of a railroad are demanded, is not an action for trespass, and on the death of plaintiff may be revived in the name of his devisee and executor.

Appeal from special term:

Argued before LARREMORE, C. J., and BOOKSTAVEN and VAN HOESEN, JJ.
Edward C. James, for appellants. *Henry G. Atwater*, for respondent.

LARREMORE, C. J. This action was commenced by the late Charles W. Sanders. He died seised of the premises to which the action relates, and leaving a will, in and by which he appointed his wife, Elizabeth B. Sanders, sole executrix, and made her sole devisee of his real estate. The present appeal is from an order reviving the suit, and directing it to be continued in the name of said Elizabeth B. Sanders individually and as executrix. The main contention of the learned counsel for the appellants is founded on the assumption that the present action is a common-law action for trespass. The case of *Dyckman v. Allen*, 2 How. Pr. 17, (a special term decision,) is cited, which holds that an action for trespass abates upon the death of one of several plaintiffs, and cannot be continued in the name of the survivors. From such proposition of law the learned counsel argues that the case at bar abated upon the death of the sole original plaintiff, and that, in order to pursue her remedy for an injunction, Mrs. Sanders must, as devisee, begin a new action. But this suit is not technically an action for trespass. It is an action for an injunction, in which incidentally damages for the maintenance of the elevated railroad are demanded. Undoubtedly the former principles of law on this subject have been modified, and quite materially extended, to fit the peculiar exigencies of these litigations. In *Shepard v. Railway Co.*, 5 N. Y. Supp. 189, it was held that the claim for the injunction and for damage constitute but a single cause of action, and that the heirs of a co-owner and his administrators are proper parties to be joined as plaintiffs. The tendency of the decisions has been to bring these actions into the general class of equitable actions founded upon the title to real estate, such as actions for partition, for specific performance, etc. It is the settled rule in equity that such actions do not abate upon the death of the plaintiff, but may be revived and prosecuted in the name of the proper successors in interest. *Hoffman v. Tredwell*, 6 Paige, 309; *Douglass v. Sherman*, 2 Paige, 359; *Earl of Durham v. Legard*, 34 Beav. 442; *Jackson v. Ward*, 1 Giff. 30. It is conceded that all the rights demanded by the original plaintiff pass in some form or forms to some person or persons. Regarding the case at bar, therefore, not as an action for trespass, but simply as an action in equity affecting rights in real estate, it should be revived in its entirety. This course was adopted in granting the order appealed from. We have formerly held (*McGree v. Railroad Co.*, 13 Daly, 302) that a devisee and executrix might properly join in bringing one of these actions. It follows that if the action is to be revived the devisee and executrix are the proper persons to be substituted as plaintiffs. See, also, *Shepard v. Railway Co.*, *supra*. A revival precisely similar to the one here complained of was made in *Henderson v. Railroad Co.*, 78 N. Y. 423. A testator died *pendente lite*, and the suit, which was for an injunction and damages against the Central Railroad Company for depriving said testator of land, was revived in the name of his devisees and executors, and in such form prosecuted to judgment. It appears that the revival was by order of the court, but whether the points which appellants now raise were taken

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and discussed, or such order was made without opposition, the reported record of the case does not disclose. In any event, we approve of the course there adopted. The order appealed from should be affirmed, with costs.

PEOPLE v. TIETJEN *et al.*

(*Common Pleas of New York City and County, General Term. December 2, 1889.*)

BAIL—FORFEITURE—REOPENING JUDGMENT.

Where defendant has forfeited his bail, and judgment has been entered thereon, the judgment cannot be vacated because defendant is afterwards surrendered, tried, and acquitted, unless it appears that the prosecution has not been deprived of proofs by the delay; and the certificate of the district attorney is not sufficient evidence on that point.

Application to vacate judgment on a recognizance.

Argued before LARREMORE, C. J., and DALY and VAN HOESEN, JJ.
John R. Fellows, Dist. Atty., for the People. Thornton, Earle & Kiendl, for defendants.

PER CURIAM. The prisoner was arraigned for keeping open on Sunday, August 26, 1888, a place duly licensed for the sale of spirituous liquors, to-wit, 431 Seventh avenue, was held to bail in \$100, was indicted November 2, 1888, called for trial on December 21, 1888, and, not answering, his bond was forfeited on that day, and judgment entered February 27, 1889. On May 17, 1889, he was arraigned for trial and acquitted. The petition states that the people have lost no rights by reason of his failing to appear on the first-named day set for trial, and were in as good position to prosecute him on the 17th May, 1889, as they were on that date. A certificate of the district attorney to the same effect is produced. Before the judgment on the recognizance can be vacated, we must have evidence that the prosecutor or the witnesses for the people had notice of the subsequent arraignment and proceedings in court when the prisoner was acquitted, and a copy of the evidence upon which the indictment was found should be produced to us, and the principal witnesses for the people, or the complainant, should be examined as to whether they were subpoenaed to appear in court when the prisoner was arraigned. We cannot discharge these judgments, where the prisoner was subsequently surrendered and acquitted, unless it appears that the prosecution has not been deprived of proofs by the delay, and we cannot accept as evidence on this point the certificate of the district attorney. *People v. Carey*, 5 Daly, 533.

Application refused, with leave to renew on further proofs.

SALING v. GERMAN SAV. BANK.

(*Common Pleas of New York City and County, General Term. December 2, 1890.*)

1. BANKS AND BANKING—BY-LAWS OF SAVINGS BANKS.

A provision in the by-laws of a savings bank, signed by depositors, that the "bank will not be responsible for frauds committed on the officers by producing the pass-book and drawing money without the knowledge or consent of the owner," does not discharge the bank from obligation to exercise ordinary care as to the identity of persons presenting pass-books. Following *Appleby v. Bank*, 62 N. Y. 12.

2. SAME—PAYMENT OF FORGED CHECK—PROVINCE OF JURY.

Where defendant savings bank paid money to S., who presented plaintiff's pass-book and forged his name, testimony of the bank's officer, whose duty it was to examine the signatures, that after making comparison he could readily distinguish the genuine signatures from the forgeries; that he did not ask S. any of the questions as to his birthplace, age, etc., which facts are always set opposite a depositor's name for future identification; that the signature was such a good imitation that he did not think he could be mistaken; that he was frequently so busy that he did not have time to ask the questions; and that, on account of the rush of business, if a signature presented "is a tolerably good signature, we have it paid without any questions,"—presented a question of defendant's negligence for the jury.

Appeal from city court, general term.

Action by Henry Saling against the German Savings Bank in the city of New York. Judgment for defendant, and plaintiff appeals.

Argued before LARREMORE, C. J., and DALY and VAN HOESEN, JJ.
Regismund Kaufmann, (Lewis Sanders, of counsel,) for appellant. *Max Bayersdorfer*, (David Leventritt, of counsel,) for respondent.

LARREMORE, C. J. It is not necessary that we should state at any great length our reasons for affirming the order of the general term of the city court, reversing the judgment rendered at trial term. The plaintiff was a depositor in the defendant's bank. It appears that one Rudolph Schwartz, who has since been indicted and convicted for the offense, surreptitiously procured plaintiff's bank-book, personated plaintiff at the bank, forged his signature on several occasions, and thereby collected various sums in plaintiff's name, which the defendant has charged to plaintiff's account. The payment of such sums to Schwartz the defendant interposed as a defense to this action. The forged signatures were produced on the trial, and compared with the signature of plaintiff in the signature book of the bank, and with other genuine signatures. An officer of the bank whose duty it was to examine the signatures upon draft checks admitted that after making such comparison he could readily distinguish such genuine signatures from the forgeries. This witness further says that when the man Schwartz presented himself to draw money he does not think he asked him (Schwartz) any of the questions as to the birthplace, age, etc., which facts are always set opposite a person's name, when he opens an account, for future identification; that the signature was such a good imitation that the witness did not think he could possibly be mistaken; and that, moreover, he was frequently so busy that he did not have time to ask the questions. The witness further said that on account of the rush of business, if a signature presented "is a tolerably good signature, we have it paid without asking any questions." With this evidence in the case, it was error for the trial judge to refuse to allow the jury to pass upon the question whether or not the defendant was guilty of negligence in making the payments. *Fricke v. Bank*, 4 N. Y. Supp. 627; *Cornell v. Bank*, 9 N. Y. St. Rep. 72.

The defendant relies upon an ordinance or by-law, to which plaintiff subscribed, to the effect that the "bank will not be responsible for frauds committed on the officers by producing the pass-book and drawing money without the knowledge or consent of the owner." In order to sustain the action of the trial judge in directing a verdict, it would have to be held that such by-law exonerates the officers of the bank from exercising ordinary care in the making of payments. In *Appleby v. Bank*, 62 N. Y. 12, the by-law involved was in terms much stronger than the one in question here. It expressly provided that "although the bank will endeavor to prevent fraud upon its depositors, yet all payments to persons producing the pass-books issued by the bank shall be valid payments to discharge the bank." Even in that case it was said in the opinion that "these rules do not dispense with the exercise of ordinary care on the part of the officers of the bank." Page 17. It would therefore seem not to be the policy of the law to allow a savings bank to discharge itself from all obligation to exercise ordinary care as to the identity of persons presenting pass-books. In the case at bar, facts tending to show negligence in making the payments were adduced from defendant's own officers, and the issue of negligence should have been submitted to the jury. The order of reversal should be affirmed. All concur.

*ZUNZ v. HEROY et al.**(Common Pleas of New York City and County, General Term. December 2, 1889.)***CONTRACT—ACTION FOR BREACH—COUNTER-CLAIM.**

Plaintiff made contracts with defendants to deliver them merchandise, and it was stipulated, as a condition of the shipment that defendants should furnish letters of credit to plaintiff to secure the price, and two letters of credit were furnished under the first order, and shipments made. These letters of credit were afterwards withdrawn, and none others issued. *Held*, that defendants failed to show performance of the contracts on their part, and their counter-claims of damages, by reason of plaintiff's neglect to ship the goods, were properly dismissed.

Appeal from special term.

Action by Paul Zunz against James H. Heroy, David J. Marenner, and William W. Heroy, for an accounting. Defendants filed counter-claims. There was judgment for plaintiff, ordering that an account be had before a referee, and dismissing defendants' counter-claims. Defendants appeal.

Argued before LARREMORE, C. J., and VAN HOESEN, J.

William W. Niles, for appellants. *Horwitz & Hershfeld*, for respondent.

LARREMORE, C. J. The record in this case is voluminous, but the points to be considered on the appeal are very simple. The action is for an accounting for the proceeds of glass shipped to defendants, as brokers, to be sold for plaintiff's account. Defendants admitted the delivery to and sale by them of the merchandise specified in the complaint, and there is evidence to support the findings of the judge at special term as to the agency on defendants' part. Indeed, it would almost seem, from a perusal of the testimony, that defendants did not seriously dispute plaintiff's original claim, or the sufficiency of the evidence to uphold it, but relied upon their counter-claims. Said counter-claims were properly dismissed. They were alleged to have arisen on contracts for the sale of glass to defendants by plaintiff, and defendants aver that they have suffered damage by reason of plaintiff's neglect to deliver such merchandise to them. But the contracts in question stipulate that, as a condition to the shipment of goods, defendants should furnish letters of credit on certain bankers to plaintiff, to secure him for the purchase price. Two letters of credit were in fact furnished under the first order, and plaintiff accordingly shipped goods as called for by the contract. These two letters of credit were subsequently canceled, and none others were afterwards given. Defendants' case on such counter-claims was therefore fatally defective, in that it failed to show performance on their part of the contracts of which they claimed the benefit. But, beyond this, defendants do not prove any actual damage by reason of the failure of the plaintiff to forward the glass. This in itself would have necessitated a dismissal of the counter-claims. The learned counsel for the appellants strenuously insists that the counter-claims should not have been dismissed, but an award of nominal damages should have been made upon them. This is an action in equity for an accounting, and we have been unable to perceive how such award could be of the slightest benefit to defendants, even if, as matter of law, they were entitled to it. In our opinion, the trial judge properly eliminated all consideration of the alleged counter-claims from the case before sending it to a referee to take and state the account. As to the appeal from the order of March 29, 1889, refusing to amend the interlocutory judgment, it will be useless to consider the same now; for it appears that the referee has already made and filed his report. Whether or not he acted upon a too narrow view of the scope and meaning of the interlocutory judgment we will determine if an appeal is taken from the final judgment. It would be impossible to consider this question intelligently, without having before us the record of proceedings upon such reference. The interlocutory judgment appealed from should be affirmed, with costs.

GREEN v. SHUTE *et al.*¹

(Common Pleas of New York City and County, General Term. December 2, 1889.)

1. PARTNERSHIP—POWER TO BIND RETIRING PARTNER.

At the time of the dissolution of the firm of B. & S., B. executed a note for \$900 to plaintiff in the firm name. There was undisputed evidence that at that time B. & S. owed plaintiff \$715 for services. Plaintiff testified that the note was given in settlement of wages, and for money which he had loaned to B. & S. S. denied that any loan was made to the firm, to him, or in his presence to B., and denied any knowledge of the giving of the note therefor. Plaintiff continued in the employ of B. after the dissolution. It appeared that he received two checks from B. for \$500 each, made by S. to B.'s order. He testified that these were given him for wages due him from B. alone. There was no evidence for what purpose S. gave the checks to B. *Held*, that the evidence was sufficient to support a verdict for plaintiff against B. & S. for the full amount of the note.

2. TRIAL—DIRECTION OF VERDICT.

Where both parties request the direction of a verdict, neither can afterwards object that there were questions of fact which should have been submitted to the jury.

Appeal from city court, general term.

Action by Shirley J. Green against Noah B. Shute and Charles O. Bailey. Defendant Shute appeals from a judgment of the general term of the city court affirming a judgment of the trial term of said court, entered on the verdict of a jury directed by the court for the sum of \$1,082.70; and from an order of said general term affirming an order of the trial term denying defendant's motion for a new trial on the minutes.

Argued before LARREMORE, C. J., and DALY and VAN HOESEN, JJ.
Seaman & Conger, for appellant. *Wm. G. McCrea*, for respondent.

DALY, J. At the close of the proofs both parties moved for a direction of a verdict, and a verdict was directed for plaintiff. To this direction the defendant excepted, and his exception brings up the question whether there was evidence to sustain the verdict. Appellant cannot be heard to urge that there were questions of fact in the case which should have been submitted to the jury. Where both parties ask for a direction of a verdict, they concede that there is no dispute upon the question of fact, and that there was left for decision only a question of law upon an uncontradicted state of facts. *Leggett v. Hyde*, 58 N. Y. 275; *Koehler v. Adler*, 78 N. Y. 287.

There was ample evidence to sustain the verdict. The action was upon a promissory note for \$900, made by defendant Bailey in the name of his firm, Bailey & Shute, on December 31, 1885, payable to plaintiff on demand. The defense admitted the copartnership of defendants on that date, and set up that the note was made by Bailey in fraud of his firm, and that no amount was then due from the firm to plaintiff, and there was no consideration for the note, and also that the note had been paid. The defendant Shute, who alone appeared and answered, had the affirmative on the trial, and read the deposition of plaintiff, by which it appeared that he was in the employ of defendants' firm as their foreman; that previous to December 31, 1885, and when the firm first commenced business, he had loaned to Bailey & Shute together, personally, the sum of \$185, and received their note for that amount; that when the note in suit was given on December 31, 1885, there was due him a balance of \$715 for wages, besides the \$185, and the note in suit was given for the total amount then due; the original note for \$185 being then delivered up to Bailey. The amount due for wages was figured up between the plaintiff and Bailey from the firm books and plaintiff's own accounts, and the balance, \$715, as above, found due. The plaintiff's wages were \$18 per week. He swore that he worked for the parties after that until the fall of 1887, when they stopped business, and Bailey went away. That he received money from them from

¹Affirming ante, 69.

time to time on account of wages. That in 1887, at different times, he received two checks of \$500 each, made by Shute to Bailey's order, which Bailey indorsed over to him. They were for the balance of wages owing him outside of the note in suit. That he got the checks by asking money from Bailey on account of money due him for wages, Bailey going each time to Shute, and getting a check; that no part of the note in suit had been paid. The defendant Shute, sworn on his own behalf, denied that any loan of \$185 was made by plaintiff to the firm, to him, or in his presence to Bailey, and denied any knowledge of the giving of the note therefor. He also testified, and it was conceded by plaintiff's counsel, that the firm of Bailey & Shute dissolved on January 1, 1886, but he admitted that Bailey remained after that at the old place of business, carrying on the same business; that plaintiff continued to be employed there, and that he (Shute) was occasionally at the old place, and had business transactions with Bailey; and that he finally took possession of the place and business under foreclosure of a mortgage he held thereon, Bailey going away.

It is claimed by defendant that as the note in suit was in settlement of wages up to the time of the dissolution, and nothing could be owing plaintiff from Shute after that date, the \$1,000 subsequently paid in the two checks in question must have been given in payment of that prior indebtedness, and so extinguished the note sued on. But it appears that these two checks were not made payable to the order of plaintiff. They were made by Shute to the order of Bailey, and were evidently a loan to the latter to pay the wages he owed to plaintiff, or an advance or payment on account of some transaction between the former partners. Plaintiff asked Bailey for money on account of wages due from Bailey to him. Bailey went to Shute, got the checks to his own order, and indorsed them over to plaintiff. Shute does not state on what account he delivered these checks to Bailey, and there is nothing whatever to show that they were intended as a payment of the old firm's indebtedness to plaintiff. The defense of payment, therefore, wholly failed. There was no evidence offered to show that the old firm was not indebted to plaintiff in the sum of \$715 on December 31, 1885, and the only question of fact in the case as to the \$185 was whether the loan of \$185 was made to Bailey personally, or to Bailey & Shute; and the testimony of plaintiff in that regard is contradicted in only one particular by Shute,—that is, as to the latter's being present at the time the loan was made. If defendant desired to have that question of fact submitted to the jury, he should have asked for such submission after the denial of his request for a direction of a verdict in his favor. Where, after both parties asked direction of a verdict, nothing is done in the way of asking for the submission of any particular question of fact to the jury, it will be assumed that they waive the right of submission to the jury, and consent that the court shall decide the questions of law and fact involved. *Koehler v. Adler*, above.

The evidence was ample to support a verdict of a jury in plaintiff's favor on the issues involved, and the decision of the court, under the circumstances, upon the same state of facts, cannot be disturbed.

The judgment and order appealed from should be affirmed, with costs. *All concur.*

GREEN v. SHUTE *et al.*¹

(*Common Pleas of New York City and County, General Term. December 2, 1889.*)

1. APPEAL—PRACTICE—SETTLEMENT OF CASE.

Where a motion to resettle a case is denied on affidavits, it cannot be assumed by an appellate court that there was other proof than the affidavits before the trial court which warranted the omission of a certain matter from the case.

¹ Affirming *ante*, 69.

2. TRIAL—DIRECTION OF VERDICT.

Where defendant's request to submit a question to the jury has been granted, and on another ground he asks a direction of a verdict, he waives the right of submission, and consents to the decision of law and fact by the court.

3. SAME—APPEAL—WHAT REVIEWABLE.

An appeal on exception to the direction of a verdict only brings up for review the question whether there was evidence to sustain the verdict, not the question whether the fact should have been submitted to the jury.

Appeal from city court, general term.

Action by Shirley J. Green against Noah B. Shute, impleaded with Charles O. Bailey. Defendant Shute appeals from an order of the general term of the city court dismissing, with costs, an appeal from an order of the special term of said court denying defendant's motion to resettle the case on his appeal from the judgment in this action.

Argued before LARREMORE, C. J., and DALY and VAN HOESEN, JJ.

Slaman & Conger, for appellant. *Wm. G. McCrea*, for respondent.

DALY, J. It appears from the affidavits read upon the motion for a resettlement that, after the defendant had rested, he having the affirmative, plaintiff asked for the direction of a verdict in his favor, and defendant asked to go to the jury on the question of the loan; that the court intimated that there was sufficient to submit to the jury on that question; that defendant then asked for the direction of a verdict in his favor upon the question of payment, and the plaintiff thereupon renewed his motion for the direction of a verdict in his favor, which the court granted. On settling the case the judge omitted the request of the defendant for leave to go to the jury on the question of the loan. Defendant urges that it is material to his appeal to have it inserted, claiming that after such a request it was error to direct a verdict for the plaintiff. The city court held that the settlement of the case by the trial judge was conclusive, because there was a dispute as to what had occurred. I do not find that there was a dispute upon this point, because the statement above set forth is taken from the affidavit of plaintiff's attorney, which agrees with that of defendant's counsel on the question in controversy. As the order appealed from was made, as is recited, upon the affidavits, we cannot assume that there was any other proof before the trial judge which warranted the omission from the case of the matter in question.

It seems to me, however, that it would be a waste of the time and the money of the litigants to reverse this order, and the judgment of affirmance entered upon the appeal, which was heard upon the case as settled, if the matter which the appellant desired to have inserted in the case is immaterial, and I am satisfied that it is. The rule is that where both parties ask a direction of a verdict the court will presume that they consent that the court may pass upon all questions of fact and law; but after such request and refusal there is no absolute inconsistency in asking to submit questions of fact to the jury. If nothing be done, however, after both parties ask a direction of a verdict, it will be assumed that they intend to waive the right of submission to the jury, and consent that the court should decide the questions of law and fact involved. *Koehler v. Adler*, 78 N. Y. 287. In this case the defendant, after plaintiff had asked for a direction of a verdict in his favor, requested the court to submit one question of fact to the jury. The court decided that he was entitled to have that question submitted. Whereupon defendant, instead of availing himself of the permission he had asked for, requested a direction of a verdict in his favor upon another ground. The two requests were absolutely inconsistent, and by making the latter he must be held to have abandoned the former; and, by not renewing the request for submission after the motion for a direction was refused, he must be held to have acquiesced in the decisions of law and fact by the court.

It did not affect any right of the appellant for the trial judge, in settling the case, to exclude the request to go to the jury which had been abandoned after it had been granted. There was nothing for the appellate court to review in connection with that request. The motion for a new trial "upon the exceptions, and because the verdict was contrary to law," did not bring it up for review. The exception to the direction of a verdict only brought up for review the question whether there was evidence to sustain the verdict, not the question whether the fact should have been submitted to the jury. The latter could only be raised upon exception to a refusal to so submit after a direction of a verdict in appellant's favor had been refused; but no request for the submission of any fact to the jury was made after such refusal, and no exception to a refusal to submit was ever taken. The case was therefore properly settled, and the order appealed from should be affirmed, with costs. All concur.

ENOCH MORGAN'S SONS CO. v. SMITH *et al.*

(Common Pleas of New York City and County, General Term. December 2, 1880.)

PLEADING—COUNTER-CLAIM—REPLICATION—BURDEN OF PROOF.

In an action for the value of goods sold, defendants set up for counter-claim a contract for premiums on sales, alleging compliance with the terms of the contract. The replication admitted a contract, but alleged that it contained an express stipulation of forfeiture for the failure of defendants to perform certain conditions, and that defendants had failed as to such conditions. *Held*, that defendants were only required to show general compliance with the terms of the contract, and that the burden was on plaintiff to prove such particular acts of non-compliance on the part of defendants as amounted to the alleged forfeiture.

Appeal from trial term.

Action by Enoch Morgan's Sons Company against George Waldo Smith and John S. Sills to recover for goods sold. The defense was the counter-claim of premiums on sales under contract. The replication alleged forfeiture of premiums. Trial by jury, and verdict for defendants. From the judgment entered thereon, plaintiff appeals.

Argued before VAN HOESEN and BOOKSTAEVER, JJ.

Seward, Da Costa & Guthrie, for appellant. *Seaman & Conger*, for respondents.

VAN HOESEN, J. I think that a careful reading of the contract must dispel all doubt as to the burden of proof. The defendants pleaded a counter-claim in an action brought by the plaintiffs to recover the reasonable value of a quantity of sapolio sold and delivered. The counter-claim set up by the defendants was a demand for a bonus or premium that the plaintiffs had promised to allow them in case their sales of sapolio for the year 1887 should exceed their sales for the year 1886. The plaintiffs contended that the defendants had no right to the bonus, because, although their sales for 1887 were in excess of those for 1886, the increase in such sales was effected by means which, by the terms of the contract between the parties, operated as a forfeiture of any claims to the bonus. Upon this statement of the case, it is evident that the defendants were not bound to prove, in the first instance, that the plaintiffs had no defense to their counter-claim. It is said that a compliance by the defendants with all the terms and provisions of the contract respecting the bonus was a condition precedent to their right to recover. Undoubtedly, the defendants were under an obligation to perform every part of the agreement; but it does not follow, from a conception of the truth of that proposition, that they were bound to prove, as part of their case in chief, the details of every sale of sapolio that had been made in 1887, and that no one of those sales had been promoted by the use of any of those inducements that a contract prohibited. If there was any good reason for not paying the bonus,

it was an answer to the counter-claim; and the proof of that answer devolved upon the plaintiffs. The letters that formed the contract proved this beyond a reasonable doubt. The proposition of the plaintiffs, which became the contract, was substantially this: "In order more fully to interest you, and encourage a larger sale, we will pay you, in addition to present discount, one dollar for each half-gross case and fifty cents for each quarter-gross case you may purchase, during the year 1887, in excess of the 890 half-gross cases you purchased in 1886, provided you adhere to the following terms: (1) You must make every reasonable exertion to increase the sale of sapolio, and order lots of not less than 40 cases of one half-gross cases; (2) you must not sell half-gross cases at less than \$4.50 per case, nor quarter-gross cases for less than \$2.25 per case; (3) you must not give a larger credit, or a larger discount for cash, than you allow on other goods; (4) if in a single instance you violate either in letter or in spirit any one of the foregoing stipulations, you shall forfeit and relinquish your right to any bonus whatever." To these terms the defendants assented. The defendants' sales of sapolio in 1887 were much larger than they had been in 1886, and they claimed the promised bonus. The plaintiffs answered that the bonus was forfeited, because the defendants had sold sapolio for less than the prices nominated in the contract. If this was so, the defense to the counter-claim was perfect; but it was for the plaintiffs to prove it, and not for the defendants to disprove it, in presenting their case in chief. Proof of a general nature, such as the defendants furnished, that they had performed the contract, was all that was, in the first instance, required of them. The agreement was not to do a particular thing, and only slight evidence of compliance was required. *Calder v. Rutherford*, 3 Brod. & B. 302. The substantive fact to be made out was that the defendants had forfeited their right to the bonus by violating the terms of sale, and it was for the plaintiffs, who alleged the forfeiture, to prove it. *Calder v. Rutherford*, 3 Brod. & B. 302; *Soward v. Leggatt*, 7 Car. & P. 613. I think that Judge DALY properly decided the question as to the burden of proof, and that the judgment should be affirmed.

VERNON v. SIMMONS.

(Common Pleas of New York City and County, General Term. December 2, 1889.)

1. PARTNERSHIP—WHAT CONSTITUTES—EVIDENCE.

A finding that no partnership existed between plaintiff and defendant is supported by evidence that, though a firm name was used on letter-paper and in correspondence, and that a lease of an office was executed to them jointly, this was done at defendant's request, to help him get contracts; that, though plaintiff admitted he was to have an interest in certain contracts obtained by defendant, it was only in the net profits, "for services rendered;" that, when plaintiff applied for an interest in other contracts, defendant told him a separate agreement must be made for each transaction; and that, when plaintiff offered to settle the matter in dispute, after rendering an account for services and expenditures, defendant, in his written reply, made no suggestion of any unsettled partnership accounts between them.

2. ACCOUNT STATED—WHEN ACTION LIES.

Proof that defendant, without objection or making any reply, retained an account for moneys expended and services rendered for him by plaintiff, inclosed in a letter demanding payment, and that subsequently, on meeting plaintiff, defendant acknowledged the receipt of the letter, and said he had no money to settle the account, is sufficient to sustain an action on an account stated.

3. SAME—OBJECTIONS TO EVIDENCE—APPEAL.

Though an objection is properly taken to the admission of evidence as to any item not specified in the account stated, but included in the bill of particulars annexed to the complaint, yet, to make it reversible error, it must be followed up by a request to exclude the item from the consideration of the jury.

Appeal from city court, general term.

Action by Edward Vernon against James A. Simmons, on an account stated. From a judgment of the general term of the city court, affirming a

judgment entered on a verdict in plaintiff's favor, and from an order denying his motion for a new trial on the minutes, defendant appeals.

Argued before LARREMORE, C. J., and DALY and VAN HOESSEN, JJ.

Olcott, Mestre & Gonzales, (*Emmet R. Olcott* and *William I. Judge*, of counsel,) for appellant. *J. Douglas Brown*, (*Geo. W. Stephens*, of counsel,) for respondent.

DALY, J. The plaintiff sent to the defendant, on or about August 26, 1884, two accounts,—one for moneys laid out, showing a balance of \$293.13, and one for services, amounting to \$500,—inclosed in a letter demanding payment of these sums. The defendant retained the accounts without objection, or making any reply, and subsequently, on meeting plaintiff, acknowledged the receipt of the letter, and said that he had no money to settle the account, but would pay it as soon as he could. This proof was sufficient to sustain an action upon an account stated, and, although the defendant swore that he never had any such conversation with plaintiff, the case was properly for the jury, and the verdict in favor of the plaintiff upon the issue of fact cannot be disturbed. The appellant, in his brief, upon this appeal, ignores the evidence of express promise to pay the account as rendered; but such a promise is directly sworn to by plaintiff.

The account so sent to defendant did not include an item of \$125 for money paid out for defendant prior to the time of rendering the account. This item was included in the bill of particulars annexed to the complaint, and is part of the demand in the pleading. It was proved under the defendant's objection. That objection was a good one at the time, but it should have been followed up by a request to the court to exclude the item from the consideration of the jury. Instead of doing so, the defendant permitted the court to submit to the jury, with the items of the account, this item of \$125, with the evidence for and against it, without objection; and, having done so, he cannot now claim error in that regard. The city court, in its discretion, upon the motion for a new trial, might have reversed the judgment upon this ground; but, in the absence of an exception to the charge upon this point, we cannot do so.

The principal contention in the case arose upon the defense that the parties were copartners, and that the matters sued for were part of the copartnership transactions, and that no settlement of such transactions had ever been had. The plaintiff denied the copartnership, and the jury believed him, although defendant affirmed the contrary, and several witnesses swore to plaintiff's admissions in that regard, and there was uncontradicted evidence of the use of the firm name on letter-paper and in correspondence, and evidence of a lease to the parties jointly of an office for business purposes. The plaintiff explained that the use of the firm name upon the letter-paper was at defendant's request, he saying that it would help him to get contracts; and plaintiff, while still denying that any partnership was agreed upon, admitted that he supposed he was to receive an interest in contracts obtained by defendant. What that interest was we can judge by one transaction, by which an interest in a contract was given by plaintiff to defendant. By an instrument in writing dated August 20, 1884, at about the close of the relations between them, the defendant assigned to the plaintiff, in consideration of one dollar and "for services rendered," "one half part or portion of the net profits accruing to the defendant from the contract entered into between him and one John S. King, jointly with the Ohio River & Lake Erie Railroad Company, for the building of the road from Greenville to a connection with the Nickel Plate road." From the language of this instrument, it is manifest that the plaintiff did not receive the one-half share of the profits as profits, but as compensation for services only. This piece of proof, therefore, though introduced by defendant to prove a copartnership, did not prove it, but the

contrary. It also appears from the testimony of plaintiff that when he applied for an interest in the other contracts the defendant told him that a separate agreement must be made for each transaction. This was not denied by defendant, and is quite satisfactory evidence that no general, nor in fact any, copartnership agreement existed between them. In addition, it appears that when, some 18 months after the accounts were rendered to defendant, the plaintiff wrote to him, offering, as he was "very hard up," to receipt in full for all demands if defendant would send him \$125 in cash, and a note at three or six months for a similar amount, saying that it was "settling at about twenty-five per cent. on the dollar," the defendant, in a written reply, said that he was sorry to say that he could not comply with the request; if he could, he would cheerfully do so,—and nowhere in his letter makes any suggestion of any unsettled copartnership accounts between them. It is not surprising that the jury, upon all this evidence, found that there was no copartnership. There was not only nothing in the testimony which was conclusive against plaintiff's claim, but, on the whole evidence submitted to the jury, they might properly find, as they did, that the parties were not, and never had been, partners.

The fact that the plaintiff was contradicted by several witnesses and by certain circumstances, including acts and alleged admissions of his own, might be ground, for the general term of the city court, for ordering a new trial, if they thought that the plaintiff's version was not corroborated by facts proved in the case; but we, as an appellate tribunal, cannot disturb the verdict on that ground, if we would, there being sufficient evidence in the case to sustain the verdict. This is not a case where there is a mere conflict of oath against oath of plaintiff and defendant on the promise to pay. The plaintiff is corroborated by the letter of defendant, to which I have referred above. There is no error in the charge. The defendant's case was most fully and fairly submitted upon his requests. The judgment and order should be affirmed, with costs. All concur.

BLOCKER v. GUILD *et al.*

(Common Pleas of New York City and County, General Term. December 2, 1889.)

1. EXAMINATION OF PARTY BEFORE TRIAL—NATURAL PERSONS.

An order will not be granted, at plaintiff's instance, under Code Civil Proc. N. Y. § 873, for the examination before trial of an adverse party who is a natural person, where the issue between them is simply one of veracity and credibility, where no peculiar circumstances appear to make the case different from ordinary cases of the same character, where it is not alleged that any documentary evidence is in the possession of such adverse party, or it is not shown that such oral evidence as he may give cannot be just as well given at the trial.

2. SAME—CORPORATIONS—PRODUCTION OF DOCUMENTS.

In an action by a stockholder against a corporation for false representations, where plaintiff's affidavit avers that out of certain documents in possession of the company or its officers he will be able to deduce proof of the falsity of the representations to be used at the trial, etc., an order will be granted him under Code Civil Proc. N. Y. §§ 870-873, for the examination before trial of the officers, and the inspection of such books and papers, of the corporation, but the examination will be confined to official matters and acts of the company in connection with the books and documents produced.

Appeal from special term.

Action by Adam D. Blocker against Alexander Guild and the Zelaya Mining Company, for false warranty. There was an order granting, at plaintiff's instance, an examination of the defendant Guild, and of the secretary and treasurer of the defendant corporation, and the production for use upon such examination of various books and documents of said corporation. Defendants' motion to vacate this order was denied. Defendants appeal.

Argued before LARREMORE, C. J., and BOOKSTAYER, J.

Anderson & Howland, for appellants. John W. Weed, for respondent.

LARREMORE, C. J. The defendant Guild is the president of the defendant corporation. The latter was organized, under the laws of the state of New York, to acquire and operate gold mines in Tegucigalpa, in the republic of Honduras. The plaintiff purchased stock in said corporation, relying, as he claims, upon erroneous or false information furnished by the defendant Guild, individually, and by the defendant corporation, as to said corporation's property, franchises, and business prospects. He alleges such misrepresentations at length in the complaint, and claims damages. The defendants have answered, denying all the material allegations of the complaint. No objection has been raised as to the form of the action or the joinder of parties defendant. This appeal is from an order denying a motion to vacate an order granting, at plaintiff's instance, an examination of the defendant Guild and of the secretary and treasurer of the defendant corporation, and directing the production for use upon such examination of various books and documents of said corporation. An inspection of the order, and the papers on which it was granted, indicates that the probable intention was to allow an examination before trial of the defendant Guild as an individual. Under the interpretations of section 873 of the Code by recent decisions, I do not think that valid reasons appear for such examination. As far as the pleadings and affidavits disclose, the issue between plaintiff and Guild is simply one of veracity and credibility. No peculiar circumstances appear to differentiate the present case from the ordinary run of actions based upon fraudulent representations or false warranty. It is not alleged that any important documentary evidence is in the possession of Guild as an individual, nor is it shown why such oral evidence as plaintiff expects to draw from him may not with equal force be taken upon the trial. The courts have united in holding that the examination of an adverse party, being a natural person, shall not be granted as of course, and the moving papers fail to establish that such examination in the case at bar is material and necessary.

Our conclusion is otherwise with regard to the defendant corporation. One of the allegations of false warranty is that it was represented to plaintiff, before he purchased his stock, that the company owned in its own right a large tract of valuable land, which representation was untrue in all essential respects. Plaintiff avers that out of documents in the possession of the company or its officers he will be able to deduce proof, competent for use on the trial, that such representation was false when it was made, and that it was so made either with knowledge of its falsity, or with culpable neglect to ascertain whether or not it was true. Defendants' answer to this suggestion is that plaintiff could ascertain by researches in Honduras whether or not the company owned the land in question at the time referred to, and that it is therefore unnecessary that he should resort to the company's archives for such proof. But plaintiff should not be put to the trouble and expense of such researches in a distant land, if the evidence exists near at hand, in the books and papers of a corporation of which he is a stockholder. The obvious intention of the legislature in enacting section 870 of the Code, in connection with sections 872 and 873, was to enable a party to an action to procure evidence for use on the trial, by taking the deposition of an adverse party or co-plaintiff or co-defendant. That the special purpose in inserting section 870 was to entitle a party to obtain original evidence for the trial in such manner is shown by section 882, which allows the deposition of an adverse party to be read in evidence, whether the latter is able to attend the trial or not, while, in the case of other witnesses, proof of inability to be present and testify orally must be given before their depositions become competent. Subdivision 7 of section 872 provides for taking a deposition of this character when a corporation is a party, and also for the inspection of books and papers of the corporation, in connection with the testimony of its officers. We have referred, by way of illustration, to one piece of evidence which plaintiff expects to extract from

such documents, and there are other matters of proof which he also alleges he verily believes will be discovered. We think the application, as against the defendant corporation, is a *bona fide* attempt to procure evidence, and comes clearly within the express privileges granted by the sections cited. An obvious criticism upon the above reasons for sustaining the order is that the language of such sections of the Code is equally broad with regard to natural persons and corporations; and that, nevertheless, the provisions have in the case of natural persons been construed with the utmost stringency. The force of this point must be conceded; but it should be remembered that any theoretical inconsistency that may arise results from the artificial and arbitrary interpretation which courts have given to the sections, in order to protect individuals against fishing excursions. If the language were taken literally, the right to an examination before trial would be almost a matter of course, both as to natural persons and corporations. We see no reason for extending to corporations that special protection which, by judicial adjudications, has been grafted upon the statute, and is not contained in it. The affidavit upon which the order was granted contains sufficient to uphold such order. It sets forth the names of the books and papers as to the contents of which an examination is desired; the names of two of the officers, to-wit, that of the president and that of the secretary and treasurer; and reasons why the testimony of such officers, and an examination of such books and papers, is material and necessary. We are not obliged to vacate the order because, in directing Guild to appear for examination, it does not describe him as president, and the apparent intention was that he should be examined as an individual. He and Lyman, the secretary and treasurer, must both attend; but the questions to be put to them shall be confined to official matters and acts of the company, in connection with the books and documents produced, and shall not extend to their individual relations or transactions with plaintiff. The order should be affirmed, without costs of this appeal.

KANE v. METROPOLITAN EL. RY. Co. *et al.*

(Common Pleas of New York City and County, General Term. December 2, 1889.)

1. COSTS—ALLOWANCE—RIGHTS OF DEFENDANT.

Code Civil Proc. N. Y. § 8229, provides that where, in an action against two or more defendants, plaintiff is entitled to costs against one or more, but not against all of them, none of defendants are entitled to costs of course. *Held*, that where two defendants have united in one answer, and judgment has been rendered against one and in favor of the other, the successful defendant is not entitled to have the costs of trial taxed in his favor.

2. SAME—COSTS ON APPEAL.

Where two defendants appeal on the same set of papers, and the judgment is affirmed as to one and reversed as to the other, but there is no proof that the successful defendant paid or incurred any part of the expense, and his appeal could have been just as effectively presented in a less expensive manner, no disbursements for printing or for stenographer's minutes will be taxed in his favor.

3. SAME—ARGUMENT FEES.

In such a case, however, the successful defendant is entitled to his costs before the argument, and for the argument on appeal.

Appeal from special term.

Action by Edith Kane against the Metropolitan Elevated Railway Company and the New York Elevated Railway Company. Plaintiff obtained a judgment against both defendants at the trial term, and on appeal (6 N. Y. Supp. 526) this was affirmed, with costs, as to the New York Elevated Railway Company, but reversed, with costs, as to the Metropolitan Elevated Railway Company. Under the order of reversal, the last-named defendant served on plaintiff a bill of costs, containing the following classes of items: (1) Its costs and disbursements at the trial term; (2) the costs at general term, including the making and serving a case of more than 50 folios, costs before argument at

general term, and for argument at general term; (3) printing disbursements necessarily incurred by this defendant in presenting its appeal to the general term, and a copy of the stenographer's minutes required for preparing the case on appeal. The clerk disallowed the costs and disbursements at trial term, and allowed the costs and disbursements of the appeal. Code Civil Proc. N. Y. § 3229, provides: "Where, in * * * an action against two or more defendants, the plaintiff is entitled to costs against one or more, but not against all of them, none of defendants are entitled to costs of course."

On an appeal by both parties from the clerk's taxation of costs, the following opinion was filed at the special term:

"VAN HOESEN, J. The Manhattan Elevated Railway Company would have been a proper party defendant to this action, but the Metropolitan Elevated Railway Company was nowise responsible for the grievance for which the plaintiff sought redress. It is probable that the Metropolitan Company was made a party by mistake, the attorney for the plaintiff having for the moment confounded the names of the two companies. The defendants' attorneys seem not to have been at all anxious to call attention to the mistake until the case reached the general term, when a reversal of the judgment against the Metropolitan Company was demanded on the ground that it was the Manhattan, and not the Metropolitan, Company that ought to have been made defendant. The judgment against the Metropolitan Company was necessarily reversed; and in the order of reversal it is provided that the plaintiff and respondent shall recover costs of the appeal against the New York Elevated Railway Company, as to which company the judgment was affirmed, and that the judgment against the Metropolitan Elevated Railway Company should be reversed, with costs to the appellant, the Metropolitan Elevated Railroad Company. The question before me is as to the construction to be placed upon the order of the general term; and I am to decide what costs the Metropolitan Company should be permitted to tax under that order.

"*First.* The costs of the trial cannot be taxed in favor of the Metropolitan Company. That is clear. Only one answer was interposed, and in that both the New York and the Metropolitan Companies united. The two companies were not united in interest. Costs were rightly awarded against the New York Company. Section 3229 applies to the case, and provides that under such circumstances costs shall not be awarded to the defendant in whose favor judgment shall be recovered. Note to Throop's Code 1888, § 3229; *Allis v. Wheeler*, 56 N. Y. 50; *Sawyer v. Thurber*, 14 Civil Proc. R. 210; *Kraft v. Wilson*, 8 Civil Proc. R. 362. The general term meant to award such costs as could have been taxed if the proper judgment had been rendered in the first instance. No costs, save costs of the appeal, can lawfully be taxed in favor of the Metropolitan Company.

"*Secondly.* The only costs of appeal that should be taxed in favor of the Metropolitan Company are twenty dollars costs before argument and forty dollars for the argument. If there be a right to recover any disbursements, it has not been made to appear. There was only one notice of appeal, only one appeal-book, only one set of points. These were all necessary for the defendant the New York Company in the presentation of its appeal. The judgment against the New York Company was affirmed, with costs, and that affirmation carries with it the liability to pay all the expenses incurred in preparing for the argument of the appeal. The intention of the general term was that the New York Company should pay them. Why should the clerk of this court tax them against this plaintiff? The expense was incurred but once. Why should it be paid twice? The allowance of disbursements actually made, or necessarily to be incurred, is by way of indemnity to the party who has made or incurred them. Did the New York Company make or incur these expenses? If it did, it is not entitled to be reimbursed, because the judgment that it appealed from has been affirmed, with costs. The taxation

made by the clerk proceeded upon the erroneous theory that constructively there was a separate set of appeal papers printed by the Metropolitan Company. No such papers were in fact printed; and that company, therefore, needs no indemnity. The plaintiff ought not, in good conscience, to be compelled to pay the expenses of printing the papers of the New York Company; and yet that is practically the effect of the clerk's taxation. Under section 3265, the clerk may tax anew in conformity with the rulings here made. In cases where two defendants appeal upon the same set of papers, and the judgment is affirmed as to one and reversed as to the other, a fair mode of adjusting the expense would be to divide the cost of printing equally between them, so that one-half of that expense might be taxed by the party who succeeded in obtaining the reversal. But then there should be proof that the expense was in the first instance paid or incurred equally by both appellants. There should be no *post decisionem* arrangement. There is no proof here that the Metropolitan Company paid or incurred any part of the expense. But in this instance it would be inequitable to divide the expense equally, because the case of the Metropolitan could have been presented without incumbering the record with the mass of testimony that bore on the liability of the New York Company, though it had not the slightest relation to the case of the Metropolitan Company. A record of a few pages, and a brief of half a page or less, would have been ample for all the purposes of the Metropolitan Company. The expense of printing the oral testimony as to the loss inflicted upon the plaintiff by the operations of the New York and Manhattan Companies was not, and in the nature of things could not, have been necessarily incurred in presenting the appeal of the Metropolitan."

The defendant the Metropolitan Company appeals.

Argued before LARREMORE, C. J., and DALY and BOOKSTAVEN, JJ.

Davies & Rapallo (Edward S. Rapallo and Brainard Tolles, of counsel,) for appellant. *John A. Weekes, Jr.*, for respondent.

PER CURIAM. The order herein made and entered, and dated August 2, 1889, denying the motion of the appellant for a retaxation of said appellant's costs, and granting the motion of the respondent for a retaxation of said appellant's costs, should be affirmed, upon the opinion filed by VAN HOESEN, J., in making such order.

DUNKELL v. SIMONS et al.¹

(Common Pleas of New York City and County, General Term. December 2, 1889.)

1. MASTER AND SERVANT—DISOBEYING ORDERS—WRONGFUL DISCHARGE.

Since a master has the right to fix his own prices on his goods, and to insist that any offer of a smaller price should be submitted to him for determination by his servant, the reasonableness of this order is not a question of fact for the jury; and the servant's disobedience is not excused by the fear that his dignity would be impaired in the eyes of some customers if he should comply with the order.

2. SAME—INTOXICATION AS GROUND OF DISCHARGE.

Gross intoxication of the servant while on duty, though produced by drinking liquor for sanitary reasons, warrants the master in discharging him.

3. SAME—CONDONATION OF OFFENSE.

The intoxication of a servant while on duty is not condoned by the master's not discharging him on the spot; but the circumstances must show that the delay was owing to the master's forgiveness, and not to any other good reason.

Appeal from city court, general term.

Action by Albert Dunkell against Henry F. Simons and Frederick G. Cunningham, trading as H. F. Simons & Co., to recover damages for plaintiff's alleged wrongful discharge from defendants' service. From a judgment af-

¹Reversing 5 N. Y. Supp. 417.

firming the judgment of the trial term in plaintiff's favor, defendants appeal. For the facts and former opinion, see 5 N. Y. Supp. 417.

Argued before LARREMORE, C. J., and DALY and VAN HOESEN, JJ.

Stapler & Wood, (Henry B. B. Stapler, of counsel,) for appellants. *Henry Parsons*, for respondent.

VAN HOESEN, J. The plaintiff, as the servant of the defendants, was bound to obey the lawful instructions they gave as to the manner in which he should perform the work that they employed him to do. It was no excuse for his disobeying his masters' orders that he thought that his dignity would be impaired in the eyes of some customers if he should, in obedience to the defendants' commands, apply to the defendants for permission to sell goods at a lower figure than that at which he had first offered them. The defendants had a right to fix the prices upon their own goods, and to insist that any offer of a smaller price should be submitted to them, that they might determine whether or not it would be better to accept it than to have an intending purchaser leave without buying. A clerk who is too dignified to obey such an order places his employer in a most embarrassing position, for the clerk must then usurp the powers of his employer, and reduce the prices as he pleases, or else the price first asked must be insisted upon even though the customer is, by a refusal to shade the prices, lost to the store forever. A clerk who refuses to obey such instructions ought not to complain if his employer has no further use for him. It was error to leave it to the jury to determine whether such commands of the employer were or were not reasonable. The law adjudges them to be reasonable, and the judge ought so to have instructed the jury. It was also error to tell the jury, as the judge did in substance tell them, that the gross intoxication of the clerk would not warrant the employer in discharging him if it were produced by drinking liquor for sanitary reasons. No such palliation for drunkenness in a clerk while on duty is known to the law. It would be most unfortunate if a clerk, who, by drunkenness, totally incapacitated himself for the performance of his duties, could compel his master to retain him in his service by setting up the excuse that his inebriety was the result of an attempt to cure the malaria with whisky. It is for the jury, and not for the court, to determine whether or not the defendants had pardoned and condoned the offense of drunkenness, and the court should tell the jury that it did not follow that the offense was condoned because the employer did not discharge the clerk on the spot; that there must be evidence of condonation; and that the circumstances must show that the employer had forgiven the clerk, and that the delay of the employer in discharging him was owing to forgiveness of the delinquency, and not for any other good reason.

The judgment should be reversed, and a new trial ordered, with costs of the appeal in this court to the defendants, to abide the event. All concur.

HAYES v. NOURSE.

(Common Pleas of New York City and County, General Term. December 2, 1889.)

APPEAL—REVERSAL—RESTITUTION OF MONEY PAID.

In the exercise of discretionary power conferred by Code Civil Proc. N. Y. § 1833, the court will order restitution of money paid on a judgment which has been reversed on appeal, where it appears that the judgment on appeal is in effect a final determination of the issues, though the money originally belonged to the party who obtained judgment in the trial court.

On motion for restitution.

Action of Ellen T. Hayes against Charles J. Nourse, Jr., an assignee, to recover purchase money paid on lands. A judgment for plaintiff was affirmed at the general term, and the judgment paid by defendant. Subsequently the judgment was reversed by the court of appeals, (see 22 N. E. Rep. 40,) and now defendant asks restitution.

Argued before LARREMORE, C. J., and DALY, J.
G. W. Wickersham, for the motion. W. B. Putney, opposed.

LARREMORE, C. J. This is a motion for restitution, under section 1823 of the Code. The plaintiff purchased certain real estate, formerly belonging to defendant's assignors, at the assignee's auction sale, and, under the terms of sale, paid 10 per cent. of the amount of her bid to bind the bargain. She subsequently rejected the title, and brought the present action to recover the amount of her deposit. She obtained a judgment in her favor at special and general terms of this court. The defendant thereupon, for reasons which seem perfectly proper, and of which the court of last resort has approved, (107 N. Y. 577, 14 N. E. Rep. 508,) paid the amount of said judgments, and satisfied the same. Upon appeal to the court of appeals said judgments in plaintiff's favor were reversed, and defendant now demands restitution of the amount so paid. 22 N. E. Rep. 40. The phraseology of section 1823 of the Code makes the right to a restitution discretionary with the court in all cases. Counsel for defendant cites adjudications in which the property in dispute had originally belonged to the defendant. Such a case was *Costar v. Peters*, 4 Abb. Pr. (N. S.) 53, which was an action for ejectment, and in which the plaintiff by execution had been placed in possession of the premises sued for. Similar in effect was *Murray v. Berdell*, 98 N. Y. 480, in which the property of defendant had been sold under execution to discharge a debt alleged to be due the plaintiff. We do not consider these cases analogous in principle to the case at bar, because here the money deposited was originally plaintiff's money, and therefore does not stand for property of which in the first instance defendant had been deprived. If there appeared any feasible chance of plaintiff's obtaining a different result on the new trial which the court of appeals has ordered, we should be inclined to deny the present motion. Defendant elected to satisfy the judgments, which was equivalent to returning to plaintiff her deposit, to be kept in her custody *pendente lite*. If, therefore, there remained any actual uncertainty as to the ultimate right to such money, it would be more equitable not to interfere with its present custody, but to hold defendant to his election until final judgment and final affirmance on appeal. But inspection of the pleadings shows that the court of appeals has passed upon and authoritatively decided the only question raised. The new objection which counsel for plaintiff seeks to interject upon this motion could not be urged upon a new trial, without an amendment of the complaint amounting to a substantial change of base. We are not called upon here to say whether a motion for such amendment could under any circumstances prevail; and certainly we are not, when the present application is addressed to our discretion, bound to consider what plaintiff's possible *status* might be if a motion for a radical amendment had been made and granted. Upon the case as it stands, the court of last resort has finally determined in defendant's favor the only issue involved, and therefore, in the exercise of our discretion, it is just that the order of restitution should be made. The motion should be granted.

PEOPLE v. KETTERLE *et al.*

(Common Pleas of New York City and County, General Term. December 2, 1889.)

BAIL—FORFEITED RECOGNIZANCE—MOTION TO REFUND MONEY PAID.

On a motion to refund money paid on a forfeited recognizance, proof of service of notice on the district attorney must be made, and a certificate of the deposit, and a certified copy of the order discharging the recognizance, produced.

On motion to refund money paid on forfeited recognizance. For former report, see 5 N. Y. Supp. 957, *mem.*

Argued before LARREMORE, C. J., and DALY and VAN HOESSEN, JJ.

J. R. Fellows, Dist. Atty., for the People. A. P. Fitch, for defendants.
v. 7 N. Y. s. no. 14—42

PER CURIAM. This is an application to require the comptroller to refund to the surety the sum of \$300 paid by him to the district attorney in satisfaction of the judgment on a forfeited recognizance against such surety and one Valentine Ketterle, on proof that on June 3, 1889, an order was made by the general term of this court discharging and canceling the said judgment. 5 N. Y. Supp. 957, *mem.* Proof of service of the notice upon the district attorney must be produced; also certificate of the comptroller or chamberlain as to deposit with him, and certified copy of the order discharging the recognizance; and application may be renewed on such papers. All concur.

PEOPLE v. HIGGINS et al.

(Common Pleas of New York City and County, General Term. December 2, 1890.)

BAIL—JUDGMENT ON FORFEITED RECOGNIZANCE—VACATION.

Defendant was produced by his surety on the day set for trial, but, complainant failing to appear, though subpoenaed, the case was adjourned to another day, when defendant was again produced; complainant again failing to appear, after having been subpoenaed. Afterwards the case was again called, and neither defendant nor complainant appearing, neither having been summoned, defendant's recognizance was forfeited. The surety afterwards surrendered defendant, and he was discharged; complainant again failing to appear. *Held*, that the judgment on his recognizance should be vacated.

On motion to vacate judgment against Thomas Higgins, principal, and E. H. Martin, surety, on a forfeited recognizance.

Argued before LARREMORE, C. J., and DALY and VAN HOESEN, JJ.

J. R. Fellows, Dist. Atty., for the People. *E. F. Hassey*, for defendants.

PER CURIAM. It appears in this case that the prisoner was produced by his surety on the day when the cause was set down for trial, February 20, 1889, and appeared there with all his witnesses, but the complainant failed to appear, although duly subpoenaed; that the cause was adjourned to the 27th February, 1889, when the prisoner was again produced by his surety, and attended with his witnesses in court, and the complainant failed to appear, although he had been personally served with a subpoena, and notified to come to court on that day; an attachment was then ordered against the complainant, and the prisoner, his surety, and witnesses departed; that on the 4th day of March the cause was again called, although the prisoner and his surety had no notice of its being set down for that day, and failed to appear, but the complainant also failed to appear at that time, he not having been subpoenaed, because the officer who attempted to serve him could not find him at his residence at that time. The recognizance was forfeited on said last-named day. On subsequently learning that it had been forfeited, the surety produced the prisoner, and surrendered him, on June 3, 1889. His cause was set down for trial the next day. His witnesses attended at that time. The complainant did not appear, the officer not being able to serve him with a subpoena, and the prisoner was then discharged. If the affidavit of the subpoena server is to be taken as sufficient evidence that the complainant was notified to appear in court, then we must assume that the reason why the cause was never tried was because of his neglect to prosecute. It does not appear that any obstruction to justice was caused by any act of the prisoner or his surety. The prosecution was for assault and battery. I think the judgment on the recognizance should be discharged. All concur.

PEOPLE v. SAMUELS *et al.*

(Common Pleas of New York City and County, General Term. December 2, 1889.)

BAIL—JUDGMENT ON FORFEITED RECOGNIZANCE—VACATION.

Where a defendant whose recognizance has been forfeited is afterwards surrendered by his surety, tried, and discharged, complainant not appearing, judgment on the forfeited recognizance will not be vacated on the certificate of the district attorney that the people have lost no rights by defendant's failing to appear when his case was first called, but it must be shown that complainant and the principal witnesses for the people were subpoenaed, and diligence used to bring them into court when the prisoner was tried and discharged.

On motion to vacate judgment on a forfeited recognizance against Samuel Samuels, principal, and Julius Israels, surety.

Argued before LARREMORE, C. J., and DALY and VAN HOESEN, JJ.

J. R. Fellows, Dist. Atty., for the People. Ph. Gratz, Jr., for defendants.

PER CURIAM. The prisoner was arraigned for misdemeanor, to-wit, assault in the third degree on Jacob Levermann. He was held to bail in the sum of \$300, called for trial on January 31, 1889, failed to appear, and his bond was forfeited, judgment being entered on May 16, 1889. No excuse for his failure to appear is shown. On May 29, 1889, the surety produced the prisoner, the case was called, and the complainant failed to appear, and defendant was fully and finally discharged. The petition and the certificate of the district attorney state that the people have lost no rights by reason of the prisoner's failing to appear on the date first set for his trial. The record of the general sessions states that the complainant cannot be found. In the case of *People v. Carey*, 5 Daly, 533, it was held that the certificate of the district attorney that the prosecution has not suffered by the failure of the prisoner to appear on the day first set for his trial is not sufficient to warrant the court in discharging the judgment on the forfeited recognizance, but that the court will require evidence that the prosecutor or the witnesses for the people had notice of the subsequent arraignment, and the proceedings in court, when the prisoner was acquitted. A copy of the evidence upon which the indictment was found must be produced, and the principal witnesses for the people or the complainant should be examined as to whether they were subpoenaed to appear in court when the prisoner was arraigned. It must appear fully that sufficient effort was made to find the complainant, with full particulars as to his last known place of residence, and the diligence used to bring him into court.

Application denied, with leave to renew on further proofs. All concur.

PEOPLE v. SMITH *et al.*

(Common Pleas of New York City and County, General Term. December 2, 1889.)

BAIL—JUDGMENT ON FORFEITED RECOGNIZANCE—VACATION.

Judgment entered on a forfeited recognizance will not be discharged on the ground that defendant was afterwards surrendered, tried, and acquitted, unless it is proved that the complainant and the principal witnesses for the people were subpoenaed, and had notice of the subsequent arraignment in court, when acquittal was had.

On motion to vacate judgment on a forfeited recognizance against Frank A. Smith, principal, and Francis J. Fitzpatrick, surety.

Argued before LARREMORE, C. J., and DALY and VAN HOESEN, JJ.

J. R. Fellows, Dist. Atty., for the People. J. M. Tierney, for defendants.

PER CURIAM. The prisoner was charged with assault in the third degree on Daniel N. Hurlburt on the 17th July, 1888, and was held to bail in the sum of \$300. He left the state, went to Colorado, and remained there several months. While he was absent, and on December 10, 1888, he was called for trial, and, not appearing, his bond was forfeited, and judgment entered on

May 16, 1889. In the month of August, 1889, he returned to the city, and surrendered himself, and on August 6th his case was called for trial. The petition states that subpoenas had been duly issued to the witnesses in the cause, but does not say whether they attended. It also says that the prisoner duly appeared on said last-named day, and, after a hearing in said case, was discharged; and sets forth that the people of the state were not in any way prejudiced by his failure to appear on the day first set for his trial, and that the people have lost no rights by reason of such failure; and the district attorney of the city of New York certifies to the same effect. We have held that a judgment entered upon a forfeited recognizance will not be discharged on proof that the prisoner was subsequently surrendered and acquitted on trial, unless it appears that the prosecution has not been deprived of proofs by the delay. The court will require proof that the prosecutor or the witnesses for the people had notice of the subsequent arraignment and proceedings in court when the acquittal was had, and a copy of the evidence upon which the indictment was found should be produced to the court, and the principal witnesses for the people or the complainant should be examined as to whether they were subpoenaed to appear in court when the prisoner was arraigned. *People v. Carey*, 5 Daly, 533. The practice pointed out in that case must be pursued in this. Application refused, with leave to renew on further proofs.

PEOPLE v. BAER *et al.*

(*Common Pleas of New York City and County, General Term. December 2, 1889.*)

BAIL—JUDGMENT ON FORFEITED RECOGNIZANCE—VACATION.

Where it does not appear that the people lost any rights by default of a prisoner, who was afterwards produced and convicted, the excuse for default being that he was present, but did not answer, as he did not hear his name called, a forfeiture of the recognizance will be set aside.

Application to discharge a judgment and forfeited recognizance, in which Louis Baer was principal, and Jacob Goldstein surety.

Argued before LARREMORE, C. J., and DALY and VAN HOESEN, JJ.

J. R. Fellows, Dist. Atty., for the People. *Adolph Cohen*, for defendants.

PER CURIAM. The prisoner was guilty of cruelty to a horse, and was to appear for trial on October 14, 1886, at the court of special sessions. The surety and the petitioner were present, but failed to answer, the excuse being that they did not hear their names called. The recognizance was thereupon forfeited. On December 2, 1886, the prisoner was produced by the surety for trial at the special sessions, and was convicted of the offense, and adjudged to pay a fine of \$5, which was paid. It does not appear that the people lost any rights by their default. The application should therefore be granted.

PEOPLE v. DEVINE.

(*Common Pleas of New York City and County, General Term. December 2, 1889.*)

BAIL—JUDGMENT ON FORFEITED RECOGNIZANCE—VACATION.

The certificate of the district attorney is not sufficient proof that the state lost no rights by failure of a prisoner, afterwards acquitted, to appear according to the obligation of the recognizance, but the facts must also be shown in detail, in order that the court may determine the question.

Application to discharge a judgment and forfeited recognizance.

Argued before LARREMORE, C. J., and DALY and VAN HOESEN, JJ.

J. R. Fellows, Dist. Atty., for the People. *Wm. H. Miller*, for defendant.

PER CURIAM. The certificate of the district attorney has never been taken as sufficient proof that the people lost no rights by the failure of the prisoner to

appear in pursuance of the obligation of the recognizance. The certificate of the district attorney must be supplemented by proof that the people lost no rights. Was the prosecutor present when the prisoner was acquitted? Did he testify? If the prisoner was acquitted because a witness was absent when the trial came on, then the people did lose rights in consequence of the prisoner's non-appearance. The facts must be set out in detail, in order that the court may determine for itself whether or not the people lost rights. Motion denied, with leave to renew.

PEOPLE v. BRADY *et al.*

(*Common Pleas of New York City and County, General Term. December 2, 1889.*)

BAIL—JUDGMENT ON FORFEITED RECOGNIZANCE—VACATION.

Where the security for one accused of keeping open on Sunday a place for sale of liquor made effort to secure his due attendance, but failed, and the prisoner afterwards appeared, was convicted, and paid a fine, the forfeited recognizance will be discharged.

Application to discharge a judgment and forfeited recognizance, in which James Brady was principal, and Oscar J. Mayer surety.

Argued before LARREMORE, C. J., and DALY and VAN HOESEN, JJ.

John R. Fellows, Dist. Atty., for the People. *Townsend, Dyett & Einstein*, for defendants.

PER CURIAM. The prisoner Brady was accused of keeping open on Sunday a place duly licensed for the sale of spirituous liquors, No. 342 First avenue. He was admitted to bail in the sum of \$100, and required to appear for trial on the 5th day of December, 1888. The security made effort to secure his attendance on that day, but was unsuccessful, and the bond was forfeited. On the 25th May, 1889, the prisoner appeared before the court, was tried, convicted, and sentenced to pay a fine, which he did pay. The application to discharge the judgment and the forfeited recognizance should be granted.

PEOPLE v. FLYNN *et al.*

(*Common Pleas of New York City and County, General Term. December 2, 1889.*)

BAIL—JUDGMENT ON FORFEITED RECOGNIZANCE—VACATION.

A forfeited recognizance will be discharged, where it appears that the default was caused by the prisoner's removal from his former place of employment and residence; that his security did not know of the default till after the forfeiture; and that the prisoner was afterwards convicted, and the fine paid; and it does not appear that the people lost any rights by the delay.

Application to discharge a judgment and forfeited recognizance, in which Patrick Flynn was principal and Patrick J. Carroll surety.

Argued before LARREMORE, C. J., and DALY and VAN HOESEN, JJ.

J. R. Fellows, Dist. Atty., for the People. *William J. Nicholson*, for defendants.

PER CURIAM. This was a prosecution, under the excise law, for keeping open on Sunday a place duly licensed for the sale of spirituous liquors, at 50 Rutgers street. The recognizance was forfeited on the 25th March, 1889, and the reason of the prisoner not being present on that day, when his case was called, was due to his removal from his former place of employment and residence, and that his security did not ascertain the fact of his non-appearance until subsequent to the forfeiture. On August 6, 1889, the surety produced the principal in court, who was thereupon tried for the offense, found guilty, and sentenced to pay a fine of \$30, which has been paid. It does not appear that the people have lost any rights by reason of the delay. The application should therefore be granted.

PEOPLE v. PERLSTEIN *et al.*

(Common Pleas of New York City and County, General Term. December 2, 1889.)

BAIL—JUDGMENT ON FORFEITED RECOGNIZANCE—VACATION.

A judgment on a forfeited recognizance will be vacated, where accused was confined to his house by illness on the day set for trial, and died soon after.

Application to vacate judgment against Elias H. Perlstein, as principal, and one Wollowitz, as surety, entered on forfeited recognizance.

Argued before LARREMORE, C. J., and DALY and VAN HOESSEN, JJ.

J. R. Fellows, Dist. Atty., for the People. Samuel J. Crook, for defendant.

PER CURIAM. The prisoner was accused of selling and disposing of goods on a Sunday, and held to bail in the sum of \$100, and required to appear for trial on December 28, 1888. On that day he was ill, and confined to the house, and died on January 30, 1889. The judgment subsequently entered on May 16, 1889, on the forfeited recognizance, should be vacated.

PEOPLE v. PERLSTEIN *et al.*

(Common Pleas of New York City and County, General Term. December 2, 1889.)

BAIL—JUDGMENT ON FORFEITED RECOGNIZANCE—VACATION.

A judgment on a forfeited recognizance will be vacated, where the surety afterwards produces the accused in court, and he pleads guilty, and pays a fine.

Application to vacate judgment against Meyer S. Perlstein, as principal, and one Wollowitz, as surety, entered on forfeited recognizance.

Argued before LARREMORE, C. J., and DALY and VAN HOESSEN, JJ.

J. R. Fellows, Dist. Atty., for the People. Samuel J. Crook, for defendant.

PER CURIAM. The prisoner was accused of publicly offering merchandise for sale on Sunday, and held to bail in the sum of \$100. The recognizance was forfeited on the 21st day of February, 1889, on which day he failed to appear for trial. On the 3d day of June following the surety caused the prisoner to be produced in court. He pleaded guilty, and a fine of five dollars was imposed upon him, which he paid. The application should be granted.

DOERE *et al.* v. WOOLSEY.

(Common Pleas of New York City and County, General Term. December 2, 1889.)

SALE—RIGHTS AND REMEDIES—ACTION FOR PRICE.

Plaintiffs delivered a pair of horses to defendant's coachman, with a notice that they would cost \$200 more than a former pair, which message was given to defendant, who kept and used the horses from that time. She told her coachman plaintiffs would have to see her son, who did all her business; but the message was not given to plaintiffs. Held, defendant was liable for the \$200.

Motion for a reargument. For former report, see 5 N. Y. Supp. 447.

Argued before LARREMORE, C. J., and DALY and VAN HOESSEN, JJ.

P. C. Tolman, for appellant. R. C. Schaidter, for respondents.

DALY, J. I have read the evidence in the case and the briefs, and it does not appear that the general term overlooked anything in either. The original contract to supply defendant with a pair of horses upon the original terms was not lost sight of; for it was in view of that original contract, and the subsequent assent to a modification as to price, (assumed from the retention by the defendant of the last pair of horses sent to her, with knowledge that \$200 additional was demanded for them,) that the general term cited the cases of *Manufacturing Co. v. Dunning*, 41 Hun, 638, and *Dent v. Steam-Ship Co.*, 49

N. Y. 390. The justice who rendered the judgment, and the general term of this court, have held that the act of the defendant in retaining the horses, with express notice that their price was \$200 above the original contract, was an assent to such price, and agreement to pay it. The plaintiffs were not bound to give notice to the defendant's son because he had charge of the negotiation. It was for the defendant, after receiving notice, to refuse the horses, or to notify her son to negotiate concerning this additional demand, if she desired to retain them. It was not until some time after she had received the horses, with notice, and when a bill was presented for the additional price, that she referred plaintiffs to her son; and this did not avoid the effect of her retaining the horses. Besides, the son, when applied to by plaintiffs, refused to hear them. The motion for a reargument should be denied, with \$10 costs. All concur.

VAN ETEN v. NEWTON *et al.*

(Common Pleas of New York City and County, General Term. December 2, 1889.)

APPEAL—REHEARING.

Where judgment has been rendered for demurrage on the ground that the delay was due to defendants' negligence, and it afterwards appears that the delay was due to third persons, and that defendants had stipulated with plaintiff that they should not be liable for demurrage unless the delay was improperly caused by defendants, a rehearing will be granted.

Motion for reargument, or for leave to appeal to the court of appeals.

For statement and former opinion, see 6 N. Y. Supp. 531.

Argued before LARREMORE, C. J., and DALY and VAN HOESEN, JJ.

Edward D. McCarthy, for appellants. Hyland & Zabriskie, for respondent.

DALY, J. There is no question of law in this case which would justify us in sending the appeal to the court of appeals. The effect of the stipulation in the order for the coal which the defendants gave to plaintiffs was to relieve them from liability for demurrage, unless the detention of the boat was due to other than unjust or improper delay on defendants' part in loading, where it does not appear that the recipient of the order was ignorant of the conditions indorsed upon it. *Rackett v. Stickney*, 23 Blatchf. 566, 27 Fed. Rep. 878. But there is a question of fact in the case upon which appellant should be allowed an opportunity to be heard; that is, whether the delay in loading the boat from the 8th to the 17th of May, or for any part of that time, was an unjust and improper delay. I find from the evidence that the defendants had no control over the transportation of coal from the mine to Perth Amboy; that they ordered it on the 10th, but none came until the 15th, when 80 tons arrived, and were put on the boat,—the balance not arriving until the 17th, when the loading was completed; and that the sole fault lay with the railroad company. Against the default of third parties the defendants might reasonably avail themselves of their stipulation, and this seems to be such a case. And as the decision of this court affirming the judgment was placed upon the ground that the delay was due to the defendants, and was unjust and improper, and as the point was not argued on the appeal, I think a reargument should be permitted.

LOCKWOOD v. TWENTY-THIRD ST. RY. CO.

(Common Pleas of New York City and County, General Term. December 2, 1889.)

DAMAGES—WHEN EXCESSIVE.

In awarding damages for personal injury, the best criterion is the average amount awarded for injuries of a like nature and extent; and, where the verdict largely exceeds this average, it will be set aside, unless plaintiff consents to its reduction.

Appeal from trial term.

Action of Angelena C. Lockwood against the Twenty-Third Street Railway Company for damages on account of personal injury. Trial by jury, and verdict for plaintiff. From the judgment entered on the verdict, and from an order denying a motion for a new trial, defendant appeals.

Argued before LARREMORE, C. J., and VAN HOESEN, J.

Leslie W. Russell, for appellant. *Arnoux, Ritch & Woodford*, for respondent.

VAN HOESEN, J. In *Jennings v. Van Schateck*, 13 Daly, 7, this court said: "Where a verdict is much above or much below the average, it is fair to infer, unless the case presents extraordinary features, that partiality, prejudice, or some other improper motive has led the jury astray." The verdict in this case is far above the average. The plaintiff has recovered \$10,000 for an injury to the sciatic nerve, and for an inflammation of a broad ligament that sustains the *uterus*, accompanied by obstinate constipation, the suppression of menstruation, and nervous prostration. The plaintiff is 44 years of age, and at the time of the accident was almost 43,—near the period at which menstruation ceases, in obedience to a law of nature. She had formerly had an inflammation of the ligament and of the *uterus*, but for three years prior to the accident had not suffered from that ailment. She was never a robust woman; but she is more feeble now than she was formerly, and she has suffered considerable pain, and a great deal of inconvenience. She suffers when she walks, and she is not strong enough to do house-work. These infirmities are all deplorable, but, compared with the verdicts that juries are in the habit of giving where the injuries are quite as severe as those of which the plaintiff complains, this verdict is inordinately large. She is not entitled to recover for loss of time, or for medical attendance, because those are items of damage recoverable by her husband. Her claim is for compensation for pain and suffering, and when that has been satisfied the demand of her husband must be met. The consideration to which I have just referred ought not to influence our estimate of the recompense which the plaintiff herself ought to receive; but it may well be borne in mind that pain and suffering are the only elements of damage that the jury ought to have combined. It is difficult to estimate the damages, and, as has already been said, the best attainable criterion of the reasonableness of a verdict is its conformity to the average amount awarded by juries in cases in which injuries of like nature and like extent have been sustained. Judged by that standard, our experience and observation teach us that this verdict is not reasonable. We shall set aside the verdict, and order a new trial, on the payment by the defendant of the costs of this appeal and of the last trial, unless the plaintiff will stipulate to reduce the damages to \$4,000.

LIND *et al.* v. BRAENDER *et al.*

(Common Pleas of New York City and County, General Term. December 2, 1889.)

1. MECHANICS' LIENS—ABANDONMENT BY CONTRACTOR—RIGHTS OF SUBCONTRACTORS.

Where the owner has entered into a contract, and made payments under it, for work done on his building, and the contractor has abandoned the work before completion, it is competent, in an action by subcontractors to enforce their liens, for the owner to prove how much of the work the contractor left undone, and what it has cost to complete it in the manner provided by the contract.

2. SAME—PAYMENT TO CONTRACTOR.

The mechanic's lien law of 1885, (Laws N. Y. 1885, c. 842, § 2,) which provides that if the owner shall, for the purpose of avoiding the provisions of this act, or in advance of the terms of any contract, pay by collusion any money on such contract, and the amount still due shall be insufficient to satisfy the claims, the owners shall be liable to the amount that would have been unpaid had no such payment been made, does not apply, where the owner has made a payment in advance, without collusion.

Appeal from special term.

Action by Oscar Lind, Thomas H. McCracken, George Adie, Medart Bourque, Charles Johnson, August Brown, and Sylvanus Thebedeau against Philip Braender and others, to foreclose a number of mechanics' liens filed by plaintiffs against Philip Braender as owner, and John Walsh as contractor. Defendant Braender was building a number of houses, and in January, 1888, employed John Walsh to do the carpenter work for \$1,520, to be paid in three installments, the first of \$500, the second of \$500, and the third, upon completion of the work, of \$520. On May 5, 1888, Walsh stopped the work before finishing it. At this time he had been paid the first two payments, and \$250 of the third payment. Plaintiffs were journeymen carpenters, employed by Walsh, and did certain work on defendant's houses for which they were not paid. The action was tried before a referee, who found for plaintiffs, and judgment was entered accordingly. Defendants appeal.

Argued before LARREMORE, C. J., and VAN HOESEN, J.

Bartlett, Wilson & Hayden, (Philip L. Wilson, of counsel,) for appellants.
Langbein Bros. & Langbein, (Leonard L. Langbein, of counsel,) for respondents.

VAN HOESEN, J. Walsh, the contractor, abandoned the work before it was finished. Exactly how far from completion the building was when Walsh deserted the contract the evidence does not disclose. The defendants attempted to prove by competent evidence how much of the work remained undone, and what the cost of completing the building in the manner provided for by the contract with Walsh actually was, but the referee refused to receive the evidence. This was error, and the defendants' exception to that ruling is of itself enough to call for the reversal of the judgment. In order to ascertain what was due to Walsh it was necessary to learn how much work he had done, and what the value of that work was. Then the amount that the defendants were compelled to expend in finishing what Walsh left incomplete was to be proved. From these data a calculation could be made as to how much, if anything, was due to Walsh, and the amount payable to Walsh is the sum that the lienors could recover from the defendants in this action. *Wright v. Roberts*, 43 Hun, 413; *Van Clief v. Van Vechten*, 1 N. Y. Supp. 99; *Develin v. Mack*, 2 Daly, 94; *Cheney v. Association*, 65 N. Y. 282.

The referee assumed that, no matter what the defendants had been compelled to lay out in completing Walsh's unfinished contract, the defendants were still liable to pay the original contract price to the subcontractors. That this ruling is erroneous it requires no argument to prove. But, as the referee was led to this conclusion by an erroneous construction of the lien law of 1885,¹ it is proper that this court should express its views upon the section that he undertook to construe. Section 2 of the act provides that if the owner shall, for the purpose of avoiding the provisions of this act, or in advance of the terms of any contract, pay, by collusion, any money or other valuable thing on such contract, and the amount still due, or to become due, to the contractor, subcontractor, or assignee, after such payment has been made, shall be insufficient to satisfy the claims made in conformity with the provisions of this act, such owner shall be liable to the amount that would have been unpaid, had no such payment been made. In other words, a payment made in advance of the time fixed for it by the contract, or a payment made for the purpose of evading the operation of the act, shall not be permitted to deprive a subcontractor of what is due to him, if it were made by collusion between the owner and the contractor. A collusive payment, made before the time appointed for it by the contract, or made with intent to evade the lien law, shall be thrown entirely out of consideration in determining how large the

¹ Laws N. Y. 1885, c. 342.

fund is to which the subcontractor may resort for the satisfaction of his lien. We have been urged by the plaintiffs to disregard the words "by collusion," as used in this act, and to construe the section as though the provision read: "If the owner shall, for the purpose of avoiding the operation of this act, or in advance of the terms of any contract, pay any money," etc., "such payment shall not be taken into account;" but we feel that we have no right to do so. Effect must be given to those words "by collusion," and, if they are to be considered at all, they necessarily apply to payments made in advance, as well as to payments made in evasion of the law. Again, we have been urged to interpolate the word "or," so that the section would read; "If the owner, for the purpose of avoiding the provisions of this act, or in advance of the terms of any contract, or by collusion, pay any money," and so forth; but we cannot assume any such power. It is said that the court of appeals in *Post v. Campbell*, 83 N. Y. 283, gave just such a construction to an act very similar to the lien law of 1885. In that case the court, in construing the Kings county act of 1862, which disallowed payments made "by collusion, for the purpose of avoiding the provisions of the act, or in advance of the terms of the contract," said: "It is perhaps possible to construe the provision so as to make the word 'collusion' apply both to payments made for the purpose of evading the act, and to payments made in advance; but we think the more natural construction of the sentence is that payments made by collusion, for the purpose of evading the act, constitute one class of payments to be disallowed, and payments made in advance * * * constitute another class." The words of the lien law of 1885 are the same as those of the Kings county act, but the arrangement of them is different, and I believe that the change in the collocation of them was deliberately made. The inconvenience resulting from making any payment in advance is highly dangerous to the owner, and must have been felt by laborers, contractors, material-men, and all others whose employment makes them possible lienors. It must have often happened that a contractor could not pay his men, because he could get no advance from the owner. A laborer would feel that an advance payment was not a bad thing when it gave to him his wages on a Saturday night. A collusive payment—that is, a payment made to cheat and defraud him—would be a great evil, but not an advance payment honestly made. Hence it seems to me that the framers of the lien law of 1885 intentionally so altered the position of the words which the court of appeals had construed that, without doing violence to every rule of construction, it is impossible to say that the words "by collusion" do not apply to payments in advance as well as to payments made to evade the act. Both kinds of payment are mentioned, and then follows the provision that, if such payments are made "by collusion," they shall not prejudice subcontractors. It was easy, in construing the Kings county act, to limit the words "by collusion" to the phrase that immediately followed them, namely, "for the purpose of avoiding the provisions," etc., but no such limitation is possible in construing the act of 1885. "By collusion" refers to both kinds of payment, or it does not refer to either. If the payment to Walsh were not made collusively, it ought to have been credited to the defendant. Judgment reversed, and new trial ordered, with costs to abide the event.

MALLARD v. NINTH AVE. R. CO.

(Common Pleas of New York City and County, General Term. December 2, 1899.)

HORSE AND STREET RAILROADS—NEGLIGENCE—QUESTIONS FOR THE JURY.

In an action against a street-railroad company for personal injuries resulting in the death of plaintiff's intestate, it appeared that the latter was a girl, about 10 years old; that she stood about 2 feet from the track, with her back to the car, which was about 50 feet away, and called to her companions to follow her; that there was no obstruction to prevent the driver from seeing her; and that the car

came up at rapid speed as the child turned to cross the track, when she was struck by it and run over. *Held*, that plaintiff was entitled to go to the jury on the question of whether the driver exercised ordinary care, as his failure to do so rendered defendant liable, though there was negligence on the part of the child.¹

Appeal from trial term.

This action was begun on the 25th day of June, 1879. The answer was served on the 4th day of August, 1879. It was tried before the court and a jury, February 9, 1881, and the complaint was dismissed on motion of defendant's counsel. After the proofs on the part of the plaintiff were in, a judgment was entered in favor of defendant, from which plaintiff appeals. The action was brought to recover damages for the death of the plaintiff's intestate, Mary Ellen Mallard, who was killed on the 10th day of May, 1879, by being run over by a horse-car at the corner of Greenwich and Spring streets, in the city of New York.

Argued before LARREMORE, C. J., and DALY and BOOKSTAVEN, JJ.

George W. Wilson, for appellant. *Robinson, Scribner & Bright*, for respondent.

DALY, J. There was testimony on the part of the plaintiff to show that the deceased, a child between 9 and 10 years of age, was attempting to cross Greenwich street, at the intersection of Spring street, in the evening, between 8 and half-past 8 o'clock; that there was a crowd of persons on the crosswalk at the time, who stood back to let the approaching car pass; that the deceased stopped about 2 feet from the car track, with her back to the approaching car, then 50 feet away, and called to companions on the sidewalk to follow her; that there was no obstruction to prevent the driver seeing the child, and that he came up at a rapid pace,—one witness says a sharp gallop, one, a trot; and that his horse passed the child, who then turned and attempted to cross the track, and was struck by the front platform of the car, run over by the front wheel, and dragged a short distance by the hind wheel, before the car was stopped. This state of facts required the submission to the jury of the question whether the driver of the car exercised ordinary care, under the circumstances. The distance from the track (2 feet) at which the child stood when the car approached may have been a safe distance, providing she remained where she was; and it may be urged that the driver was justified in proceeding without slackening his speed, in view of that circumstance. I think this would be so, if the child had been looking towards the car as it approached, or the driver had any reason to believe that she was aware of the danger of making an attempt to cross, and that she would probably refrain from doing so. But, as her back was towards him, he must have seen that there was some hazard that she might not be aware of the approach of the car, and might make some movement that would have put her in danger. He was not to expect the same prudence on her part that he might justly look for from an adult or older person. He was bound to know that she could exercise only the prudence natural to her tender years, and under these circumstances he was bound to exercise care proportioned to the danger to be avoided; and whether he did so or not was a question for the jury. It is urged, however, that the same proof in the plaintiff's case showed that the deceased child was guilty of negligence which contributed directly to the accident. She was bound to the exercise of some care, and of such care as might be reasonably expected from a child of her years. What an older person should have done in the way of looking before starting to cross the street is not the standard by which her actions are to be judged. It is true that she is de-

¹As to the liability of horse and street railway companies for injuries to persons in the street and to passengers, and as to what is negligence in such cases, see *Valentine v. Railroad Co.*, 4 N. Y. Supp. 481; *Farrell v. Railroad Co.*, Id. 597, and note; *Railway Co. v. Robinson*, (Ill.) 18 N. E. Rep. 772, and note.

scribed as having stopped near the middle of the street, 2 feet from the railroad track, with her back to the approaching car, then 50 feet away, calling to her companions on the sidewalk to follow her; and that just as the horses had reached her, or had passed her, she turned to run across the street, without looking before her, and was struck by the front platform of the car, and run over by the front wheel. Had an adult done this, it is probable that he would not be permitted to recover damages for the injury that ensued, as his conduct might be deemed reckless in the extreme. It is possible that the deceased was negligent in so acting. If she were, and that negligence contributed to the accident, a nonsuit was proper. If we assume that she was *sui juris*, it implies that she had sufficient mental and physical capacity to be chargeable with the exercise of some degree of care and prudence, and responsible for the consequences of some degree of negligence. An infant is not in law altogether exempted from the exercise of care and prudence, and the defendant has a right to insist that she should not have been the heedless instrument of her own injury; and, whenever it affirmatively appears that the injury was occasioned by the fault of the party injured, there can be no recovery. *Wendell v. Railroad Co.*, 91 N. Y. 420; *Reynolds v. Same*, 58 N. Y. 248. But in this case the question arises whether the driver of the car, notwithstanding the negligence of the child, could not have prevented the accident by the exercise of ordinary care. If he could, then he was the sole cause of the injury, and the negligence of the child will not prevent a recovery. "The plaintiff may recover, notwithstanding his own negligence exposed him to the risk of injury, if the defendant, after becoming aware of the plaintiff's danger, failed to use ordinary care to avoid injuring him." *Shear. & R. Neg.* § 86. Contributory negligence on the part of the plaintiff will not disentitle him to recover damages, if the defendant might, by the exercise of care on his part, have avoided the consequences of the neglect or carelessness of the plaintiff. *Add. Torts*, (3d Ed.) 21. There may be mutual negligence, and yet one party have a right of action against the other. If a man negligently lie down and fall asleep in the middle of the public road, and another, failing to exercise ordinary care, should drive over him, the party injured would have a right of action against the other. *Thomas v. Kenyon*, 1 Daly, 142.

What degree of care was the driver bound to exercise with regard to this child, if he saw, or could have seen, her where she stood, as described by the witnesses? The authorities answer the question. It is said in *Sheridan v. Railroad Co.*, 36 N. Y. 39, that a child is entitled to more attention and care from a railroad company than a person who is under no disability. It is entitled to more consideration when crossing a street, to the end that the cars shall not run over it; and such speed in driving as would be reasonable care towards others might well be carelessness and neglect towards a child. In *O'Mara v. Railroad Co.*, 38 N. Y. 445, it was said: "The old, the lame, and the infirm are entitled to the use of the streets; and more care must be exercised towards them by engineers than towards those who have better powers of motion. The young are entitled to the same rights, and cannot be required to exercise as great foresight and vigilance, as those of maturer years. More care towards them is required than towards others. In the case of a child but two or three years of age, no knowledge or foresight could be expected. This an engineer is bound to know, and, if the child is within his view, to act accordingly. In a case like the present, that of a boy 11½ years of age, the jury were not bound to require the same demureness and caution as in the case of an older person." In *Thurber v. Railroad Co.*, 60 N. Y. 326, it was said: "If the driver of the car had been reasonably vigilant, or even exercised the very lowest degree of care, * * * he would have seen the plaintiff, and could by a very slight effort have entirely arrested, or checked, the progress of the car, and avoided the injury. * * * His omission to perform this slight duty was culpable negligence, for which the defendant must respond, unless it appears

from the whole case that the injury is not attributable to that cause." In *Murphy v. Orr*, 96 N. Y. 14, it was said. "Whoever drives horses along the street of a city is bound to anticipate that travelers on foot may be at the crossing, and must take reasonable care not to injure them. He is negligent whenever he fails to look out for them, or when he sees, and does not, so far as in his power, avoid, them. In this case the day was clear and bright. The street was unobstructed, the horses quietly moving on a walk, completely under the control of the driver, who, from his elevated seat, could see all around, in front, and on both sides of him. The plaintiff, a child between three and four years of age, while on the cross-walk, and passing over, was knocked down by one of the horses. The evidence is sufficient to show that, if the driver had looked, he would have seen the child in season to have avoided it. His conduct was sufficient to justify the conclusion of the jury that he failed in both particulars, because he was unobservant; and the learned trial judge committed no error in charging them to say whether, under all the circumstances surrounding the transaction, he was negligent in not discovering the child in time to prevent the injury." And in *Moebus v. Herrmann*, 108 N. Y. 349, 15 N. E. Rep. 415, it was said that the "driver was bound to be watchful at all points elsewhere, as well as at the cross-walk; and, had he been so, the jury might well have said from the evidence he would have seen the child in season to have prevented the collision." These rules, by which we are to judge the conduct of drivers of vehicles approaching children who are in the street, exposed to the consequences of their own natural want of foresight, as well as to want of care on the part of others, require that in a case like the one before us the questions of contributory negligence on the part of the infant, and of the want of ordinary care on the part of the driver, should be submitted to the jury. The case is distinguishable from *McKenna v. Railroad Co.*, 9 Daly, 262, where it was held not to be negligence in the engineer of a locomotive to proceed when he perceived a person lying motionless by the side of the track, in such a position that if he had made no incautions movement he would have escaped injury. In this case the child was not lying motionless, and it was for the jury to say whether it was apparent that she might change her position at any moment, so as to bring her into danger. There is also to be considered the fact that the speed of a horse-car may be more easily controlled than that of a locomotive. The judgment should be reversed, and a new trial ordered; costs to abide event. All concur.

WALSH v. BOWERY SAV. BANK.¹

(Common Pleas of New York City and County, General Term. December 2, 1889.)

1. GIFTS—PLEADING AND PROOF—AMENDMENT.

Proof of a gift *causa mortis* is admissible under a complaint alleging a gift *inter vivos*, and the amendment of the complaint to conform to proof of a gift *causa mortis* does not prejudice defendant.

2. SAME—DONATIO CAUSA MORTIS—EVIDENCE.

A good gift *causa mortis* is shown where it is proved that money on deposit in bank was given to plaintiff, and that the bank-book to enable her to get the money was actually delivered to her by the donor, who at the time was in expectation of impending death, and who did die a day or two afterwards.²

3. SAME—RIGHT OF DONEE TO SUE.

Where there is a gift *causa mortis* of money on deposit in a bank and a delivery to the donee of the bank book, and the bank pays the money to the donor's administrator after receiving notice of the donee's claim, the donee is not compelled to look to the administrator, but may recover from the bank.

Appeal from city court, general term.

¹ Affirming ante, 97.

² Concerning what constitutes a valid gift *causa mortis* see *Van Fleet v. McCarn*, 2 N. Y. Supp. 675, and note; *Fearing v. Jones*, (Mass.) 20 N. E. Rep. 199; *Drew v. Hagerty*, (Me.) 17 Atl. Rep. 63, and note; *Sanborn v. Sanborn*, (N. H.) 18 Atl. Rep. 233.

Action by Mary Walsh against the Bowery Savings Bank, to recover money deposited with defendant by one Mary Duffy, (since deceased,) and given by her before her death to plaintiff. The complaint was as follows: "The plaintiff, by W. H. Regan, her attorney, complaining of the above-named defendant, alleges: (1) On information and belief, that at all times hereinafter named the defendant was and is now a corporation, duly organized and existing under and by virtue of the laws of the state of New York, and having its principal place of business in the city of New York. (2) On information and belief, that on or about the 20th day of September, 1882, at the city of New York, Mary Duffy (now deceased) deposited with defendant, in her own name and for her own account, the sum of one hundred and eleven dollars, which was of her separate estate, she being a married woman, and received from said defendant thereupon its bank or pass book numbered 546,069, said defendant agreeing thereupon to pay on demand said sum, and such interest as its profits would allow; that no part of said sum or interest has ever been paid by said defendant, except the sum of five dollars. (3) That on or about the 9th day of February, 1883, said Mary Duffy gave and transferred said sum, and the interest due thereon, and all her right and interest therein, to this plaintiff, accompanying said gift and transfer by the delivery to this plaintiff of the said pass-book. (4) That on or about the 15th day of February, 1883, the plaintiff duly demanded said sum of the defendant, but said defendant then and has ever since refused, and still refuses, to pay said sum, or any part thereof, and the whole thereof is now due, with interest from February 15, 1883. Wherefore plaintiff demands judgment against the defendant for the sum of one hundred and six dollars, and interest thereon from February 15, 1883, besides the costs and disbursements of this action." On motion of plaintiff, the complaint was amended to conform to proof of a gift *causa mortis*. There was judgment for plaintiff. Defendant appeals. For motion to amend complaint, see *ante*, 97.

Argued before LARREMORE, C. J., and DALY and VAN HOESEN, JJ.

Norwood & Coggeshall, for appellant. William H. Regan, for respondent.

VAN HOESEN, J. Under the complaint, as it was originally drawn, it was proper to admit proof that the plaintiff acquired title by a *donatio causa mortis*. An amendment was not at all necessary, though the counsel for the defendant succeeded in frightening the plaintiff's attorney into making a motion for leave to amend. Such leave was granted, but the defendant was not thereby prejudiced.

A good *donatio causa mortis* was proved. The money on deposit was given the plaintiff, and the bank-book was actually delivered to her by the donor to enable her to get the money. The donor was in expectation of impending death, and she died in a day or two afterwards of the disease whose fatal issue she anticipated. A good *donatio causa mortis* may be made by the delivery of the donor's bank-book to the donee, where the circumstances exist that must surround a gift of that description. 8 Amer. & Eng. Cyclop. Law, 1345, 1346 *et seq.*

As to the validity of the gift in this case there cannot be a doubt; but a question is made as to the right of the plaintiff to recover the money from the bank. The money was actually drawn from the bank by the administrator of the donor, and, as the gift was valid, the plaintiff might recover judgment against the administrator in an action for money had and received to her use. Whether such a judgment would be of any value in this case, we have no means of knowing. In Massachusetts, it was decided in the case of *Pierce v. Bank*, 129 Mass. 425, that, even without the consent of the administrator, the donee might maintain an action for the money in the administrator's name. Such an action could not be maintained in this case, because the administrator has already collected the money from the bank. The difficulty in

which the bank now finds itself is entirely of its own creation; for, after having been notified that the plaintiff claimed the money as hers by gift, it nevertheless, either carelessly or willfully, disregarded the notice, and paid the money to the administrator. The payment to the administrator, after notice of the plaintiff's rights, leaves the bank in no position to call on the plaintiff to look to the administrator for the money. By thus paying the administrator the bank stepped into his shoes, and cannot defeat the plaintiff's claim unless the administrator could successfully resist it. The case was rightly decided, and judgment should be affirmed, with costs.

ILSLAY *et al.* v. SMEDES.

(City Court of New York, General Term. October 31, 1889.)

NEGOTIABLE INSTRUMENTS—BONA FIDE HOLDERS—COLLATERAL SECURITY.

The *bona fide* holder for value of a negotiable note, without notice and before maturity, is not bound to inquire whether there is collateral security accompanying it, where it contains no reference to security; and, in a suit by the holder to collect it, evidence of collateral deposited with plaintiff's assignor to secure its payment is inadmissible.

Appeal from trial term.

Action by William C. Ilsay, Chester P. Doubleday, and Edwin S. Doubleday, constituting the firm of Ilsay, Doubleday & Co., against Thomas S. Smedes, on a promissory note payable to B. F. Watkins and assigned to plaintiffs. The defense was conversion of collateral security, the evidence of which was excluded by the court, and a verdict directed for plaintiffs, and from judgment entered thereon defendant appeals.

Argued before MCADAM, C. J., and HOLME, J.

Andrews & Purdy, for appellant. *Reynolds & Harrison*, for respondents.

PER CURIAM. The plaintiffs became *bona fide* holders of the note in suit for value, and without notice, before maturity. This is the legal presumption, and it was not negated. The note is in the ordinary form, makes no reference to collateral, and the plaintiffs were not bound to inquire or ascertain whether there was collateral accompanying it or not. The note is not printed, but there is nothing in the case to show that it differs in any way from an ordinary promise to pay. The defendant offered nothing which changed the burden of proof, or in any way altered the legal presumption. The record offered in evidence was ruled out; it was between different parties, and was apparently inadmissible. The record is not before the court, is not printed in the case, and we are unable to determine that any error was committed. The colloquy between the court and counsel, after the verdict was directed, does not make the direction erroneous. It follows, therefore, that the judgment appealed from must be affirmed, with costs.

In re APPROVAL OF MEDICAL CERTIFICATES OF INSANITY.

(City Court of New York, General Term. December 12, 1889.)

INSANITY—APPROVAL OF MEDICAL CERTIFICATES—CONSTRUCTION OF STATUTE.

Acts N. Y. 1874, c. 446, provides that no person can be confined as a patient in an asylum for the insane except upon the certificate of two duly-qualified physicians, setting forth the insanity of such person; and the confinement cannot exceed five days, unless within that time the certificate shall be approved by a judge of a court of record of the county in which the lunatic resides. *Held*, that the physicians may unite in one certificate, or each may make one, which need not be sworn to on the same day, or before the same judge, it being a compliance with the statute if the certificates are approved of within five days.

Case submitted upon agreed statement.

Certain institutions for the insane having refused medical certificates on the ground that they were approved on different days and by different judges, the question of their validity has been submitted to the court.

Argued before McADAM, C. J., and NEHRBAS, EHRLICH, MCGOWN, and HOLME, JJ.

PER CURIAM. Under Act of 1874, c. 446, no person can be confined as a patient in an asylum for the insane except upon the certificate of two duly-qualified physicians, setting forth the insanity of such person. The confinement cannot exceed five days, unless within that time the certificate shall be approved by a judge of a court of record of the county in which the alleged lunatic resides. The certificate of the physicians is not a commitment, nor does the approval of the judge make it a commitment. The certificate, in the first instance, is a mere justification for receiving the patient, and the approval, authority for detaining him over five days. No term of confinement is mentioned in the statute or certificate, and it is the duty of those in charge to see that the patient is discharged whenever his condition warrants a discharge. The patient is confined, not for crime, but for the safety of himself and the public, and as soon as it is ascertained that the cause of restraint is removed he should be discharged. A sane person cannot be deprived of his liberty under this statute. The physicians are not judicial officers, but act as medical experts, and are liable for failure to use the care and skill which their profession *per se* implies they will bring to their professional work. *Ayers v. Russell*, 3 N. Y. Supp. 338. The judge approving the certificate acts judicially. *Id.* The two physicians may unite in one certificate, or may make two. Where they differ in their diagnosis of the case, but agree that the patient is of unsound mind, two certificates are necessary, for each must contain the reasons which lead to the result arrived at. Where there are two certificates, they need not be sworn to on the same day, or before the same judge. The law does not regard the *personnel* of the judge, but his authority, nor does it require the certificate to be sworn to at the same time. The statute is satisfied if the "certificate" is approved of within five days, and in the use of this term the plural is included within the singular. In this view of the law, the certificates already approved are valid, and answer all the requirements of the law. All concur.

LONGUEMARE v. NICHOLS *et al.*

(City Court of New York, General Term. November 25, 1889.)

ARREST IN CIVIL CASES—SUPERSEDEAS—WHO IS A DEFENDANT.

Where a plaintiff is defeated, and defendant seeks to pursue him on a judgment for costs, plaintiff becomes a defendant, within Code Civil Proc. N. Y. § 572, providing that a defendant shall have a writ of *supersedeas* in certain cases of debt.

Question of construction submitted to the general term, in view of the *diction* reported *ante*, 157, in reference to the non-applicability of section 572 of the Code to defeated plaintiffs.

Argued before McADAM, C. J., and NEHRBAS, J.

Geo. Bell, for plaintiff. H. S. Snow, for defendants.

McADAM, C. J. For the purpose of bringing an action in a court of law, the party prosecuting is, for convenience of reference, styled "plaintiff," and the party defending "defendant." The terms are convertible, however, and changeable, whenever the exigencies of the case require. A few examples will suffice. Thus the party against whom a writ of error is taken is styled "defendant in error," although the plaintiff below. Gen. St. Mass. c. 146, § 138, providing that, if an execution has not been satisfied, the court, "upon petition of the defendant," may order a stay, if the petitioner gives the re-

quired security for the prosecution of the review, refers to the party against whom the judgment sought to be reversed is rendered, not to the defendant in the original action. *Leavitt v. Lyons*, 118 Mass. 470. The word "plaintiff," in the second and eighth sections of the act to prevent usury, extends to the party in interest as plaintiff, although not named as plaintiff on the record. *Stevens v. White*, 5 Hill, 548. Statutes regulating procedure, and referring in terms only to "plaintiff" or to "defendant," are to have a free construction, to answer all the purposes and requirements of the acts. *Lumber Co. v. Holtzclaw*, 39 Fed. Rep. 579. In all the reported cases, these terms have been used interchangeably, whenever that course was required in furtherance of justice, and to advance the object of some remedial statute. It is not extending or enlarging the statute, or changing its words, but giving to the act the construction the legislature intended it should receive. The design of the law-makers was to compel judgment creditors (whoever they might be) to perfect their judgments and pursue their remedies thereon against the debtor within certain specified periods, or, in default thereof, to enable the debtor to obtain a speedy discharge from imprisonment. It is a remedial statute, in the interest of personal liberty, and must be liberally interpreted to advance the remedy and make it efficient. As the case is clearly within the mischief the statute was designed to suppress, it is, by construction, within the remedy furnished to crush the evil. It is the duty of courts to make such construction of an act as shall suppress the mischief and advance the remedy, putting down all subtle evasions for continuance of the mischief, and adding force and life to the remedy *pro bono publico*. *Potter's Dwar. St.* 184. Where a plaintiff is defeated, and the defendant seeks to pursue him on a judgment for a counter-claim or costs, the plaintiff, who is forced to protect himself against the process and proceedings of his pursuer, becomes, for the purpose of his defense, a "defendant," although the formal title of the action first given to it remains unchanged. The original positions of the parties have, by operation of law, been reversed, though the title of the proceeding (a mere form) continues as before. The defendant is now the prosecutor; the plaintiff is on the defensive, seeking protection only against the aggressive attacks of his adversary. When the position of parties is thus substantially changed, the provisions of the statutes in regard to the exemption of property from seizure and the person from arrest apply to the judgment debtor against whom pursuit is made, whether originally plaintiff or defendant. This is not antiphrastic interpretation, but the use of words in the sense in which the law-makers intended them to be used, whenever a defeated party becomes for the purposes of the relief afforded a "defendant," as the plaintiff here has, within the purview of these remedial provisions which were designed to relieve impecunious debtors from judicial restraint on certain specified contingencies. The act was not intended to discriminate against plaintiffs. It was designed as a beneficent statute, to relieve all unfortunate debtors, without regard to individuals, or any class of individuals. Under our construction of the term "defendant," as used in section 572 of the Code, in regard to *supersedeas*, it is applicable to all unfortunates, whether defeated plaintiffs or imprisoned defendants. Both come within the purpose, spirit, and intent of the act, and are entitled to the same relief, when laboring under the same conditions. The motion to discharge the plaintiff, under section 572, must therefore be heard upon the merits by the justice at special term to whom the matter is remanded, freed from the technical objection here disposed of.

FREELAND v. BACON *et al.**(City Court of New York, General Term. December 2, 1889.)***CONTRACT—SUPPLEMENTARY AGREEMENT—CONSIDERATION.**

Where plaintiff was employed by defendants, at a salary of \$1,200 a year, to teach a class of a certain number of students, and defendants afterwards increased the size of the class, agreeing to give plaintiff additional pay, plaintiff is entitled to recover such additional pay, the extra work being sufficient consideration for the agreement to pay it.

Appeal from trial term.

Action by William Freeland against Richard S. Bacon and others. Judgment was entered on a verdict for plaintiff. Defendants appeal.

Argued before MCADAM, C. J., and NEHRBAS and HOLME, JJ.

William H. Gibson and *J. O. Clark*, for appellants. *T. D. Kenneson*, for respondent.

PER CURIAM. It is no doubt the rule that all services rendered under a contract are deemed to have been included in it. The question is how far the rule can be applied to this case. The plaintiff claims that he was employed to teach a class of 30 boys at \$1,200 per year; that the defendant, against the plaintiff's objection, added 12 boys to the class, thereby increasing his labor. This circumstance, standing alone, would not raise an implication that the defendants were to pay the plaintiff anything above the contract price for his services; but the plaintiff went further, and testified that after he objected to the extra labor the defendants agreed to add \$200 to his year's salary for the additional services required, the additional compensation to commence with the first month of that year's term of service. This contract for extra pay was founded on a sufficient consideration, and is binding on the defendants. True, the defendants denied that they made any such contract, but the jury found that they did; and their finding on this subject is sufficiently sustained by the evidence. The parties agreed that, if the plaintiff was entitled to recover anything, the amount found by the verdict was not excessive; so that the question of excessive damages need not be considered. We find no error, and the judgment must be affirmed, with costs. All concur.

NEGLEY v. SHORT, (two cases.)

*(City Court of New York, General Term. December 2, 1889.)***APPEAL—WHEN LIES—OPENING DEFAULT ON TERMS.**

Where there is an order opening a default, and permitting defendant to come in on terms, and defend on the merits, defendant cannot appeal from the order after having complied with the terms.

Appeal from special term.

Two actions by James S. Negley against John C. Short. There was judgment against defendant by default, and an order was entered opening default upon terms. From this order, defendant appeals.

Argued before NEHRBAS and HOLME, JJ.

James Parker, for appellant. *Morris Cooper*, for respondent.

PER CURIAM. By the order appealed from, the defendant was permitted to come in and defend on the merits, upon the following terms: (1) Upon payment, within three days after service of the order, of the costs and disbursements included in the judgment, and upon the service of his answer at the same time; (2) the judgment and all proceedings founded thereon to stand as security; (3) the actions to go on the day calendar, November 11th, and to be tried when reached. The appellant concedes that he has paid the costs and served his answer in compliance with the order. That ends this appeal.

By submitting to the terms of the order, the appellant waived his appeal. See *Grunberg v. Blumenlahl*, 66 How. Pr. 62. The case of *Hayes v. Nourse*, 107 N. Y. 577, 14 N. E. Rep. 508, has no application. A judgment recovered must be paid, either voluntarily or by execution. In such a case a voluntary payment does not affect the appeal from the judgment. But here there was no compulsion upon the part of the appellant to pay. It was a favor granted him, with which he could comply, or decline to do so. Having availed himself of the favor extended, he cannot be heard upon appeal in opposition thereto. Besides, the discretion exercised was not abused. It is an elementary rule that an agreement of accord executory, to be performed at a future day, with a complete tender of performance, is no bar to an action, unless performance is accepted. 8 Bl. Comm. 15. In this case the notes given upon the supposed accord were never accepted, inasmuch as the former notes were not surrendered, nor any other act done showing an acceptance, and plaintiff was at no time deprived of his right to continue his actions. The appeal will therefore be dismissed, with \$10 costs and disbursements.

VANDENBURGH *et al.* v. MAYOR, ETC., OF THE CITY OF NEW YORK *et al.*
(*Superior Court of New York City, General Term. November 22, 1889.*)

1. JUDGMENT—AMENDMENT—FORECLOSURE OF MORTGAGE.

Where, in a suit to foreclose a mortgage on the franchise of an under-ground railway company, a judgment is entered which assumes to adjudicate that the mortgagor has performed all the conditions required by the statute granting the franchise, and has acquired the right to appropriate portions of the streets of a city, which has been made a defendant, whereas the complaint makes no claim as to the extent of the rights under the franchise, and prays no judgment that may affect in any manner the right of the city to claim that the franchise has been lost, it is proper, upon motion of such defendant, to amend the judgment by striking from it every adjudication in excess of the relief specifically asked for in the complaint; everything beyond that being outside of the jurisdiction of the court in such an action, under Code Proc. N. Y. § 275, which provides that "the relief granted to the plaintiff, if there be no answer, cannot exceed that which he shall have demanded in his complaint; but in any other case the court may grant him any relief consistent with the case made by the complaint and embraced within the issue."

2. SAME—LAPSE OF TIME.

Such a motion to amend is not too late, though made 18 years after the judgment was entered, where it was never served on the law officer of the city, though other officers of the city may have had notice of it, and though his attention may have been called to it in other proceedings.

Appeal from special term.

This was an action by Origen Vandenburg against the New York City Central Under-Ground Railway Company, the New York Under-Ground Railway Company, the mayor, aldermen, and commonalty of the city of New York, and others. There was a judgment for the plaintiff. Subsequently the court granted a motion to amend the judgment made by the last-named defendant, and the other parties appeal. Section 275 of the old Code of Procedure provides: "The relief granted to the plaintiff, if there be no answer, cannot exceed that which he shall have demanded in his complaint; but in any other case the court may grant him any relief consistent with the case made by the complaint and embraced within the issue."

Argued before SEDGWICK, C. J., and FREEDMAN and INGRAHAM, JJ.

George Hoadly, Edward Winslow Paige, and Henry D. Sedgwick, for appellants. *Wm. H. Clark*, counsel to the corporation, *Thomas P. Wickes* and *David J. Dean*, for respondents.

INGRAHAM, J. This action was commenced in the year 1875, for the foreclosure of a mortgage made by the New York Central Under-Ground Railway Company to secure the payment to the plaintiff of a sum exceeding \$90,-

000, and interest. The mortgagor and certain other parties, having or claiming liens upon the property, with the mayor, aldermen, etc., of the city of New York, were made parties defendant. The complaint alleges the making and execution of the mortgage, with allegations as to the liens of the other defendants, and the description of the property described in the mortgage. The only allegation affecting the respondents is as follows: "The mayor, aldermen, and commonalty of the city of New York are made defendants in this action, because the plaintiff was informed they might have a claim or interest in the property covered and conveyed in the two mortgages mentioned, and in the relief demanded in this complaint. No claim or demand is made against the said mayor, aldermen, and commonalty of the city of New York." The relief demanded is that the plaintiff have judgment against said company for the amount claimed to be due to him; that it be adjudged that the mortgage be foreclosed; that said company, and all claiming under it, be foreclosed of the right to perform certain agreements set up in the complaint; that the mortgaged franchises and property be sold, and the proceeds of such sale be applied to satisfy the indebtedness due to this plaintiff; that a certain other mortgage, described in the complaint, be canceled and discharged of record; that the company be restrained from issuing bonds under such mortgage, and from incumbering its property; and that the court grant such other and further relief as may be equitable and just in the premises.

The respondents appeared in the action, and demanded service of a copy of the complaint, which was duly served upon the counsel for the corporation, but they interposed no answer to the complaint. Subsequently an application was made for judgment, and notice thereof was served upon the counsel to the corporation. In pursuance of this notice, and, so far as appears, in the absence of the counsel to the corporation, an order was entered whereby it was ordered and adjudged that the plaintiff have judgment for the relief demanded in the complaint, and that it be referred to a referee to take proof of the allegation in the complaint, to ascertain the amount due to the plaintiff, and report the facts found by him to the court; and that said referee also take evidence and report upon certain matters referred to in an affidavit of the plaintiff annexed to the notice of the application; and on the referee's report, dated the 11th of January, 1876, without further notice to the respondents, judgment was entered directing a sale of the mortgaged premises by a referee. In March, 1889, the respondents applied to the court to strike from said judgment each and every other declaration, adjudication, or decree contained therein which is in excess of the prayer for relief specifically asked for by the complaint, and this is an appeal from an order of the special term granting such motion.

This judgment certainly contains extraordinary provisions. In an action brought to foreclose a mortgage upon a franchise it assumes to adjudicate that the mortgagor had performed all the conditions required by the statute granting the franchise; had commenced the construction of its railway; and owned the right to appropriate a large portion of the streets and parks of the city of New York, which the judgment proceeds to particularly describe, without paying any compensation therefor; and that the purchaser under the sale therein authorized should hold the said mortgaged premises, with the right of occupancy, seizure, and possession, with and for the specific uses, rights, and powers as in the order and report of the referee recited and declared; and this judgment was rendered on the default of the defendants. There was no intimation in the complaint that any attempt would be made to obtain an adjudication as to the extent of these rights and franchises, or as to their existence at the time of the commencement of the action, or that any judgment should be asked for affecting in any manner the rights of the city of New York to claim that such rights and franchises had been lost

or forfeited, and no such provision in the judgment was necessary to vest in the purchaser at the sale all rights that the railroad company (the mortgagor) had, either at the time of the execution of the mortgage or at the commencement of the action. So far as the city was concerned, the only relief that could be given by the judgment was the relief asked for in the complaint. Code Proc. § 275.¹ For it is a general principle, necessary to the administration of justice, that the complaint must advise the defendant clearly of what is claimed. It is not alone the case as made, but also the judgment asked for, that controls. *Swart v. Boughton*, 35 Hun, 284; *Kelly v. Downing*, 42 N. Y. 78.

Appellant insists, however, that the adjudication of a fact is no part of the relief which the court grants; that the relief is "the executive action to be taken by the court in accordance with the justice of the cause, as required by the facts found. It had no reference whatever to the effect of the judgment by way of estoppel." As to the facts which must exist to entitle plaintiff to the relief granted, it is clear that granting the relief is an adjudication that such facts exist. Thus, in an action upon a promissory note, a judgment for the plaintiff for the amount is an adjudication that there was a valid note, a consideration given, and that the whole amount was due, and the relief granted would be a judgment that plaintiff recover of defendant the amount. So, in this action to grant the relief that was asked for, it was necessary to find as a fact that the mortgage was made by defendant, and that there was a certain sum due thereon, and as to those facts the estoppel of the judgment applied. But it was not necessary, to entitle plaintiff to such relief, to find that the defendant railroad company had built a part of the road, or that in another action, to which this defendant was not a party, it had been adjudged that the railroad company had located its road and commenced its construction and owned the property. The existence of those facts not being alleged in the complaint, and not being necessary to entitle the plaintiff to the relief for which he had asked, an adjudication as to the existence of those facts had no relation to the foreclosure of the mortgage, the relief demanded in the complaint; and if the court in the judgment made such an adjudication by decreeing that such facts did exist, such an adjudication was only effectual to create an estoppel, and was of itself relief in addition to that demanded in the complaint. The plaintiff was therefore entitled to a judgment appropriating the interest of the mortgagor to the payment of the amount secured by his mortgage, and any interest the city had in the property, subsequent to the mortgage, was cut off by the judgment. The city had no answer to a demand for such a judgment, and could not have interposed a defense to the action; but any attempt of the court to adjudicate that such rights did exist was, so far as it affected this defendant, without jurisdiction in this action. It is settled that in an action for the foreclosure of a mortgage the rights of parties who claim in priority or in hostility to the mortgagor cannot be litigated, and that a judgment of foreclosure granted by default only affects the interests of those subsequent to the mortgage; that the decree does not affect rights paramount to those of the mortgagor and the mortgagee. *Bank v. Thomson*, 55 N. Y. 7; *Rathbone v. Hooney*, 58 N. Y. 463; *Bank v. Goldman*, 75 N. Y. 127. Nor is there the slightest doubt as to the power of the court to set aside or modify the judgment at any time. As was said by the court of appeals in *Hatch v. Bank*, 78 N. Y. 490: "These * * * cases show the power of the court over its own judgment, and its habit to exercise it in aid of justice, and it is an inherent power, and not limited in matters of substance by the sections of the Code." Nor do I think the application was made too late. The defendant is a municipal corporation, and, so far as appears, the judgment was never served upon the law officer of the corpora-

¹ Code Civil Proc. § 1207, contains the corresponding provision.

tion; and the fact that other officers of the corporation had notice of the judgment, or that in any other proceedings the attention of the law officers of the corporation was called to this judgment, did not, under the circumstances, make it improper for the court, in the exercise of its discretion, to amend the judgment. Nor do the rights of third parties require that this application should have been denied. One of the purchasers at the sale by the referee was the plaintiff in the action. He must be chargeable with knowledge of the irregular form of the judgment, and a purchaser from him can acquire no greater rights than he had. The voluminous briefs submitted by the appellants have been considered, but we are satisfied that it would be a gross injustice to the city and to the public to have allowed this judgment, as originally entered, to stand, and the court below was right in the exercise of its discretion vested in it in granting the application. Order appealed from should be affirmed, with costs. All concur.

CARTER *et al.* v. NEW YORK EL. R. Co. *et al.*

(*Superior Court of New York City, General Term. November 23, 1889.*)

EVIDENCE—EXPERT TESTIMONY—GROUNDS OF OPINION.

In an action for damages to abutting property, caused by operating an elevated railroad, and to enjoin its further use, where expert testimony of the value of the property is given, the opinions of adjoining property owners, not experts, are admissible to show the value of the expert testimony.

Appeal from special term.

Action by Oliver S. Carter and Henry E. Hawley against the New York Elevated Railroad Company and the Manhattan Railway Company, to recover damages to abutting property by the operation of defendant's railway, and to restrain its further use. Judgment for plaintiffs, and defendants appeal.

Argued before SEDGWICK and FREEDMAN, JJ.

Edward C. James and Davies & Rapallo, for appellants. *Thomas T. Shearman, William V. Rowe*, and *Evarts, Southmayd & Choate*, for respondents.

SEDGWICK, J. The judgment for the injunction in this case should be affirmed, under the decisions that have been made in like cases. If it be assumed that testimony on this issue was improperly admitted, enough other testimony appeared that, as matter of law, supported the injunction under these decisions. The court below proceeded to ascertain the terms upon the performance of which by the defendants the injunction might be dissolved, and made rulings as to the evidence on this point, which the appellant now argues were erroneous. These rulings concerned opinions of the owners of adjoining property of the value of such property, they not being "experts," as it is called, in estimating the values of real property. But the opinions of experts had been given in evidence, and it was important to ascertain the value as testimony of these opinions. The court was at liberty to examine the grounds of such opinion. These grounds were not matters of fact, legally proved, and were in part, at least, the values that the adjoining owners placed upon their property; for the market value would be the resultant of the opposition between buyers and sellers. The rulings were not erroneous. But, if they were, they did not affect the absolute right to an injunction that the defendants stay their invasion of plaintiffs' property. The ascertainment of the condition was not due to any equity the defendants had as against the plaintiffs, or because, equitably, the plaintiffs' right to a permanent injunction was a modified one, and not absolute. Substantially the condition was gratuitously made as to the defendants, and was allowed for the sake of third parties. The whole judgment should not be set aside, because the judge below ascertained what values owners on the street attached to their own property or that belonging to others. In my opinion, the judgment should be affirmed, with costs.

PAPPENHEIM v. METROPOLITAN EL. RY. CO. *et al.*

(Superior Court of New York City, General Term. November 22, 1889.)

APPEAL—REVIEW—INCONSISTENT FINDINGS.

Where an appeal is taken on exceptions to the conclusions of law, and there is a separate and distinct finding of fact, unqualified in form, in irreconcilable conflict with the conclusions of law and the judgment, the judgment cannot stand, though from the other findings, which fully sustain the conclusions of law and the judgment, it appears that the finding was made by inadvertence.

Appeal from equity term.

Action by Lena Pappenheim against the Metropolitan Elevated Railway Company and the Manhattan Railway Company. Judgment for plaintiff, and defendants appeal.

Argued before FREEDMAN, TRUAX, and INGRAHAM, JJ.

Davies & Rapallo, (*Brainard Tolles*, of counsel,) for appellants. *Sackett & Bennett*, (*Charles Gibson Bennett*, of counsel,) for respondent.

FREEDMAN, J. This is an appeal from a judgment rendered at an equity term of this court, after a trial of the issues. The plaintiff sued as the owner of certain easements appurtenant to certain premises situate on Second avenue, in the city of New York, which were alleged to have been taken, or at least seriously impaired, by reason of the construction, maintenance, and operation of the elevated railway of the defendants in front of plaintiff's premises. The judgment awarded damages to the plaintiff for the injuries inflicted in the past, and also gave an injunction to prevent the continued maintenance and operation of the railway, unless a certain compensation was made. The whole theory of the action is that the construction, maintenance, and operation of the elevated railway constitute an excessive and inconsistent street use, and that by reason of such construction, maintenance, and operation Second avenue had not been kept open in like manner as the other public streets and avenues in the city of New York are, and of right ought to be. But the learned trial judge, after finding that Second avenue, past and in front of plaintiff's premises, had been laid out and opened as a public avenue under the act of 1813, further found as matter of fact that the said avenue from thenceforth, viz., its opening, continuously has been and now is appropriated and kept open for a public avenue, highway, and thoroughfare in the city of New York, in like manner as the other public streets and avenues in the said city are, and of right ought to be. This finding is in irreconcilable conflict with the conclusions of law of the learned trial judge, and with the judgment herein. From the fact that there are other findings which fully sustain the conclusions of law and the judgment, the fair inference is that the finding referred to was made by inadvertence. It was made on the application of the plaintiff, and probably was not intended to be an unqualified finding. But in form it is unqualified, and it was made as a separate and distinct finding. This being so, and the court of appeals having repeatedly held that whenever two findings of fact are inconsistent the appellant is entitled, in support of his exceptions to the conclusions of law, to have that taken as true which is the more favorable to himself, (*Bonnell v. Griswold*, 89 N. Y. 122; *Schwinger v. Raymond*, 83 N. Y. 192; *Conselyea v. Blanchard*, 103 N. Y. 231, 8 N. E. Rep. 490; *Redfield v. Redfield*, 110 N. Y. 671, 18 N. E. Rep. 373; *Green v. Roworth*, 113 N. Y. 462, 21 N. E. Rep. 165,) a new trial must be ordered.

Another serious question is presented by the fact that the plaintiff acquired title to the premises to which the easements are claimed to be appurtenant three or four years after the construction and the commencement of the operation of the elevated railway, and that she failed to connect herself with the street-opening proceeding in which the easements originated, or with the title of some one who, as owner of the premises, had a right to the easements prior

to the construction of the elevated railway. The defect, if it be any, may be obviated on a new trial,—which, as already shown, must be had,—and consequently it is not deemed necessary to decide the question now, nor to express any opinion on the remaining questions which have been argued. Judgment reversed, and new trial ordered, with costs to appellants, to abide the event. All concur.

SWIFT et al. v. MAYER et al.

(*Superior Court of New York City, General Term. November 22, 1889.*)

DEPOSITION—AFFIDAVIT OF MATERIALITY—VACATION OF ORDER.

Code Civil Proc. N. Y. § 872, subd. 4, and rule 83 of the general rules of practice of New York, provide that when the deposition of a party before trial is required, under Code Civil Proc. § 870 *et seq.*, the affidavit to be presented to the judge who grants the order for the taking of the deposition must show that the examination is material and necessary. *Held* that, where the action is to set aside as fraudulent a deed made in 1882, such examination is not shown to be material and necessary by an affidavit that the persons sought to be examined are the only ones having knowledge of the whereabouts of defendant's property at the time of making such affidavit, in 1889; and the order granting the examination will be vacated.

Appeal from special term.

This was an action by James T. Swift and others against Ferdinand Mayer and others. The defendants moved to vacate an order for the taking of their depositions before trial, which motion the court granted, delivering the following opinion, and plaintiffs appeal:

"DUGRO, J. The order which the defendants move to vacate is for a deposition to be taken as prescribed in article 1, tit. 3, c. 9, Code Civil Proc. [§§ 870–886.] It is not an order directing persons to appear and be examined under oath concerning matters pertaining to a discovery. The papers upon which the order was granted, and the order itself, show this. The plaintiffs are therefore wrong in contending that the papers upon which the order was granted need not conform to rule 83. The affidavit upon which the order was granted specifies no facts and circumstances which show that the examination desired is material and necessary; for, though it be conceded that the persons sought to be examined 'have especial knowledge as to the whereabouts and condition of any property belonging to the defendants Ferdinand Mayer and Benjamin Mayer, and they and the said Benjamin Mayer have substantially the only knowledge of the subject,' I cannot see how evidence as to the whereabouts and condition of any property belonging to the defendants Ferdinand and Benjamin Mayer will be material and necessary to the plaintiff in the trial of this action. The affidavit is made in May, 1889, and so refers to property then existing, while the action is brought to have a conveyance made in 1882 declared to have been made in fraud, etc., of creditors. Although the facts and circumstances need be but slight to warrant an examination in a case such as this, these presented by the affidavit do not suffice. The papers raise a suspicion that the order is desired merely for inquisitorial purposes. The motion to vacate the order is therefore granted, with \$10 costs."

Gen. Rule Prac. 83, is as follows: "When an examination is required under sections 870, 871, 872, of the Code of Civil Procedure, the affidavit shall specify the facts and circumstances which show, in conformity with subdivision 4 of section 872, that the examination of the person is material and necessary."

Argued before SEDGWICK, C. J., and TRUAX and INGRAHAM, JJ.

Stickney & Shepard, for appellants. *Donohue, Newcombe & Cardoso*, for respondents.

PER CURIAM. The order appealed from is affirmed, on the opinion of the court below.

DEGENER v. UNDERWOOD et al.*(Superior Court of New York City, General Term. November 22, 1889.)***1. REFERENCE—WHEN ORDERED—LONG ACCOUNTS.**

An order of reference is proper where it appears that the trial of the issues will require the examination of a long account, that it will not require the decision of any difficult questions of law, and that an "account" between the parties, in the proper acceptance of the term, is directly involved.

2. SAME—AMENDMENT OF ANSWER.

The statement by defendants that they intend to amend their answer is no ground for refusing an order of reference.

3. SAME—COUNTER-CLAIM.

The amendment of the answer and incorporation of a counter-claim is no ground for vacating an order of reference.

Appeal from special term.

Action by Frederick L. Degener against John T. Underwood and others. An order of reference was entered, and an order denying defendants' motion to vacate the same. Defendants appeal.

Argued before FREEDMAN and INGRAHAM, JJ.

James A. Hudson, for appellants. *J. E. Ludden*, for respondent.

PER CURIAM. The moving papers upon which the order of reference was granted, and which included the pleadings, satisfactorily established that the trial of the issues would require the examination of a long account, containing 714 items, on the part of the plaintiff; that it would not require the decision of any difficult questions of law; and that an "account" between the parties, in the proper acceptance of the term, was directly involved.

It was no answer to the motion to say that the defendants intended to amend their answer. *Enos v. Thomas*, 4 How. Pr. 290. The foundation of the practice in the courts rests upon acts, and not upon mere intentions. The case, as it appeared upon the moving papers, was clearly referable, and consequently no error was committed in granting the order of reference. The amended answer, which was subsequently served, in no way lessened the necessity of a reference. The incorporation of a counter-claim rather increased the necessity. On the motion to vacate the order of reference, on the ground that the issues had been changed by an amendment to the answer, the burden of proof was on the defendants to establish that the answer, as amended, rendered a reference unnecessary. This they wholly failed to establish. The case presents only questions of practice, and not of jurisdiction, and upon all the facts we cannot say that the several judges who made the orders appealed from abused the discretion vested in them. The orders appealed from should be severally affirmed, with costs and disbursements.

TREMAINE v. MORTIMER et al.*(Superior Court of New York City, General Term. December 5, 1889.)***1. ASSIGNMENT FOR BENEFIT OF CREDITORS—ASSIGNEE—PRIOR INCUMBRANCES.**

The purchaser under execution of property assigned for the benefit of creditors, has no right to contest prior incumbrances on the property, as the assignment remains in force, notwithstanding the sale of the assignor's interest in the property, and such right is in the assignee.

2. EXECUTION—PROPERTY SUBJECT TO LEVY—CHATTELS REPLEVIED.

Where a chattel has been replevied it may not be levied on, while in the possession of the sheriff, by virtue of an execution against defendant in replevin.

Appeal from trial term.

Action by William B. Tremaine against William Y. Mortimer and others. Plaintiff appeals from an order vacating and setting aside the verdict of a jury in favor of the plaintiff, and directing judgment dismissing the complaint.

Argued before FREEDMAN and TRUAX, JJ.

Herbert T. Ketcham, for appellant. *John W. Pitsson*, for appellees.

TRUAX, J. One Sewall made two mortgages on November 2, 1885, upon certain personal property then belonging to him, and then in his possession. One of these mortgages was made to one Chase, and the other was made to the defendants herein. Both were filed in the register's office on the same day. The Chase mortgage was refiled April 8, 1887, but the mortgage to the defendants has never been refiled. Sewall having made default, Chase took possession of the property mentioned in the mortgage, under his mortgage, on December 12, 1887, and on the following day said Sewall made a valid general assignment for the benefit of his creditors. Thereafter certain judgments were obtained against said Sewall, executions were issued on the said judgments to the sheriff of the city and county of New York, and on January 9, 1889, the sheriff sold to the plaintiff, by virtue of said executions, all the right, title, and interest of the said Sewall in and to the said property. The plaintiff claims the right to the property by virtue of said sale to him as aforesaid, and has brought his action against the defendants to recover damages for the conversion by the defendants of the said property, while the defendants claim under the Chase mortgage as well as under the mortgage to them. We think that the case of *Smith v. Payne*, 3 N. Y. Supp. 826, is decisive of this case. It was held by this court in that case that, while an assignment for the benefit of creditors remains in force, the right to assail prior incumbrances is in the assignee, and is not in the judgment creditor. It is true that the sheriff sold all Sewall's right, title, and interest in and to the property of the plaintiff; but at the time of this sale Sewall had no right, title, or interest in or to the property, because he had parted with it by virtue of his general assignment; and as that assignment remains in force, the assignee, and not the creditors of Sewall, would be entitled to the property.

The defendants also claim the right to hold the property by reason of certain proceedings taken by them under the mortgage to them. It was shown on the trial that, before any levy had been made under the executions that were issued on the judgments against Sewall, the defendants brought an action of replevin against Chase, Sewall, and Sewall's assignee. Such proceedings were had in this action that the property mentioned in the complaint was delivered by the sheriff to the defendants. While the property was in the possession of the sheriff, under the warrant of replevin, a levy under the executions, which had been issued upon the judgments above referred to, was made. The plaintiff claims under the sale that was made by virtue of this levy. The case cannot be distinguished in any material respect from the case of *Bank v. Dunn*, 97 N. Y. 149, in which it was held that, where a chattel has been replevied, it may not, while in the possession of the sheriff, be levied upon by virtue of an execution against the defendant in the replevin action. Of course, if the property cannot be levied upon, no valid sale can be made under such a pretended levy, and the plaintiff did not acquire a valid title by his alleged purchase under such sale. The judgment and order are affirmed, with costs.

GILMAN v. TUCKER *et al.*

(Superior Court of New York City, General Term. December 5, 1889.)

1. JUDGMENT BY DEFAULT—UNAUTHORIZED APPEARANCE BY ATTORNEY—RELIEF.

Relief from a judgment entered as on a default to answer, on the ground of an unauthorized appearance by an attorney, can only be had by an application to the court which rendered the judgment to set it aside.

2. SAME.

The defendant in such judgment, to entitle herself to relief, must show that she has a defense on the merits.

TRUAX, J., dissenting.

Appeal from judgment on report of referee.

Action by Cornelia Gilman against Preble Tucker and Augustus Prentice, to set aside a judgment. Plaintiff appeals from a judgment dismissing her complaint.

Argued before SEDGWICK, C. J., and FREEDMAN and TRUAX, JJ.

Charles P. Crosby, for appellant. *Kelly, Tucker & Henderson*, for respondents.

SEDGWICK, C. J. The case of *Denton v. Noyes*, 6 Johns. 296, has been approved by the highest court in this state,—in particular, by *Brown v. Nichols*, 42 N. Y. 26. Against such an approval, the dissenting opinion in the latter case cited *Robson v. Eaton*, 1 Term R. 62. This last case was an instance of a forged warrant of attorney, and *Ferguson v. Crawford*, 70 N. Y. 253, held that in such a case, no process having been served, the judgment was void. In the present case, following *Denton v. Noyes*, the judgment was not void, and was regular when entered, and the appropriate relief for the unauthorized appearance is by an application to the court by which judgment was given; and the relief given by the court in its discretion, when the attorney appearing is insolvent, would be to allow the defendant to come in and plead. My opinion is that in this action the plaintiff could not be relieved of the judgment, as it was in the power alone of the court giving judgment to set aside the judgment. But, if this proposition is not correct, the relief that should be given in the action should be no greater than could be obtained in the court that gave the judgment; that is, the defendant in the judgment, to entitle herself to relief, should show that she has a defense on the merits. In my opinion, there should be an affirmance of the judgment appealed from, with costs.

FREEDMAN, J., (*concurring*.) I am of the opinion that the judgment should be affirmed, with costs, for the reasons assigned by the learned chief justice, and the further reason that the complaint in this action, on its face, shows no equitable cause of action.

TRUAX, J., (*dissenting*.) The plaintiff was the owner of certain premises in the city of New York. On the 7th day of August, 1884, a judgment was entered in the office of the clerk of the city and county of New York, in an action in the supreme court of the state of New York, wherein one of the defendants herein, Augustus Prentice, was plaintiff, and the above-named Cornelia Gilman and one Andrew E. Smyth were defendants, for the sum of \$1,800.78. The plaintiff herein alleges that neither the summons nor complaint in said action was ever served upon her; that she never authorized any attorney to appear for her in said action, and never authorized any person or persons to employ or authorize any attorney to appear on her behalf; that she never had any knowledge of any proceedings in said action, or that any attorney had claimed to appear for her, until on or about the 28th day of June, 1886; that an attorney, without her knowledge and consent, did appear in said action; that judgment was entered therein as on a default to answer; that execution was issued on this judgment in favor of the said Prentice; and that on the 10th day of March, 1885, the premises hereinbefore mentioned were sold under said execution, and at such sale Prentice became the purchaser. The plaintiff further alleges that on the 1st day of March, 1886, one Mary A. P. Tucker obtained a judgment against her for the sum of upwards of \$10,000; that the above-named defendant Preble Tucker took an assignment of the said judgment, and redeemed the premises hereinbefore mentioned from said Prentice, and paid said Prentice the amount of the first-mentioned judgment, and received a deed of said premises from the sheriff; that thereafter said Preble Tucker instituted summary proceedings in the district court for the sixth ju-

dicial district of New York; and that thereupon the plaintiff brought this action to restrain the enforcement of such summary proceedings, and to set aside the said first-mentioned judgment, and all the proceedings thereunder. This action was referred, and on the trial the complaint was dismissed by the referee.

I think that the referee erred in dismissing the complaint on the grounds stated by him, namely, that the plaintiff had a "perfect remedy by motion in the original action to set aside the judgment in that action." It may be that the plaintiff could have moved in the action in which the judgment was obtained to set aside the judgment, but she also has the right to bring an action to set aside the judgment. That a remedy at law exists is not a valid objection to an action in equity, if the equitable remedy is concurrent with the remedy at law. *Crary v. Smith*, 2 N. Y. 60. Equitable actions of the nature of this are not unknown to the courts of this state. In *McIntyre v. Sanford*, 9 Daly, 21, (affirmed in 89 N. Y. 634,) it was held that an action would lie to set aside a sheriff's sale of real estate under an execution; and it was so held although the plaintiff in that action had his remedy by motion in the action in which judgment had been obtained against him.

The principal, and, in my opinion, the only important, question in this case is, can the plaintiff in this action show that the appearance by the attorney in the other action was unauthorized and void? The printed book shows that the plaintiff herein never was served with the summons in the action in the supreme court; never authorized any attorney to appear for her in that action; had no knowledge that the action had been begun; and knew nothing of the judgment that was obtained therein, nor of the sale under execution, until possession of her real estate was demanded,—and this was after the time to redeem had expired; and that the attorney who so appeared for her is not now a resident of this state. It was held by this court in *Bolton v. Jacks*, 29 N. Y. Super. Ct. 166, that want of jurisdiction renders void the judgment of any court, whether of superior or inferior, general or limited, or local jurisdiction, and the recital of jurisdictional facts in the record of such judgment is not conclusive, (unless made so by statute,) but only *prima facie* evidence of the existence or occurrence of such facts; and the party against whom the record of such judgment is offered in evidence is not estopped by such recitals from showing affirmatively, by proof *dehors* the record, that they are untrue, and thus avoiding the judgment. This case was cited with approval by Judge RAPALLO in *Ferguson v. Crawford*, 70 N. Y. 266, 267. Judge RAPALLO, after referring to many cases on this subject in this state and in other states, says that "it thus appears that the current of judicial opinion in this state is very strong and uniform in favor of the proposition stated by JONES, J., in [*Bolton v. Jacks*,] 6 Rob. (N. Y.) 198. * * * It has not as yet, however, been directly adjudicated; and, if sustained, it must rest upon the local law of this state, as it finds no support in adjudications elsewhere. There are reasons, however, founded upon our system of practice, which would warrant us in so holding. The powers of a court of equity being vested in our courts of law, and equitable defenses being allowable, there is no reason why to an action upon a judgment the defendant should not be permitted to set up, by way of defense, any matter which would be ground of relief in equity against the judgment; and it is conceded, in those states where the record is held conclusive, that when the judgment has been obtained by fraud, or without bringing the defendant into court, and the want of jurisdiction does not appear upon the face of the record, relief may be obtained in equity. The technical difficulty arising from the conclusiveness of the record is thus obviated." In *Howard v. Smith*, 33 N. Y. Super. Ct. 124, this court held that, "whenever it appears by the record of a judgment of a sister state that the defendant appeared by attorney, it is *prima facie* evidence of the fact; but in such a case the defendant may rebut this presumption by proof that the at-

torney named in the record was not his attorney in fact, and never had any authority to appear for him in the action." In other words, notwithstanding the recital of the record, he may disprove the authority of the attorney to appear. And the court of appeals in *Ferguson v. Crawford* said, in effect, that there is no distinction in this respect between domestic and foreign judgments; and for this reason this case of *Howard v. Smith* is an authority for reversing this judgment. There is no distinction between a forged notice of appearance and a notice really given by an attorney not authorized to give it; and jurisdiction is not acquired in either case. *Burton v. Sherman*, 20 Wkly. Dig. 419. On the trial of the action the court may and will determine on what terms relief will be granted to the plaintiff. The judgment should be reversed, and new trial ordered, with costs to the appellant to abide the event.

KIP v. CITY OF BUFFALO.

(*Superior Court of Buffalo, General Term. November 19, 1889.*)

1. MUNICIPAL CORPORATIONS—CIVIL SERVICE.

Laws N. Y. 1884, c. 410, authorizing the mayor of each city to prescribe civil service rules, and to employ suitable persons to make inquiries and examinations, and prescribe their duties, gives the mayor power to designate a secretary for the civil service commission appointed by him under the act, and to fix his salary.

2. SAME—FEES.

The charter of the city of Buffalo, tit. 5, § 1 *et seq.*, provides that the comptroller shall, on or before the 1st day of April in each year, furnish to the council a financial statement for the current year, together with an estimate of the current expenses of each department. Heads of departments are also required to furnish estimates of the amounts required by their respective departments for the current year. The council may amend such estimates, and are required to pass upon them not later than May 1st. The expenditures of each department are required to be kept within the estimates made for it; each office or purpose being debited with the whole sum appropriated, and credited with the salaries and other fixed sums to be paid therefrom, and "the other expenditures" are not to exceed the remainder of the estimate. Contracts for amounts exceeding such remainder shall not bind the city as to the excess. The mayor fixed the salary of the secretary of the civil service commission at \$600 per annum, payable monthly, but the council only appropriated \$50 for the expenses of the commission for the whole year. After paying all fixed expenses of the mayor's department, a balance remained to its credit of less than the amount of salary due the secretary. *Held*, that the latter could recover the \$50 appropriated for the expenses of the commission, and the unexpended balance to the credit of the mayor's fund, but no more.

On demurrer to complaint.

Action by William F. Kip against the city of Buffalo, for his salary as secretary of the civil service commission of said city, for the period of six months.

Argued before BECKWITH, C. J., and HATCH and TITUS, JJ.

Ansley Wilcox, for plaintiff. *Frank C. Laughlin* and *William F. Worthington*, for defendant.

BECKWITH, C. J. This is an issue of law, raised by a demurrer to the complaint. The demurrer is upon the ground that it appears upon the face of the complaint that it does not state facts sufficient to constitute a cause of action. The plaintiff, by the allegations of his complaint, seeks to recover a judgment against the defendant for his salary as secretary of the civil service commissioners appointed by the mayor for the city of Buffalo. The contention on the part of the defendant is that the mayor had not power to bind the city for the payment of the plaintiff's salary. The charter, (title 5, § 9) provides that a contract by which a liability shall be attempted to be created against the city in excess of the annual appropriation for any department shall not be binding on the city for the amount contracted to be paid which is in excess of the appropriation. Section 8 of chapter 410 of the Laws of 1884, which is not an amendment of the charter, but a general law, directs

the mayor to "employ suitable persons" to conduct the inquiries and make the examinations prescribed as to the fitness of persons applying to enter the civil service of the city. It must be presumed that the legislature intended the statute to have effect, and it is considered that a power given by statute carries with it every incident absolutely necessary to give it operation. 1 Kent, Comm. 464. Such construction ought to be put upon a statute as does not suffer it to be eluded. THOMPSON, C. J., in *People v. Insurance Co.*, 15 Johns. 381. When, therefore, we find the statutes, called the "Civil Service Acts," directing the mayor to employ suitable persons, we conclude that they impliedly authorize him to agree upon a reasonable compensation for their services. The civil service acts are general statutes, operative on all the large cities of the state. Their mandate is directed to the mayor, in his official capacity, as the executive and agent of the city. As chief executive of the city, the mayor, in employing the suitable persons mentioned in the statute, enters into the contract on behalf of the city, and promises that the city will pay. Such power must therefore be deemed to be exercised with reference to the capacities of the municipal corporation, and the modes prescribed by the legislature for the exercise of its powers. The power to contract for compensation was, consequently, limited by the provisions of the city charter respecting the raising of moneys for the public expenditures, and the disbursement of the same. We think, therefore, that, within the limitations of the charter as to the expenditures of the public moneys, the mayor had power to contract with the plaintiff for a compensation for his services.

The employment of the plaintiff as secretary of the civil service commission was treated by the mayor as belonging to his department of the city government. In the spring of 1887, according to the directions of the charter, when the time came to make up the estimates of the amount of money to be raised by taxation in order to carry on the city government, he sent to the comptroller an estimate of the sum required in order to secure the execution in this city of the civil service acts. He put the sum at \$1,000. The comptroller included the same sum for that purpose in his estimate sent to the common council. The common council, on revising the estimates, reduced the sum for the civil service to \$50. An allowance was therefore made for the civil service. But the common council fixed the estimate for the mayor's department at \$6,825. It is alleged in the complaint that at the time the mayor employed the plaintiff there was a balance remaining of this fund, unexpended, of \$395.18, and at the end of the fiscal year a balance of \$201.38. The plaintiff was appointed secretary, at a salary of \$50 a month, on the 20th day of September, 1887. The balance in the fund for the mayor's department was at that date sufficient to meet the obligation incurred by the employment of the plaintiff until the end of the fiscal year,—the 31st day of December, 1887. The common council estimated the expense of executing the civil service acts at \$50; but I do not understand the charter to mean that an expenditure for a particular object shall not exceed the itemized sum set down therefor in the estimates of the comptroller, or of the common council. The item is the common council's estimate of the probable expense. It may be too much, or too little. The charter provides, in substance, that contracts, made in any department of the city government, for an amount in excess of the sum appropriated for the department, shall not be binding on the city, beyond the balance remaining to the credit of the department. The charter does not further annul contracts that are in excess, but provides that the excess may be recovered of the members of the common council. I understand the charter to mean that the city shall not be bound by any contract, though within the objects of the department, so far as the liability contracted is in excess of the appropriation. The plaintiff was not employed for any definite or stated period. He was simply appointed by the mayor to the position of secretary, at a salary of \$600 per annum, payable in equal monthly payments. The plaintiff and the

mayor were bound to take notice of the provisions of the charter when they were contracting about the salary to be paid by the city; to take notice that the fund in the mayor's department could not be exceeded, and that a contract for services to be performed beyond the expiration of the fiscal year could not be legally made. The contract, by its terms, did not necessarily extend the employment beyond the fiscal year, and was therefore not void for that reason. But for the period of the employment, from the 20th of September to the end of the fiscal year, the balance remaining in the fund appropriated for the mayor's department being sufficient, we think the contract was valid.

Mr. Wilcox, in his argument, urged the court to put its decision on the broad ground that the civil service acts empowered the mayor to contract for their execution, and that such a contract, entered into by him, created a liability upon which judgment could be recovered against the city, independent of the question whether any fund had been provided for the purpose of paying and defraying the salaries and expenses attending the execution of those laws. We agree in the opinion, though not involved in the decision of the issue of law raised by this demurrer, that the mayor cannot bind the city in that manner. If the civil service acts impose a new burden of expense on the city, it is the duty of the common council to provide for it by taxation, and their neglect to perform their duty in that respect will not give to any city officer power to bind the city by contract in any mode different from that provided in the charter. The civil service acts are not so repugnant to the provisions of the charter that the latter can be said to be superseded for the sake of the civil service.

The complaint showing power in the mayor to contract with plaintiff for his services as secretary to the civil service commission, and to pay him a fair compensation, and showing that the fund in the mayor's department, unexpended at the date of entering into the contract with the plaintiff, was sufficient for the payment of the compensation agreed upon until the end of the fiscal year, we think a cause of action was stated, and, accordingly, that the demurrer must be overruled.

TITUS, J., concurs.

HATCH, J., (*concurring*.) So far as important for the disposition of the questions presented by this demurrer, the complaint alleges: *First*. That the defendant is a municipal corporation, duly organized, and is possessed of a population of over 200,000; that plaintiff is a citizen, a resident, and an elector of said city. *Second*. That Philip Becker is the mayor of said city, duly elected and qualified. *Third*. That in the month of January, 1886, the said mayor, pursuant to an act of the legislature of the state of New York, entitled "An act to regulate and improve the civil service of the state of New York," being chapter 354 of the Laws of 1883, as amended by chapter 410, Laws 1884, prescribed certain regulations for the admission of persons into the civil service of said city; that such rules and regulations were submitted to the civil service commission of the state of New York, then organized and existing according to law, for their approval, and the same, with certain amendments, were thereafter approved. *Fourth*. That rule 3, as amended and promulgated, provides: "For the purpose of conducting the inquiries and making the examinations mentioned in section eight of the said law, as amended, the mayor shall appoint fifteen suitable persons, citizens of Buffalo, not less than three or more than five of whom shall be physicians, who shall constitute the civil service commission of Buffalo,—hereinafter, for brevity, also called 'The Commission,'—and each member of which shall be known as a civil service commissioner of Buffalo; and, for the same purpose, shall also, upon the recommendation of the commission, employ a suitable person, who

shall act and be known as the secretary of the commission. * * * The commissioners shall serve without pay, and the mayor shall fix the salary of the secretary of the commission." The duty of the commission is then prescribed, with respect to conducting the examination of candidates to ascertain their fitness, and it is further provided: "The secretary shall keep minutes of their proceedings, and all necessary records of applicants, their examinations and standings, and a complete record of all persons employed in the several departments to which these rules apply, and of all appointments, promotions, dismissals, resignations, and changes of any sort therein; and shall render all such service, in connection with the conduct of the inquiries and examinations above mentioned, as may be required of him by the commission." *Fifth.* That at a regular meeting of the commission the plaintiff was by it recommended to the mayor for appointment as secretary; that thereupon, on the 20th day of September, 1887, said mayor employed, and in writing, under his hand and the seal of said city, appointed, the plaintiff as such secretary, and fixed his salary at the sum of \$600 per annum, payable in equal monthly payments. *Sixth.* That on the same day plaintiff duly accepted such appointment, duly qualified, and entered upon the discharge of his duties. *Seventh.* That plaintiff continued in such employ, performing its duties, from September 20, 1887, to March 20, 1888, when he resigned. *Eighth.* Alleges the due presentation of his claim for salary under the said appointment to the common council of defendant, for audit, more than 40 days prior to the commencement of this action; that the same was not audited or paid, and now remains wholly unpaid. *Ninth.* That there is now due and unpaid the sum of \$300, with interest; for which sum judgment is demanded.

The first question raised relates to the validity of rule 3, and the claim is made that, so far as it purports to confer authority upon the mayor to employ a secretary for said commission, it is unauthorized and void, by section 8 of the act creating the commission and authorizing the rule. Laws 1884, c. 410. So far as important here, it provides: "The mayor of each city in this state is authorized, and is hereby directed, to prescribe such regulations for the admission of persons into the civil service of such city as may best promote the efficiency thereof, and ascertain the fitness of candidates in respect to character, knowledge, and ability for the branch of the service into which they seek to enter; and for this purpose he shall from time to time employ suitable persons to conduct such inquiries and make examinations, and shall prescribe their duties." The contention is that the act only confers authority to employ examiners, and does not embrace secretaries for the examiners. We think this construction narrower than the statute contemplates. It proceeds upon the theory that only such persons as are technically called "examiners," who conduct the examinations, are meant; but, when the act is scrutinized, it is seen that its purpose is to provide for the examination and classification of a large number of persons, comprising a very large proportion of the civil list of the city. In order to accomplish such purpose effectually and intelligently, it is quite essential that records be kept, not alone of the minutes of the examination, but of the records and standing of the applicants, the persons employed in the several departments to which the act applies, together with such changes therein as from time to time occur, to the end that the labors of the commission may be effectivley rendered, with the object always in view of improving the service contemplated by the act. These duties are quite as necessary to be performed as the examination of the candidate. They are essential in determining the conclusion reached; and, with a large number of examinations, no conclusion could be intelligently arrived at without the *data* thus preserved. The language of the statute is, "employ suitable persons to conduct such inquiries and make examinations." It is not limited to examiners alone, but embraces persons suitable to conduct such inquiries. The proper conduct of the inquiries and examinations make

it quite as necessary that records should be kept, as heretofore suggested, as that examinations should be made. The only test of the right to employ is suitability and necessity; not what the person so employed shall be called. We therefore think that the duties required of the commission also required the employment of a person to perform the duties of secretary, and that authority to employ such person is fairly embraced within the spirit, and is conferred by the terms, of the act. *Bird v. Mayor*, 33 Hun, 396, is not in conflict with this conclusion; for there the act conferred authority to appoint two commissioners of accounts, with specified and well-defined duties incumbent upon them to perform. There was no provision authorizing the employment of clerks, or other persons, to aid them; and the act itself, as well as its spirit, required the intelligence, experience, and judgment of the persons appointed. It was consequently held that, as there was no authority to employ clerks, so there was no authority to create a fund for their payment. In this case the work required not alone examinations, but such record of it as made the whole complete,—one as necessary in the conduct of the inquiry as the other. For such work, the act confers authority to employ a suitable person. The act authorizing the employment of a secretary, he became, by implication of law, entitled to reasonable compensation. *People v. Common Council*, 16 Abb. N. C. 110, 111, (affirmed at general term, fifth department, 38 Hun, 637.)

The right to employ being vested in the mayor, he had, undoubtedly, the authority to contract for reasonable compensation for the service to be rendered; but, while possessing this authority to contract, as it created a liability against the city, he could only contract with reference to the law governing the officers of the city, when creating liabilities and imposing burdens to be met and discharged by taxation. This act does not furnish or attempt to provide a new scheme by which the city may be charged with burdens independent of existing requirements of law, nor does it furnish any other or different method than such as is provided in other cases where contract liabilities are required to be imposed. Nor do we find any repeal of the law furnishing the method by which liabilities are created against the city, either in express terms, by implication, or repugnancy. We are therefore remitted to the statute which provides the requirements necessary to be observed in order to charge the city with liability. This is found in title 5 of defendant's charter, section 1 of which provides that the fiscal year shall begin upon the 1st day of January. Section 2 requires the comptroller, on or before the 1st day of April in each year, to furnish the common council with a detailed statement of the city's financial condition. And by section 4 he is required to further furnish, at said time, an estimate of the amount necessary to be raised by general tax, for the purpose of meeting all the expenses and liabilities of the city for the fiscal year; specifying in detail, and under separate and appropriate heads, the amount estimated for each department or office, or other purpose. Section 3 provides that the heads of the different departments shall, on or before the 1st day of March, deliver to the comptroller a detailed estimate of the expenses and amount of money required for their respective departments and offices for the fiscal year. Section 5 provides that the estimates furnished by the comptroller shall be entered at large upon the journal. Section 6 imposes a duty upon the common council, after the expiration of one week, to proceed and consider the same; and, by a vote of two-thirds of all the members elected, may alter or amend the same; and shall, on or before the 1st day of May, finally pass upon them. Section 7 provides that the sum total of the adopted estimate shall be raised by general tax. Section 9: "The expenditures for each department, office, or other purpose, during the fiscal year, shall be kept within the estimate made for it. For the purpose of this section, each department, office, or other purpose, shall be credited with the amount included in the estimate for it, and it shall be debited with the

salaries, and the certain and fixed sums to be paid out of it; and the other expenditures shall not exceed the balance remaining of the estimate. Contracts made in any form or manner, for an amount exceeding such balance, shall not be binding on the city, beyond such balance. * * * If the treasurer shall knowingly pay a warrant on the treasury, drawn in violation of this section, he shall not be credited with the amount paid upon such warrant." This is the only provision of law providing the method by which liabilities of the character here sought to be imposed are authorized. There are certain general and fundamental principles of law, which govern the creation of obligations against a municipal corporation, which must be observed. It is only bound by the acts of its officers and agents when it manifestly appears that they are acting within the scope of their authority; and, where officers of the municipality fail to pursue, or exceed, the requirements of a statutory enactment under which they act, the corporation is not bound. And persons dealing with an officer of the corporation are bound, at their peril, to take notice of the limitations of the power given by law; and, if a contract is entered into beyond its scope, it is void. Dill. Mun. Corp. §§ 445-463, inclusive; *Lyddy v. Long Island City*, 104 N. Y. 223, 10 N. E. Rep. 155.

With these rules in mind, the complaint is to be examined. Its substantial allegations in this regard are that the mayor did, on or before the 1st day of March, 1887, deliver to the comptroller a full and detailed estimate of the expenses and the amount of money required in his department for the fiscal year beginning January 1, 1887; that among such estimates was the sum of \$1,000 for salaries and expenses of executing the civil service law; that the comptroller, on or before April 1, same year, presented his estimate to the common council of the amount necessary to carry on the city government,—which estimate included that for the mayor's department, embracing the said estimate for salaries and expenses for executing the civil service law; that the said council, on or before May 1, 1887, having previously considered the same, finally passed upon the same,—the item for salaries and expenses for executing the civil service law being reduced from the sum of \$1,000 to \$50, and, as so changed; was confirmed; that the aggregate amount of the estimates, as proposed by the mayor to the comptroller, and by the latter to the council, amounted to the sum of \$7,275, and, as finally confirmed and adopted by the council, said sum was reduced to \$6,825; that, after crediting the mayor's department with said last-named sum, and debiting it with salaries and fixed sums charged thereon, and with all other expenses which had been incurred at the time the contract was entered into, there remained to the credit of said department the sum of \$395.18, and, of the whole sum appropriated, there remained at the end of the fiscal year a balance of \$201.38 to the credit of the department. By the terms of the appointment or contract, plaintiff was to receive \$600 per annum, payable in equal monthly payments. By the rules it was also provided that the mayor might at any time change the secretary, and appoint another person, upon notice to the commission, etc. This, I think, gave notice to the person employed that his term was limited to the pleasure of the mayor. The appointment cannot, therefore, be construed into a holding for any particular period of time. *Spring v. Clock Co.*, 24 Hun, 175; *Smith v. Railroad Co.*, 35 Hun, 204. I am therefore of opinion that, under the appointment and the service, it created a liability against defendant to the extent of the sum appropriated by the common council. I am also of opinion that the balance remaining to the credit of the mayor's department is also available for the purpose of payment upon this contract. The language of the charter, after providing for the fixed sums and charges, is: "And the other expenditures shall not exceed the balance remaining of the estimate. Contracts, made in any form or manner, for an amount exceeding such balance, shall not be binding on the city, beyond such balance." This expenditure is not a certain and fixed sum with which the estimate is debited, but falls within that denom-

inated "other expenditures," and the language used seems to leave such expenditures somewhat to the discretion of the head of the department, the limitation of expenditure being the amount of the aggregate appropriation. Unless this construction obtain, then the above-quoted language of the charter becomes meaningless. The complaint alleges the various items which go to make up the whole estimate, and they equal the aggregate sum appropriated. If, therefore, the construction be that no excess in any item can be expended for any other purpose of the department, it needed no language to limit the liability of the city to any balance which might remain; for the prohibition would be absolute against its expenditure, except for the specified purpose, and, consequently, it would be impossible to create any liability against the city, even though there was an excess in some one of the items. I think such is not the construction of the section, but that the legislature contemplated that there might be a contingency where an estimate made was insufficient to meet the requirements, and that an appropriation might be made in an item in excess of its requirements; that, therefore, a discretion was vested in the head of a department, in such contingency, to apply the excess to the purpose of the deficient item; and that the city was sufficiently protected by a limitation of such expenditure to the total appropriated. Otherwise, mandatory official duties might be rendered impossible of performance. The contingency has arisen in this case. The mayor, by express command contained in the act, is charged with the execution of the civil service law. The sum appropriated proves insufficient. Within the limits of a reasonable compensation for the service, and of the unexpended balance remaining to the credit of his department, he has the right to so apply it in the performance of his duty. The claim, therefore, that no expenditure can be made, beyond the item appropriated by the council for that purpose, cannot be upheld. The court is urged to invoke extraordinary powers, and hold this contract good beyond the balance remaining of the appropriation; and the argument is gravely advanced that it is the duty of the court to now direct the mayor to make necessary contracts for the enforcement of this statute, notwithstanding that no money is appropriated to meet their requirements, and by decision give them validity sufficient to establish the obligations thereby created as a debt against the city. It may be remarked that, if the court should adopt this recommendation, it would indeed be invoking its extraordinary powers,—so extraordinary, in fact, as to be properly characterized as usurpation. Peremptory mandates of a statute may not be thus overridden, nor can liability be imposed upon a municipality by any power of the court. In such proceeding as this, it can only decree liability to exist in a case where the law authorizes it. This statute stands upon the same footing as any other, to be enforced by the persons charged with its enforcement. The court must presume that those public officers charged with such duty will obey the law. If they do not, legal remedies exist, both civil and criminal, as is clearly pointed out by Judge DANIELS in *People v. Common Council*, 16 Abb. N. C. 112-115, to enforce this statute. But the law does not authorize or permit courts, or officers of a municipality, to violate fundamental principles of law, which find reason for existence in the general good of the public, and attempt to give force to a contract for the reason that the common council has violated, or that it is apprehended they will in the future violate, their duty with respect to it. Such course would simply sanction a wrong because another wrong has been or may be committed. It follows, from these views, that the demurrer should be overruled, with costs.

DE VAU v. PENNSYLVANIA & N. Y. CANAL & R. Co.*(Superior Court of Buffalo, General Term. November 19, 1889.)***MASTER AND SERVANT—NEGLIGENCE OF MASTER—DEFECTIVE MACHINERY—EVIDENCE.**

In an action for personal injuries, it appeared that while plaintiff was working along-side certain cars, which were being unloaded of earth and gravel by means of a "plow," the plow fell over the side of the car, and injured him. The plow had been used for five years, without any injury resulting therefrom, and plaintiff failed to show why the plow fell, but defendant's evidence tended to show that it was thrown off by a stone that had lodged between two of the cars, and it appeared that it had frequently fallen before from a similar cause. The plow was pulled by the locomotive, and the whistle was usually blown when it started, but on this occasion it was not. *Held*, that a verdict for plaintiff was warranted. *HATCH, J.*, dissenting.

Motion for new trial upon exceptions.

Argued before *BECKWITH, C. J.*, and *HATCH, J.*

Charles A. Pooley, for plaintiff. *Frank Brundage*, for defendant.

BECKWITH, C. J., was of opinion that the motion should be denied, but filed no opinion. Motion denied.

HATCH, J., (*dissenting*.) The allegations of the complaint show this to be an action for damages on account of personal injuries, alleged to have been sustained by reason of the negligence of the defendant. The *gravamen* of the charge is contained in the fourth count of the complaint, viz.: "That in the conduct of its business as such railroad corporation, and in the performance of the work in filling up its road-bed, as above set forth, it was the duty of the defendant to furnish good, suitable, and safe machinery, appliances, cars, plows, and locomotives, and to employ competent and fit men for the performance of the work required of them; that, notwithstanding this, defendant, at the time and place aforesaid, failed and neglected to furnish good, suitable, and safe machinery, appliances, cars, plows, and locomotives, and failed and neglected to employ competent and fit men for the performance of the work required of them, but, on the contrary, they furnished unsuitable and unsafe machinery, appliances, cars, plows, and locomotives, and employed incompetent and unfit men to handle the engine and cars and plows used as aforesaid,—all of which was known to the defendant, but unknown to this plaintiff." The complaint further alleges that by reason of the foregoing the said plow was thrown from one of the defendant's cars, and inflicted the injuries for which the recovery is sought. It is thus seen that the issue of negligence presented by the pleading has reference to but two propositions: *First*, the furnishing of unsuitable and imperfect machinery; and, *second*, the employment of incompetent and unfit men in and about the performance of the work. The latter ground may be at once dismissed from consideration, as there was no evidence given upon the trial tending to establish negligence in this regard. As to the former, the issue furnished by the complaint was adhered to upon the trial, formed the basis upon which the case was submitted to the jury, and is now insisted upon to uphold the verdict.

Upon the facts, I am of opinion that the position cannot be upheld. It appeared, substantially without dispute, that plaintiff, at the time of receiving the injury, was employed in and about a trestle which was being filled with dirt and gravel, hauled to said trestle upon gravel-cars, which were loaded with a steam-shovel, at Cheektowaga, a few miles away. When the cars were loaded men were present to remove from the material all large stones, for greater safety in unloading. The cars were then run to the trestle, and unloaded, with an iron machine called a "plow." This machine was about 24 feet long, and rested upon 4 wheels, 10 or 12 inches in diameter. A mould-board, jointed and flanged out upon one side from 3 to 3½ feet high, made of boiler iron, was bolted to the beam of the plow. This beam was about 12 inches wide and 8 inches thick, and ran its whole length. Iron braces ran

across, and it was bridged with boiler iron. The bottom was furnished with an iron shoe, bolted on, covered with a steel plate, and the axle of the wheels ran through the center of the beam. The plow ran along the surface of the cars. Its weight was from 2 to 3 tons, and there was piled upon it from 4 to 5 tons of railroad iron, the whole weighing from 7 to 8 tons. Upon one side of the gravel-car, extending its whole length, there was bolted a piece of timber about 8 inches square, called the "guard-rail." The manner of unloading was to uncouple 6 cars from the train; chain them fast to the track, the plow being upon the rear car; attach the plow, by means of a cable, hitched at its front end by a hook or clevis, to the engine; and thus draw it along over the car, one side running next to the guard-rail, and the other, upon which was the mould-board, crowding the dirt off the opposite side of the car. The plow had been thus used about 5 years, and was in working order both before and after the accident. Upon the occurrence of the accident, the plow had been started, and the dirt removed from one car, and was running onto the next, when it suddenly toppled over the guard-rail side of the car, and struck the plaintiff, inflicting the injuries complained of. The plaintiff lived near the trestle, and had seen defendant filling it for some time. He had worked for defendant 2 years, but had only seen the plow operated 5 or 6 times. Previous to the accident plaintiff testified that he was directed to go forward of the plow and shovel off the dirt from the rails between the cars, and was so engaged when injured. He did not know, nor did it appear by his whole proof, what caused the plow to leave the car, but it was shown that on some days the plow would fall off 5 or 6 times, and upon other occasions would not go off at all. Evidence was given tending to show that when any substance, like a stone or clog, got under the wheels, it would lift the plow up, when it would topple over, and either go wholly or partially off. On the occasion in question the evidence of defendant tended quite strongly to show that the cause of its being thrown over was a stone, which had become wedged between the bumpers of the car, projecting up from 5 to 7 inches, and that the plow was raised up by it, and thus thrown over. When it fell it was moving as fast as a man would ordinarily walk. In starting the plow the engineer usually blew the whistle, but omitted it upon the occasion of the injury. There was an utter failure of evidence to show that the plow used was not such a one as was ordinarily used for the result aimed at, or that there was any better or other known device for the purpose. On the contrary, it appeared that the machine had been in use for five years, and that no injury had resulted therefrom. It would sometimes be thrown off the car, if a substance, sufficiently solid, got under it, and raised it up, but the same thing is equally true of a steam-engine or cars, when running upon a track, if they come in contact with a sufficient obstruction to throw them therefrom; so that there is no reason for claiming the machine in use was inherently dangerous.

The law is satisfied when the master has furnished a machine which is reasonably safe and suitable for the purposes required. *Hickey v. Taaffe*, 105 N. Y. 26, 12 N. E. Rep. 286. He is not bound to furnish the best or most approved machine, or the safest, but is only bound to exercise reasonable care and prudence in the selection of one that is reasonably safe. *Probst v. Delamater*, 100 N. Y. 266, 8 N. E. Rep. 184. Here there is nothing to show but that the machine used was of the most approved character. When the master has furnished a machine of the character required, the servant in entering upon the employment assumes the risk incident to its use. *Sweeney v. Envelope Co.*, 101 N. Y. 520, 5 N. E. Rep. 358. Independent of these considerations, however, there is nothing shown tending to establish that the master has in any sense violated its duty with respect to the machine furnished, and my mind is irresistibly forced to the conclusion, upon the evidence, that this injury was the result of an accident which reasonable foresight and care could not guard against. This finds support in the fact that plaintiff and his wit-

nesses are unable to assign a cause for the plow leaving the car, while immediately following it the machine remains in good condition, and a stone is found in the direct path of the plow, bearing marks of contact with it, and at the point where the plow is thrown over. This, coupled with the uncontradicted fact that it had only toppled over before when raised by a foreign substance, leads to the conclusion that it was so caused in the present case. Under such circumstances, a master has never been held responsible. *Hussey v. Coger*, 112 N. Y. 614-621, 20 N. E. Rep. 556. Liability cannot be predicated upon the failure to sound the whistle when the plow was started. If we assume it to be negligence, it was clearly that of a co-employee, and, within the principle of the last case cited, would not render defendant liable. Upon the issue furnished by the pleadings and the theory of the trial, no question of providing rules for the conduct of employees in the performance of the work is in the case, and it may not be considered. I am therefore of opinion that the exceptions should be sustained, and a new trial ordered, with costs to abide the event.

In re GILMAN'S ESTATE.

(*Surrogate's Court, Kings County. October 7, 1889.*)

EXECUTORS AND ADMINISTRATORS—ACCOUNTING—EXAMINATION OF EXECUTOR.

A contestant, who has been duly cited, but has filed no objections to an executor's account, is not entitled to cross-examine the executor, in proceedings had on a reference to try the issues raised by objections to the executor's accounts.

Motion to confirm referee's report on the account of Aaron Healy, executor of Nathaniel Gilman, deceased.

Flamen B. Candler, for Aaron Healy, executor. *Charles T. Haviland*, for Charles B. Gilman. *Anna K. Gilman, pro se.* *Wellesley W. Gage, pro se.* *William H. Hamilton*, for Charles B. Caldwell and Jackson S. Schultz, assignees of Anna K. Gilman.

ABBOTT, S. Charlotte Elizabeth Gilman died on the 10th day of October, 1879, without issue, not having reached the age of 30 years. She was the last surviving child of the testator, Nathaniel Gilman, Jr. This was one of the events upon the happening of which, by the terms of the will of the testator, his property was to be distributed. On the 23d day of June, 1880, Aaron Healy, the executor and trustee under the will, filed his account. All the persons interested in the estate were duly cited. Objections to this account, and to previous accounts of the executor and trustee, were filed by Anna K. Gilman, a sister of the testator. No other persons filed any objections. The accounts, and the issues raised by the objections of Anna K. Gilman, were referred, November 30, 1885, to Cornelius Ferguson, Jr., to take testimony as to the said issues, and to hear and determine all claims, questions, and other matters relating to said accounts. On the 25th of October, 1887, the referee filed his report. Exceptions to said report were filed by Charles T. Haviland, on behalf of Charles B. Gilman, and by Anna K. Gilman, attorney in person. The questions before me arise on the exceptions aforesaid, and upon the confirmation of the referee's report. The voluminous objections of the contestant Anna K. Gilman have been passed upon clearly and cogently by the referee; and, after carefully examining all the accounts of the executor and trustee made in this estate, and the evidence taken in this proceeding, I am of the opinion that the evidence fully supports the findings of the referee, and that his report should in all respects be confirmed. The executor has managed the affairs of the estate with prudence and thrift, and all the legatees, some 15 in number, except these two contestants, have acquiesced in and are satisfied with said executor's accounts, and have given him releases and discharges in full settlement of their shares of said estate.

As to the contention, made in behalf of Charles B. Gilman, that the referee erred in refusing to allow him or his counsel to cross-examine the executor in the proceedings before the referee, he not having filed any objections to said executor's account, I am of the opinion that the ruling of the referee was correct. Charles B. Gilman was duly cited upon this accounting and so made a party to the proceeding. He never filed any objections to the account, and, so far as he is concerned, there is no issue between him and the accounting executor. "The filing of a duly-verified account by an executor entitles the accounting executor to a decree confirming its accuracy, in the absence of objections to the account." *Estate of Austin*, 3 Law Bull. 78. The referee in this proceeding was appointed to try the issues raised by the objections filed to the account. The only objections filed were those of Anna K. Gilman, and she was the only person entitled legally to examine the executor. The executor had an absolute right to a decree settling his accounts, so far as Charles B. Gilman is concerned. He should have filed objections, if he desired to take any part in the contest. I think sections 2730 and 2731 of the Code have practically the same meaning, and are to be construed in the same manner, as the sections of the Revised Statutes which they have replaced. Such being the case, *Boughton v. Flint*, 74 N. Y. 476, decides this contention.

The account was bitterly opposed in almost every detail by the contestant Anna K. Gilman, and her numerous counsel, for a period of nearly two years; and, in my opinion, everything which could by any possibility be brought out against the account was brought out by this contestant and her counsel. I think that the whole matter has been gone over fully and thoroughly before the referee. The proposed decree should be amended as desired by William H. Hamilton, Esq., in relation to the assignment of Anna K. Gilman to Charles B. Caldwell and Jackson S. Schultz, in conformity with the affidavits submitted by him, dated June 19, 1889. I will settle allowances and decree on three days' notice.

BELLINGER, Overseer of the Poor, v. BIRGE.

(Supreme Court, General Term, Fourth Department. November, 1889.)

1. INTOXICATING LIQUORS—ILLEGAL SALES—PENALTIES—RELEASES.

In an action for the penalty imposed by Laws N. Y. 1857, c. 628, § 13, (3 Rev. St. N. Y., 8th Ed., p. 2280,) for selling liquors without a license, brought by plaintiffs in the name of the overseer of the poor, under section 30, as amended by Laws N. Y. 1873, c. 820, (3 Rev. St. N. Y., 8th Ed., p. 2284,) which provides that in case of the failure of the overseer, whose duty it is prosecute such action, under section 23 of the act, (Rev. St. N. Y., 8th Ed., p. 2283,) to do so, any other person may prosecute it in the name of the overseers of the poor, a release executed by the overseer to defendant of all such causes of action against him is admissible in evidence, where it does not appear that such release was not based on a full and valuable consideration. MERWIN, J., dissenting.

2. TOWN OFFICERS—ACTIONS.

On the death of an overseer of the poor pending an action brought by him as such, his duly appointed and qualified successor has the same control over such action as he would have had, without being substituted as plaintiff.

Appeal from circuit court, Oneida county.

Action in the name of John W. Bellinger, overseer of the poor of the town of Kirkland, against J. Allen Birge, for penalty for selling intoxicating liquor without license. Laws N. Y. 1857, c. 628, § 13, provides a penalty of \$50 for sales of spirituous liquors in quantities less than five gallons, without a license. Section 22 provides that the action for such penalty shall be brought in the name of the overseers of the poor of the town in which it is incurred. Section 30 provides that on their failure to bring the action within 10 days after complaint to them, and reasonable proof of its truth, any other person may prosecute the action in the overseers' names. 3 Rev. St. N. Y. pp.

2230, 2233, 2234. From a judgment for plaintiff, and an order denying his motion for a new trial, defendant appeals.

Argued before HARDIN, P. J., and MARTIN and MERWIN, JJ.

McMahon & Curtin, for appellant. *J. E. McCabe*, for respondent.

MARTIN, J. This was an action to recover several penalties for selling strong or spirituous liquors in quantities less than five gallons at a time, without having a license therefor. The action was based on the provisions of section 13, c. 628, Laws 1857. It was brought in the name of John W. Bellinger, as overseer of the poor of the town of Kirkland, by A. G. Hopkins and I. O. Best, in pursuance of the provisions of section 30 of said act, as amended by chapter 820, Laws 1873. On the trial the defendant offered in evidence a release under the hand and seal of said Bellinger, dated October 12, 1888, whereby, for a valuable consideration, he, as such overseer, agreed and stipulated to discontinue and settle a certain action then pending in the county court of Oneida county, in which one Rollin Root, as overseer of the poor of said town, was named as plaintiff, and the defendant in this action was defendant, and also settled and released all causes of action or rights of action which the said town, or its overseer of the poor, as such, had, or claimed to have, against the defendant, for or on account of any and all alleged sales of liquor, wines, ales, or other strong and spirituous drinks, without a license. This evidence was objected to "as incompetent and immaterial, and that the overseer has no power." The objections were sustained, and the defendant duly excepted.

This exception presents at once the most important and difficult question involved on this appeal. The action in the county court was commenced in August, 1888, by Rollin Root, the then overseer of the poor of that town. He subsequently died. On September 15th of that year Bellinger was duly appointed as such overseer, to fill the vacancy caused by such death. When Bellinger assumed the duties of his office, he found that action pending. It was afterwards settled by him, and the release mentioned was given. That such settlement and release, if valid, was a defense to this action, is not denied. The contention of the persons prosecuting this action is that the plaintiff had no power or authority to control or settle that action, because he had not been substituted as plaintiff in the case, and that he had no power to settle the matters involved therein. The court so held. Upon the death of Root, and the appointment and qualification of Bellinger as such overseer, the latter succeeded to the rights, became invested with the powers, and burdened with the duties and responsibilities, which had been possessed by and imposed upon the former, as well as to the subject-matter of such suit as to the other matters pertaining to that office. We do not think the learned trial justice was correct in holding that Bellinger had no authority to act in, or control over, that action, without being substituted as a party. We are of the opinion that that action, and the subject-matter thereof, were subject to his direction and control; that he might, and that it was his duty to, perform every act that his predecessor could or should have performed in regard to it, if he had lived and continued in office. It might have been proper for Bellinger to have procured a substitution of himself as plaintiff, if he had deemed it best to continue that action, instead of settling it, but it does not seem that it was necessary. *Farnham v. Benedict*, 29 Hun, 44; *Manchester v. Herrington*, 10 N. Y. 164; *Board v. Garlinghouse*, 45 N. Y. 249.

This brings us to the question of the power of an overseer of the poor to settle such an action, and to discharge a person from the liability which he has incurred by reason of a violation of this statute. The respondent contends that such an action cannot be compounded without the consent of the court in which the action is pending. Several authorities are cited as sustaining that contention. We do not think they sustain the doctrine contended for. The cases cited were actions brought by private individuals in their own

names, where the public was interested in a portion of the recovery, and were based chiefly upon an English statute which expressly provided that in such an action the plaintiffs should not compound or agree with the offender without the order or consent of the court in which the action was pending. Substantially the same provision is made by section 1894 of the Code of Civil Procedure. Those cases are unlike the case at bar. In this case the action was brought by a public officer, under the provisions of a statute which makes it his duty to sue for and recover such penalties; and there is no statute or other authority to which our attention has been called that requires him to obtain the consent of the court before he can settle or discharge such a cause of action. Moreover, there is no evidence that this action was compounded; *non constat* but the defendant paid the full amount of such penalties and costs. By the statute under consideration, the right of action for such penalties is vested in the overseer in the first instance. It is the obvious intent of the statute that such actions and causes of action shall be under the control and management of that officer, unless he shall improperly omit to perform his duty as such, and he must be deemed to possess all the powers necessary to a proper and efficient discharge of his duties in that behalf. Such powers as are necessary, and not expressly given, are to be implied. While it may well be that a settlement of such an action by an overseer, when proved to have been collusive, fraudulent, or without consideration, might be set aside, and that such a settlement would constitute no defense to a subsequent action brought to recover the same penalties, still we think it should not be held that the settlement and release of such a cause of action, which is in all things proper and fair, is invalid. To uphold this judgment, we must hold that an overseer of the poor has no power to settle or release a cause of action for a violation of this statute, even if the full penalty given by the statute was paid by the defendant. In this case the fairness of the settlement is in no way impeached. Presumably it was based on a full and valuable consideration. If it was the duty of Bellinger, and he had power, to settle this cause of action only on the payment of the full amount of the penalty incurred, and costs, then the presumption is that he discharged that duty, and the burden of overcoming such presumption rested with the respondent. When the action is prosecuted by others in the name of the overseer, the overseer cannot control the action; but when prosecuted by himself, he may, doubtless, control it, and even discharge the judgment when obtained, if such discharge be not in fraud of the rights of the people of his town. *Record v. Messenger*, 8 Hun, 285. We have perhaps discussed the question in this case more fully than was necessary. The only question we intend to decide is that the court erred in refusing to admit the release offered in evidence by the defendant. That the rejection of that evidence was error, we hold. For this error the judgment and order should be reversed. Judgment and order reversed on the exceptions, and a new trial granted, with costs to abide the event.

HARDIN, P. J., concurred. For opinion, see 8 N. Y. Supp. 174.

MERWIN, J., (*dissenting*.) The case presented does not, I think, authorize the assumption that any claim was made by defendant that the penalties proved had been paid. There was no plea of payment. The case shows that the new overseer saw the attorney of the parties desiring to have the cases prosecuted, and declined to go on with the prosecution on the ground that he deemed the evidence insufficient. The defendant then proposed to show that after that the overseer "conferred with counsel about it, and settled and satisfied all the cases, and released everything up to that date,—October 12th." That was the date of the release offered. There was no suggestion that the penalties were paid. Had such a suggestion been made, very likely the trial would have taken another course. At least, another question would

have been presented. So that I think the question for us to determine is whether an overseer has any power to release before judgment without payment. The statute (section 22, c. 628 of 1857, as amended by chapter 109 of 1878,) provides that the penalties of the character here sued for "shall be sued for and recovered by and in the name of the overseers of the poor,—and paid over to the treasury of the county for the support of the poor." No power to compromise or compound was given, and none, I think, was intended. Such a power would in many cases destroy the efficiency of the statute. The overseer was not the owner of the cause of action. The trial court simply held that the paper did not release the cause of action then pending. I think this ruling was correct.

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SPELLMAN *et al.* v. FREEDMAN *et al.*¹

(Supreme Court, General Term, First Department. November 7, 1890.)

1. ASSIGNMENT FOR BENEFIT OF CREDITORS—CONFESSION OF JUDGMENT.

Judgments confessed in favor of certain creditors by a debtor, in contemplation of a general assignment, constitute preferences, within the prohibition of Laws N. Y. 1887, c. 503, relating to assignments for the benefit of creditors.

2. SAME—RIGHTS OF CREDITORS—REFUSAL OF ASSIGNEE TO SUE.

On the refusal of the assignee for benefit of creditors to sue to set aside as fraudulent judgments confessed by the assignor in contemplation of a general assignment, the general creditors may sue for that purpose.

Appeal from special term, New York county.

Action by Timothy M. Spellman and another against Moritz Freedman and another, to set aside judgment and execution in favor of the defendant creditors of defendant Soussman, as a fraud upon the rights of the other creditors under an assignment. From an interlocutory judgment overruling demurrers to the complaint, Freedman appeals. For decision on demurrer, see 6 N. Y. Supp. 570.

Argued before VAN BRUNT, P. J., and BRADY and DANIELS, JJ.

A. Blumenstiel, for appellant. *J. W. Boothby*, for respondents.

BRADY, J. This action is brought to set aside a judgment and execution entered and issued in favor of the above-named defendants, upon the ground that the judgment was a violation of chapter 503 of the Laws of 1887, in reference to assignments for the benefit of creditors. The plaintiffs are general creditors, having no judgments or liens of any kind. The plaintiffs on the 14th May, 1888, were, as already suggested, creditors of the defendants. On that day the defendant Soussman made an assignment of all her property to the defendant Philips, for the benefit of her creditors, including the plaintiffs. On the same day, immediately prior to the execution of the assignment, in which they were also preferred, and while it was in contemplation, she gave to the defendants E. S. Jaffray & Co., Sigismund, and Freedman Bros. judgments by confession, amounting together to the sum of \$6,996.95, which was greater than the one-third of the assets of the assignor. Executions were issued on these judgments to the sheriff, who made a levy under them on the entire stock and property of the defendant the assignor just before the delivery of the general assignment, and proceeded to advertise the stock so levied upon for sale. The plaintiffs claim that these judgments, and the proceedings taken to enforce them, were for the purpose of preferring the judgment creditors named in them out of the assignor's assets for more than one-third thereof, after the assignment had been determined upon, and for the purpose of preferring such persons out of her property in fraud of the assignment, and to prevent its assets from going into the hands of the assignee, and being distributed to the plaintiffs and other creditors pursuant to the

¹ Affirming 6 N. Y. Supp. 570.

statute. It is also alleged that the plaintiffs notified the defendant assignee of these facts, and requested him to bring an action as such to set aside the judgments, executions, and levies, and that he refused; and they asked, on behalf of themselves and other creditors, that the judgments, executions, and levies be set aside; that the property levied upon in the hands of the sheriff be directed to be paid over to the assignee, for distribution to the creditors of the defendant Soussman, including the plaintiffs, pursuant to the directions of the assignment.

It is objected that the plaintiffs, not being judgment creditors, have no lien upon the property seized, and cannot, therefore, maintain this action. It will be observed that the plaintiffs claim no special advantage for themselves, but that the property levied upon was to be secured for the assignee, and to be distributed under the terms of the assignment. It is not a creditors' bill seeking the application of property to the plaintiffs' debt exclusively, and the right to maintain such an action as this, the object of which is to secure the appropriation of the property according to the assignment to the creditors generally, has been declared in several cases. In the case of *Dewey v. Moyer*, 72 N. Y. 78, which was an action brought to set aside a fraudulent conveyance of a bankrupt made prior to his bankruptcy, the court said: "If the assignee should refuse or neglect to sue for and reclaim property fraudulently transferred, it is abundantly established that the creditors may commence an action to reach the property, making the assignee, the debtor, and his transferees parties defendant, and in such an action the property will be administered directly for the benefit of the creditors,"—citing a number of cases to sustain the proposition; and the same doctrine was reiterated in *Crouse v. Frothingham*, 97 N. Y. 113. In such an action as this the object is to secure for general distribution property fraudulently disposed of by the assignor, and place it in the hands of the assignee, that it may be distributed according to the general provisions of the assignment. Such a right, if it did not exist by adjudication, should be established and pronounced, not only as very reasonable, having all the attributes of a common-sense view, but as important to the administration of justice.

The plaintiffs having the right to establish their assertion that the judgments were fraudulently executed as in contravention of the Laws of 1887, as already suggested, the question is whether that proposition is maintained. Section 30, c. 503, Laws 1887, amending the act in relation to assignments, is as follows: "In all general assignments of the estates of debtors for the benefit of creditors, hereafter made, any preference created therein [other than for wages, etc.] shall not be valid, except to the amount of one-third in value of the assigned estate left after deducting such wages or salaries, and the costs and expenses of executing such trust; and should said one-third of the estate of the assignor or assignors be insufficient to pay in full the preferred claims to which, under the provisions of this section, the same are applicable, then said assets shall be applied to the payment of the same *pro rata*, to the amount of each of said preferred claims." It is to be observed that this provision has reference to preferences in general assignments, the language being: "In all general assignments of the estates of debtors for the benefit of creditors, hereafter made, any preference created therein," etc. Here the alleged violation of the statutes is not in anything in the assignment, but relates to confessions of judgment made prior to the execution and delivery of the assignment. A great many cases have been cited by the respective counsel in reference to the provisions in different states relative to general assignments, and great industry has been displayed in the collation of them bearing upon the subject. But the proposition advanced on behalf of the appellant seems to be established, namely, that while in many states of the Union there are provisions prohibiting preferences in general assignments, nevertheless it has been held that confessions of judgment and other securities given prior to their execution, and in

contemplation thereof, are not violations of the provisions of the statutes. For example, in *Re Gallagher's Appeal*, 7 Atl. Rep. 237, the assignment was executed on the morning of the 17th of March, 1885. On the day prior, and probably in anticipation thereof, the assignor confessed two judgments in favor of two firms, aggregating about \$40,000; and the court held, although by the laws of Pennsylvania the debtor had no right to prefer any creditor in the deed of assignment, this did not preclude him from preferring a creditor prior to its execution, while he still retained dominion of his property, and the decision of the case rests upon that doctrine. See, also, *Banking Co. v. Fuller*, 1 Atl. Rep. 731; *Gallagher's Appeal*, 114 Pa. St. 353, 7 Atl. Rep. 237; *Gage v. Parry*, 69 Iowa, 605, 29 N. W. Rep. 822; *Gilbert v. McCorkle*, 11 N. E. Rep. 296; *Blakey's Appeal*, 7 Pa. St. 449; *Hutchinson v. McClure*, 20 Pa. St. 63; *Wilson v. Berg*, 88 Pa. St. 167; *Garretson v. Brown*, 26 N. J. Law, 425; *Bates v. Coe*, 10 Conn. 280; *Perry v. Holden*, 22 Pick. 269; *Fairbanks v. Haynes*, 23 Pick. 323; *Lampson v. Arnold*, 19 Iowa, 479; *Van Patten v. Burr*, 52 Iowa, 518, 3 N. W. Rep. 524.

On the other hand, in the case, however, of *Preston v. Spaulding*, 120 Ill. 208, 10 N. E. Rep. 903, where a kindred question was considered and disposed of, it must be said that a different conclusion is arrived at by the court, although it seems to have been based chiefly upon the ground that the statute was silent as to the form of the instrument or instruments by which the insolvent debtor might effectuate an assignment. The court, however, said, in discussing the statute: "It will be observed this act does not assume to interfere in the slightest degree with the action of a debtor while he retains the dominion of his property. Notwithstanding this act, he may now, as heretofore, in good faith sell his property, mortgage or pledge it to secure a *bona fide* debt, or create a lien upon it by operation of law, as by confessing a judgment in favor of a *bona fide* creditor. But when he reaches the point where he is ready and determines to yield dominion of his property, and make an assignment for the benefit of creditors under the statute, this act declares that the effect of such assignment shall be the surrender and conveyance of all his estate not exempt by law to his assignee, rendering void all preferences, and bringing about the distribution of his whole estate equally among his *bona fide* creditors;" and the court held that it was within the spirit and intent of the statute that when the debtor has formed the determination to voluntarily dispose of his whole estate, and has entered upon that determination, it is immaterial into how many parts the performance or execution of his determination may be broken. The law will regard all his acts having for their object and effect the disposition of his estate as parts of a single transaction. And this case is referred to in *White v. Colzhausen*, 129 U. S. 343, 9 Sup. Ct. Rep. 309, with approbation. And in the consideration of the statutes of other states, prohibiting assignments containing preferences, and acts kindred to those charged against the assignor in this case, it has been held that the statute was violated; and the reasoning of *Preston v. Spaulding* seems to have commended itself as the more convincing upon the subject than that contained in the *Gallagher Case*. See *Clapp v. Nordmeyer*, (Mo.) 25 Fed. Rep. 71; *Berry v. Cutts*, 42 Me. 445; *Holt v. Bancroft*, 30 Ala. 195; *Van Patten v. Burr*, 52 Iowa, 518, 3 N. W. Rep. 524; *Fuller v. Hasbrouck*, 46 Mich. 81, 3 N. W. Rep. 697; *Heineman v. Hart*, 20 N. W. Rep. 792-798; *Perry v. Holden*, 22 Pick. 277; *Livermore v. McNair*, 34 N. ... Eq. 478.

Our statute, however, is different from those of other states, for the reason that it allows a preference to the amount of one-third in value of the assigned estate after deducting certain things enumerated; thus recognizing, but limiting, the right which existed before the prohibitory statute was passed, of a debtor's appropriating his property by preference, if he chose to do so. But it was evidently the intention of the legislature that, if a general assignment for the benefit of creditors were contemplated, it should embrace the

disposition of all the debtor's property at the time of the formation of the determination to make the assignment, and that it should not, in its broad and general effects, be anticipated by a partial and preferential distribution of his estate. The right to the preference, in other words, must be exercised in the assignment, and not otherwise. This would place the whole estate in the hands of the assignee, subject to the preferences expressed, and would enable him to make a better disposition of it than could be accomplished by a sale under judgment and execution, and would thus carry out the design of the legislature, and effectuate the legal purpose of the assignor in making his assignment. The defendants are not deprived of their interest under the statute in the proceeds of the estate by reason of their attempt to obtain an illegal preference. They can still participate in such proceeds to the extent to which they are entitled by the legal terms of the assignment relative to them or the provisions of the statute. *White v. Cotzhausen*. For these reasons, the judgment should be affirmed, with costs. All concur.

PEOPLE *ex rel.* STAPLETON *et al.* v. BELL *et al.*

(*Supreme Court, Special Term, Rensselaer County. November 18, 1889.*)

1. ELECTIONS AND VOTERS—INSPECTORS—DUTY TO CERTIFY RETURNS.

Inspectors of elections exercise ministerial and not judicial powers, and *mandamus* will lie against them to certify election returns, as prescribed by Rev. St. N. Y. (7th Ed.) p. 888, art. 4, though some of the votes may have been illegally cast.

2. SAME—QUALIFICATIONS OF VOTERS.

Where a person who is not shown of record to have been convicted of a crime takes the oath prescribed by statute, the inspectors must receive his vote, notwithstanding anything they may believe or know of his want of qualification.

Application for *mandamus*.

R. A. Parmenter and Lewis B. Griffith, for the motion. George B. Wellington, opposed.

EDWARDS, J. This motion is brought on by an order of Mr. Justice MAYHAM, requiring the defendants to show cause at this special term why a writ of *mandamus* should not issue to compel them to sign the last election returns from the Ninth ward of the city of Troy. The relators and the defendants are the four duly-appointed inspectors of election for said ward, and acted as such at the general election, held on the 5th day of November last. The law regulating the canvass and estimates of votes by inspectors requires that "as soon as the poll of an election shall have been finally closed, the inspectors of the said election, in their several districts, shall proceed to canvass the votes. Each box being opened, the ballots contained therein shall be taken out and counted, unopened, except so far as to ascertain that each ballot is single. The canvass shall be completed by ascertaining how many ballots of the same kind, corresponding in respect to the names of persons thereon, and the offices for which they are designated, have been received; and, the result being found, the inspectors shall securely attach to a statement of such canvass one ballot of each kind found to have been given for the officers to be chosen at such election," etc. At the completion of the canvass of each box the chairman of the inspector of election shall make public oral proclamation of the whole number of votes in such box, and of the whole number given for each person, with the name of the office to which such person was named on the ballots. "The statements to be made by the inspectors shall contain a caption, stating the day on which, and the number of the district, the town or ward, and the county at which, the election was held, in relation to which such statement shall be made. It shall also contain a statement showing the whole number of ballots taken for each person, designating the office for which they are given, which statement shall be written in words at length, and at the end thereof a certificate that such statement is correct in all re-

spects, which certificate shall be subscribed by the inspectors." Election Laws, §§ 286-302.¹ The statute there provides for the filing of such statements, commonly called the "election returns."

The affidavit of the relators, on which the order to show cause is based, shows that, immediately after the closing of the polls, the said four inspectors proceeded to canvass the votes in the form required by the foregoing statutes; that they counted the ballots cast by the electors, proclaimed the result of their counting, the whole number of votes cast, and the number received by each candidate for office; that such results, number of votes cast, and number received by each candidate, so proclaimed by the inspectors, are the same in every particular as contained in the statement or election returns from said ward now on file in the office of the clerk of the county of Rensselaer; that after such proclamation the two relators signed their names to such election returns, but the defendants refused, and still refuse, to sign the same.

These allegations of the relators are not controverted by the defendants. They do not deny that the whole number of votes contained in each box at the close of the polls, and the votes found therein for each candidate, were correctly counted, nor that the election returns which they refuse to sign correctly state such count. They base their refusal to sign solely on frauds alleged to have been committed before the polls closed, and the canvassing began. Chief of these were votes cast by persons falsely representing themselves to be registered voters, and by repeaters. It is further charged that in many instances persons challenged, to whom the oath was administered, did not give satisfactory answers to the defendants, and the relators persisted, against the protests of the defendants, in putting such votes into the ballot-box.

For the purposes of this motion these allegations of fraud must be deemed to be true; but however much we may deplore and condemn their existence, do they absolve the inspectors from the duty enjoined by statute to make and sign the returns? The questions presented on this motion are purely legal. Courts must apply the law as they find it, and not as they would make it for a particular emergency.

It is conceded that the solution of the problem before us depends entirely upon the question whether the acts of the inspectors are judicial or merely ministerial. Have they power to pass judicially upon the validity of any of the votes contained in the box, or are their duties restricted to the merely ministerial acts of making the count of such votes, and a correct statement thereof? If they act judicially, the writ of *mandamus* will not lie; if ministerially, the writ should issue to compel them to do the duty enjoined by statute. This supposition is undisputed. I am very clear, both on principle and on authority, that their acts are purely ministerial. We look in vain in the statutes for any authority to the inspectors to judicially determine the legality of any of the votes contained in the ballot-boxes. But we are not without express adjudication to this question. In *People v. Pease*, 30 Barb. 588, (affirmed by the court of appeals,) the court say: "But I find no authority for holding that the board of inspectors are judges, or exercise a judicial power in receiving and counting the votes, and declaring the result. * * * The returns of election inspectors are deemed ministerial, and not judicial, acts. * * * Their acts in receiving the ballots offered are no less ministerial than in making their returns." In the same case (27 N. Y. 45) the court of appeals say: "Their duties, except in the single instance adverted to, are simply ministerial in the reception of the votes, and entirely so in counting and making returns thereof. The legislature have left to those bodies having the power to judge of the return and election of their own mem-

¹ Rev. St. N. Y. (7th Ed.) p. 383, art. 4.

bers to correct any abuses which may have resulted in such election, and to judicial investigation, where the legal rights of individuals are concerned or affected, to apply such remedies as the nature of the case calls for." These adjudications upon the power of the inspectors in counting the votes and making returns thereof must be regarded as conclusive.

But the main contention of the learned counsel for the defendants arises out of the claims on the part of the defendants that the votes of persons challenged and sworn were put into the boxes by the relators against the protest of the defendants. The defendants' affidavits allege that persons who did not reside within the election district falsely personated registered voters, were challenged and sworn. Their answers were unsatisfactory. Defendants refused to receive their votes, but the relators put such votes into the boxes. It is contended that such votes, although put into the boxes, were not received by the board of inspectors; that the acts of the relators, against the will of the defendants, were not the acts of a majority of the board, and were therefore nugatory; that the votes, although in the box, were not legally received. On this they base a claim that the returns are incorrect, in that there were not received the number of votes therein stated, for the reason that the alleged fraudulent votes were not, in law, received. In brief, they admit that the returns correctly state the whole number of votes contained in each box, and the number found there for the respective candidates; but insist, for the reasons stated, that such votes were not received within the meaning of the statute. If the conclusion which I have reached in respect to the duties of the inspectors, sitting as a board of canvassers, is correct, I think this objection of the defendants is unavailing. It is simply another form of statement that some of the votes in the box were not legally there, and the inspectors, as canvassers, were judicially determining that question. If they act ministerially only, their duties are restricted to counting the votes contained in each box at the close of the polls, and the number of votes cast for the respective candidates; and they have no power to pass judicially upon the validity or invalidity of any of such votes. Furthermore, the defendants had no power to reject the votes of persons challenged, because their answers were "not satisfactory." It is not claimed that such voters refused to take the statutory oath, but that their answers were not satisfactory. In the case of *People v. Pease*, 27 N. Y. 45, the court of appeals says: "The course required by the statute to be pursued where the right of any person to vote is challenged cannot be reconciled with any discretionary power of rejection vested in the inspectors. The inspectors are first to administer what is called the 'preliminary oath,' requiring the person offering the vote to answer such questions as shall be put to him touching his place of residence and qualifications as an elector. The statute then mentions several questions which are to be addressed to him by the inspectors, and authorize such other questions as may tend to test his qualifications as a voter. If he refuses to take the oath, or to answer fully, his vote is to be rejected; but, if he answers fully, the inspectors are required to point out to him the qualifications, if any, in which he shall appear to be deficient. If he still persists in his right to vote, and the challenge is not withdrawn, the inspectors are required to administer to him the general oath, in which he states in detail, and swears, that he possesses all the qualifications which the constitution and laws require the voter to possess. If he refuses to take the oath, his vote shall be rejected. Is not the inference irresistible that if he takes the oath his vote shall be received? If his vote is to be rejected after he takes the oath, why not reject it before? As I construe the statutes, the inspectors have no discretion left to them in such a case, when the person offering to vote is not shown by a record to have been convicted of crime, or by his own oath to be interested in a bet upon the election, but must deposit the ballot in the box, whatever they may believe or know of the want of qualifications of the voter. They are required

to act upon the evidence which the statute prescribes, and have no judicial power to pass upon the question of its truth or falsehood, nor can they act upon their own opinions or knowledge. These are all the safe-guards the legislature have thought proper to provide to insure the prevention of fraudulent or illegal voting."

Although grievous offenses have been committed against the elective franchise, it is not difficult to conceive of greater evils which might result from the principle for which the defendants contend. If inspectors of election could be absolved from their statutory duty to sign the returns because they have reason to believe that some of the votes in the box had been fraudulently cast, or had been illegally deposited, they could practically disfranchise the legal electors of their district, and nullify the expressed will of the majority. If because, in their judgment, there are 25 fraudulent votes among the 500, they may refuse to make returns, they may also refuse because of the existence of one such fraudulent vote, and thus throw out the entire district. The prevalence of such a doctrine and practice throughout the state would open a vast field for fraud. It might practically disfranchise the qualified electors of the state, and nullify an election. I think it quite clear that the inspectors are not clothed with such power. If illegal and fraudulent votes have been cast, the party injured is not remediless. It is settled in this state that the returns are not conclusive. The injured candidate may maintain in the courts an action of *quo warranto*, judicially investigate the alleged frauds, and obtain redress. As was said by the court in the case of *People v. Pease*: "There is no tribunal by which frauds upon the ballot-box can be investigated except the judicial tribunals of the state, and there only in a way to redress the wrong, upon the trial of the right of office, in an action instituted for that purpose."

In my judgment it was the plain duty of the defendants to sign the returns, and the writ of *mandamus* should issue to compel them to discharge that duty.

DENNING v. KANE.

(Supreme Court, Special Term, New York County. October 23, 1889.)

1. TRUSTS—RESULTING TRUSTS—LEASE.

Under Rev. St. N. Y. (7th Ed.) p. 2181, § 51, which provides that where a grant for a valuable consideration shall be made to one person, and the consideration shall be paid by another, no use or trust shall result in favor of the person by whom such payment shall be made, no trust will result in favor of a person who contributes the money with which a lease is purchased for a third person.

2. EQUITY—JURISDICTION—PLEADING.

Though no trust results, equity will relieve on the ground of fraud, and a complaint is sufficient which avers that plaintiff spent a large sum of money in improving the premises, and that "defendant took the assignment of the lease in trust for the plaintiff, well knowing not only that the moneys expended in procuring the lease, but those for the erection and construction of the buildings, belonged to her."

Action by Jane Denning against Matthew Kane. Defendant demurs to the complaint.

Edward Jacobs, for plaintiff. *Kelly & MacRae*, for defendant.

LAWRENCE, J. The claim that the provisions of the Revised Statutes relating to uses and trusts do not apply to the assignment of the lease referred to in the complaint cannot, in my opinion, be sustained. The object of this action is to obtain a decree from this court declaring the leasehold property to be held in trust by the defendant for the benefit of the plaintiff, and that said defendant may be adjudged and required to assign and transfer the same, and all right of renewal thereof, to her; that the defendant may be required to account to the plaintiff for the rents, income, and profits; that a receiver may be appointed; and that the defendant may be obliged and adjudged to pay

whatever sum may be found due, etc. To entitle the plaintiff to the relief which she seeks, it must therefore be held that, by reason of the payment of the moneys in the purchase of the lease, a trust resulted in the plaintiff's favor, which this court should enforce. In determining this question, it will be necessary to bear in mind the exact provisions of sections 45, 47, 49, 51, 52, art. 2, tit. 2, c. 1, pt. 2, Rev. St., (7th Ed. pp. 2180, 2181.) Those sections are as follows: "Sec. 45. Uses and trusts, except as authorized and modified in this article, are abolished; and every estate and interest in lands shall be deemed a legal right, cognizable as such in the courts of law, except when otherwise provided in this chapter." "Sec. 47. Every person who, by virtue of any grant, assignment, or devise, now is, or hereafter shall be, entitled to the actual possession of lands, and the receipt of the rents and profits thereof, in law or in equity, shall be deemed to have a legal estate therein of the same quality and duration, and subject to the same conditions, as his beneficial interest." "Sec. 49. Every disposition of lands, whether by deed or devise, hereinafter made, shall be directly to the person in whom the right to the possession and profits shall be intended to be invested, and not to any other, to the use of, or in trust for, such person; and if made to one or more persons, to the use of, or in trust for, another, no estate or interest, legal or equitable, shall vest in the trustee." "Sec. 51. Where a grant for a valuable consideration shall be made to one person, and the consideration therefor shall be paid by another, no use or trust shall result in favor of the person by whom such payment shall be made; but the title shall vest in the person named as the alienee in such conveyance, subject only to the provisions of the next section. Sec. 52. Every such conveyance shall be presumed fraudulent, as against the creditors, at that time, of the person paying the consideration; and, where a fraudulent intent is not disproved, a trust shall result in favor of such creditors to the extent that may be necessary to satisfy their just demands."

It seems clear that the fifty-first section of the statute prevents any trust from resulting in favor of the plaintiff by reason of her having contributed the moneys which were used in the purchase of the lease from Mrs. Moore. *Garfield v. Hatmaker*, 15 N. Y. 475; *Everett v. Everett*, 48 N. Y. 223; *McCartney v. Bostwick*, 32 N. Y. 59. It is said by the learned counsel for the plaintiff that the provisions of the Revised Statutes above set forth do not apply to this case, because a lease is a chattel real, and therefore personal property. It was held, however, by the chancellor, in the case of *Ostrander v. Livingston*, 3 Barb. Ch. 426, in a case in which the subject of the controversy was leasehold property, that section 51 of the statute did prevent a trust resulting in favor of a party who had paid the consideration for the assignment of a lease to a third party. It has also frequently been held that, although a lease is a chattel real, the lessee takes an interest or estate in the land demised. *Averill v. Taylor*, 8 N. Y. 51-54; *Clarkson v. Skidmore*, 46 N. Y. 302; *Burr v. Stenton*, 43 N. Y. 465. If the tenant under a lease has an estate in the land, as decided in the cases cited, it is difficult to see why the statute relating to trusts (sections 45-51) does not apply to this case.

But, assuming them to be applicable, can this complaint be sustained on the ground that it is averred that the plaintiff spent a large sum of money in improving the premises while they were in possession of her husband; it being further averred that the defendant took the assignment of the lease in trust for the plaintiff, well knowing not only that the moneys expended in procuring the lease, but those for the erection and construction of the buildings, belonged to her. It has been held that a trust in respect to real estate may be established by parol evidence. *Swinburne v. Swinburne*, 28 N. Y. 563; *Lounsbury v. Purdy*, 18 N. Y. 515. These cases, when read in connection with the case of *Wheeler v. Reynolds*, hereinafter referred to, I think are sufficient to show that a good cause of action is stated upon the face of the

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complaint. Although it is not specifically alleged that the defendant has been guilty of a fraud in respect of the plaintiff's rights, if the facts conceded to be true by the demurrer exist, there is sufficient on the face of the complaint to sustain a charge of fraud, and to bring the case within the well-established principles of equity which are referred to by EARL, J., in delivering the opinion of the court in *Wheeler v. Reynolds*, 66 N. Y. 236. The learned judge says at pages 236 and 237: "It is a mistake to suppose that parol agreements relating to lands are any more valid in equity than at law; they are always and everywhere invalid. But courts of equity have general jurisdiction to relieve against frauds, and where a parol agreement relating to lands has been so far partly performed that it would be a fraud upon the party doing the acts unless the agreement should be performed by the other party, the court will relieve against this fraud, and apply the remedy by enforcing the agreement. It is not the parol agreement which lies at the foundation of the jurisdiction in such a case, but the fraud. So in reference to parol trusts in lands. They are invalid in equity as well as in law. But in cases of fraud courts of equity will sometimes imply a trust, and will treat the perpetrator of the fraud as a trustee, *ex maleficio*, for the purpose of administering a remedy against the fraud. For the same purpose it will take the trust which the parties have attempted to create, and enforce it; and in such a case the fraud, not the parol agreement, gives the jurisdiction." The doctrine declared in that case, when applied to this case, seems to me to sustain the cause of action stated in the complaint.

A question was raised upon the argument as to whether it sufficiently appeared upon the face of the complaint that the agreement therein referred to was in writing. If the view which I have taken of the decision of the court of appeals, just cited, is correct, it is unnecessary to discuss that question; but it has frequently been held that in an action upon a contract, required by the statute of frauds to be in writing, it is not necessary to allege in the complaint that it is in writing. *Marston v. Swett*, 66 N. Y. 206. For the purposes of the complaint this will be presumed, and unless the contract is denied in the answer, or alleged to be void, because not in writing, the statute furnishes no defense. The demurrer, of course, concedes the facts stated in the complaint, and in this discussion the question of the form of the agreement whether oral or in writing, cannot, therefore, arise. I am therefore of the opinion that the plaintiff is entitled to judgment overruling the demurrer, with leave to the defendant to answer over on payment of costs.

VAN ZANDT *et al.* v. VAN ZANDT *et al.*

(*Supreme Court, Special Term, New York County. October 17, 1889.*)

1. INTERPLEADER—WHEN MAINTAINABLE.

Where there are two claimants to part of a fund, one who admits that the entire fund is due from him may maintain a bill of interpleader to compel them to ascertain their shares.

2. SAME—TENDER.

But he must bring the amount admitted to be due into court.

3. DEMURRER—OBJECTIONS WAIVED.

Where defendants demur on the ground that the complaint does not state a cause of action, they cannot thereafter object to plaintiff's legal capacity to sue.

On demurrer to complaint in an action of interpleader.

A. Jacobson, for plaintiffs. *A. C. Franstoli*, for defendants.

LAWRENCE, J. The defendants, having demurred specifically on the ground that the complaint does not state facts sufficient to constitute a cause of action, cannot now raise the question as to the legal capacity of the plaintiff to maintain the action. *Bank v. Corbett*, 10 Abb. N. C. 85; *Wilson v. Mayor*, 15 How. Pr. 500. I think, also, that the judgment in the action for divorce is suffi-

ciently well pleaded, and that in any event there is nothing on the face of the complaint which shows that the court did not have jurisdiction.

The question then remains whether sufficient facts are stated in the complaint to show a cause of action in the plaintiff for relief in the nature of an interpleader. It appears, or is to be inferred, from the allegations in the complaint, that the former wife of Leopold Van Zandt claims the whole of the rents and profits of the share of said Leopold in the property mentioned in the complaint. It also appears that while Mrs. Sanford, Leopold's grantee, authorizes the plaintiff to deduct from such rents and profits the sums monthly theretofore paid to the wife and children by his (Leopold's) direction, she does not authorize, but inferentially forbids, him to pay the sums claimed to be due by the wife under the judgment. The rule is that an action for interpleader will not lie where there is a dispute as to the amount due from the plaintiff. That rule cannot be invoked in this case, because the plaintiff admits that the whole amount of Leopold's share of the rents and profits is due from him, but he avers that he cannot safely pay the whole of such rents and profits to either of the claimants. Where there are several claimants to parts of the fund, a bill of interpleader will lie to compel the parties to ascertain their shares and settle their priorities. *Aldridge v. Thompson*, 2 Brown, Ch. 149, 150; *Angell v. Hadden*, 15 Ves. 244, 16 Ves. 203; *Duke of Bolton v. Williams*, 4 Brown, Ch. 297; 2 Story, Eq. Jur. (13th Ed.) 142, 143. The case of *Railroad Co. v. Arthur*, 90 N. Y. 234, which is cited by the defendant's counsel, I do not regard as in point. There it was held, as already stated, that the amount due from a plaintiff cannot be the subject of controversy in an action of interpleader, and that the action can only be maintained where the plaintiff admits liability for the full amount claimed to one or other of the claimants. In that case the plaintiff had purchased goods of one of the defendants at an agreed price, but claimed to be entitled to deduct from that price a certain sum for transportation. This claim the vendee disputed, and the court held that the action could not be maintained. Here the plaintiff does not dispute the amount due. He admits that he owes it to one or the other of the defendants, and is unable to determine which. Mrs. Sanford does not, it is true, claim anything but the excess of the rents and profits over and above the sums which have heretofore been paid under the direction of Leopold. But it is clear that she claims adversely to the former wife as to the whole of that excess. It would appear to be unjust to compel the plaintiff to determine between these rival claimants as to that excess. If the complaint is indefinite and uncertain as to the amount claimed by Mrs. Van Zandt, the remedy seems not to be by demurrer, but by motion.

But there is one fatal defect to the complaint, and that is that the plaintiff does not offer to bring the amount of the rents and profits into court. This is essential. *Atkinson v. Manks*, 1 Cow. 704; *Shaw v. Coster*, 8 Paige, 339-344; *Dungey v. Angove*, 3 Brown, Ch. 36; *Metcalfe v. Hervey*, 1 Ves. Sr. 248; 2 Rum. Pr. 238; *Vosburgh v. Huntington*, 15 Abb. Pr. 254; 2 Story, Eq. Jur. (13th Ed.) 141. For this defect, there must be judgment for the defendants on the demurrer, with leave to the plaintiffs to amend on payment of costs.

In re METROPOLITAN EL. RY. CO., (In re JONES et al.)

In re NEW YORK EL. R. CO., (In re CLARKSON et al.)

(*Supreme Court, Special Term, New York County. October 28, 1889.*)

EMINENT DOMAIN—PROCEDURE—PETITION.

Laws N. Y. 1880, c. 140, § 18, (3 Rev. St., 8th Ed., p. 1742,) provides that where any railroad company is unable to purchase necessary realty it may acquire title by certain prescribed special proceedings. Section 14 provides that the company may present a petition to the supreme court, "signed and verified according to the rules and practice of such court," and stating, *inter alia*, that the company has not been

able to acquire title to certain required and described land, and the reason of such inability. There is no rule of the supreme court prescribing how such petitions shall be verified. *Held*, that such a petition might allege the company's inability to obtain title to the land sought to be condemned, on information and belief.

At chambers. Proceedings to condemn lands for elevated railroads.

Laws N. Y. 1850, c. 140, § 13, (3 Rev. St., 8th Ed., p. 1742,) provides that when any railroad company is unable to purchase realty necessary for its purposes it may acquire title by certain prescribed special proceedings. Section 14 provides that the company may present a petition to the supreme court, "signed and verified according to the rules and practice of such court," and stating, *inter alia*, that the company has not been able to acquire title to certain described land required for its purposes, and the reason of such inability.

Davies & Rapallo, for petitioners. *Davenport, Smith & Perkins* and *Jay, Candler & Brush*, for defendants.

ANDREWS, J. With one possible exception, every preliminary objection raised in these proceedings has been heretofore raised in similar proceedings, instituted by the present petitioners, and, after full argument and consideration, has been overruled by Mr. Justice BARRETT, Mr. Justice O'BRIEN, or myself. Most of such objections have been overruled by both of those justices, as well as by me. These decisions have never been reversed or modified, and they must be regarded as the law applicable to these matters. The exception referred to is the objection that the inability of petitioners to acquire title is averred on information and belief. This objection was raised before Mr. Justice O'BRIEN, and, as he appointed commissioners of appraisal, he must have overruled it, although it is not referred to in his opinion. However, even if the objection should be treated as a new one, I do not think it is well founded. All that is stated in the statute on this point is that the petition shall be signed and verified according to the rules and practice of the court; and there is no rule of the court now in force prescribing how petitions of this character, or of any other character, shall be verified. The usual practice of the court is, when a petition is to take the place of an affidavit, and is to be used as proof of the facts therein stated, to require that the matters should be stated upon the personal knowledge of the petitioner; though, even in such cases, statements made upon information and belief are received as a basis for judicial action, provided the petitioner states the sources of his information and the grounds of his belief. In many cases, however, a petition merely takes the place of a pleading, and in such cases it is the constant and uniform practice for the court to receive and act upon petitions in which many of the material allegations are made upon information and belief. In my opinion, the petition, upon applications like the present, is to be treated as a pleading; and, whether the provisions of the Code in relation to pleadings do or do not apply, it is sufficient if the allegations are made upon information and belief. If any other rule should prevail, it is evident that railroad corporations would find it almost impossible to ever present such applications to the court. The statute declares that the petition must be signed and verified. The corporation can sign and verify only through its officers or agents. The statute prescribes what the petition shall contain, and from the very nature of the case it would seldom happen that any officer or agent of the corporation could have personal knowledge of all the facts which must be stated in the petition. This is especially true of the allegations of the inability of the corporation to acquire title to the real estate which it seeks to condemn. All the preliminary objections will be overruled, and the court will hear the proofs and allegations of the parties on Tuesday, October 29th, at 3 o'clock in the afternoon.

WALL v. DELAWARE, L. & W. R. CO.

(Supreme Court, General Term, Fourth Department. November, 1889.)

1. NEGLIGENCE—PROVINCE OF JURY.

In an action for the alleged negligent killing of an employe of defendant railroad company, who was shoveling snow from its track, on a stormy, blustering morning, by backing an engine on him, several witnesses for plaintiff, who were near the place of the accident, testified that they did not hear any whistle blown, and one testified that he was listening for the whistle of an engine, and did not hear it. *Held*, that the question whether or not the whistle was blown was for the jury, though several witnesses for defendant, some of whom were in its employ, testified positively that it was blown.

2. SAME.

Plaintiff's evidence showed that the engineer through whose negligence decedent was killed, and who was his fellow-servant, had often previously run engines through defendant's yard, and in and across the streets of the city, without giving notice; that this was known to defendant's train dispatcher and road superintendent; and that his action in this respect was frequent and continuous. *Held*, that the evidence warranted submission to the jury of the question whether defendant knew, or ought to have known, that the engineer was habitually negligent, and was thus negligent in retaining him in its employ.

3. SAME.

The question of decedent's contributory negligence was for the jury, under the facts of the case.

Appeal from circuit court, Oswego county.

Action by Mary Wall against the Delaware, Lackawanna & Western Railroad Company, for the alleged wrongful and negligent killing of William Wall. From a judgment entered on the verdict of a jury for plaintiff, and from an order denying a motion for new trial, defendant appeals.

Argued before HARDIN, P. J., and MARTIN and MERWIN, JJ.

Rhodes, Coon & Higgins, for appellant. *J. A. Hathaway*, for respondent.

MARTIN, J. This case has been three times tried, and this is the third time that it has been before this court. On the first trial the plaintiff had a verdict for \$2,000. On appeal to this court from the judgment entered thereon, and from an order denying a new trial, the judgment and order were reversed, on the ground that the trial court erred in the exclusion of certain evidence offered by the defendant. 42 Hun, 653, *mem*. On the second trial the plaintiff was nonsuited. From the judgment entered thereon the plaintiff appealed, and this court then held that the trial court erred in refusing to permit the plaintiff to prove the previous negligence of Shay in running locomotives in and across the streets in question, and in nonsuiting the plaintiff without permitting her to make that proof. 50 Hun, 602, *mem*. Thus it is seen that the only questions that were determined by this court on the previous appeals related exclusively to the rejection of evidence. Therefore the appellant's claim, that the question of its liability in this action has been passed upon by this court, cannot be sustained.

On the third and last trial the plaintiff had a verdict for \$4,000. A motion was made for a new trial on the minutes of the trial judge, and denied. From the judgment entered on such verdict, and from the order denying the defendant's motion for a new trial, this appeal was taken. The appellant now contends that the evidence was insufficient to justify the submission to the jury of the question of the defendant's negligence, or the absence of contributory negligence on the part of the plaintiff's intestate, and that the trial court erred in not nonsuiting the plaintiff. The negligence attributed to the defendant was that it had and retained in its employ a servant who was habitually negligent in the performance of his duties; that the death of the plaintiff's intestate was caused by the negligent act of such servant, and resulted from the failure of the defendant to discharge him from its service. Hence the determination of the question of the defendant's negligence involves the examination of the

questions: (1) Whether the defendant's servant was negligent; and, if so, (2) whether the defendant was negligent in retaining him in its service.

The plaintiff's intestate was in the defendant's employ at the time of his death, and had been thus employed for a considerable number of years. At about half past 5 o'clock on the morning of his death, January 27, 1885, the decedent was engaged in shoveling snow from the defendant's track at a point where its road crosses Eighth street, in the city of Oswego, N. Y. It was a stormy, windy, blustering morning, and a deep snow had fallen on the previous night. While the decedent was thus engaged, Michael Shay, who was in the defendant's employ, and in charge of one of its engines, backed it to the place where the decedent was at work, and the decedent was run over by the engine and killed. There was no light upon the rear of the tender, and nothing was done to indicate the approach of the engine, unless the whistle of the engine was blown. The plaintiff claims that the whistle was not blown, but that, without any signal or warning whatever, the engine was backed onto the decedent, and caused his death. This the defendant denies. The defendant asserts, and has proved by several witnesses who were at or near the place of the accident, that the whistle was sounded several times. This question was submitted to the jury by the trial court, with instructions that if the whistle was thus sounded their verdict should be for the defendant. The jury by their verdict have found with the plaintiff. Therefore the only question on this branch of the case is whether there was sufficient evidence that the whistle was not sounded to authorize the court to submit that question to the jury. Several witnesses were called by the plaintiff, who were near the place where this accident occurred, and who testified that they did not hear any whistle blown, and each describes his situation at the time, and the opportunities he had to hear a whistle if sounded. One also testifies that he was listening for the whistle of an engine, and that he heard a whistle that he supposed was on an engine on the Rome, Watertown & Ogdensburg Railroad, and that he did not hear a whistle on the defendant's road that morning. On the other hand, the witnesses called by the defendant testified positively that the whistle upon the engine in question was sounded as it approached the place where the decedent was at work. If the witnesses called by the defendant, several of whom were in its employ, were to be believed, the whistle was blown. But the question of their credibility was for the jury. Therefore, if the testimony of the witnesses called by the plaintiff presented sufficient evidence upon this question to justify the jury in finding that the whistle was not blown, then the question was for the jury, and its finding should not be disturbed. A careful examination of the evidence has led us to the conclusion that, while the evidence of the plaintiff upon that question was not very conclusive, it was sufficient to present a question for the jury, within the case of *Culhane v. Railroad Co.*, 60 N. Y. 133, and kindred cases, as modified by the principle of the decision in the case of *Greany v. Railroad Co.*, 101 N. Y. 419, 423, 5 N. E. Rep. 425.

It must therefore be assumed, in the further discussion of this case, that Shay ran the engine which he had in charge over the place where the decedent was at work, when killed, without sounding the whistle, or doing anything to apprise the decedent of its approach, and that he was negligent in so doing. But assuming such negligence on the part of Shay, yet the defendant was not liable, unless it was negligent, as the decedent and Shay were co-employees. A master is not liable to his servant for the negligence of a fellow-servant, unless the master has been guilty of negligence in the selection of such fellow-servant, or in retaining him in his employ after he has become unfit for the service to which he was assigned. This leads us to the question of the defendant's negligence in employing or retaining Shay in its employ. We do not think the evidence sufficient to justify the conclusion that Shay was incompetent to discharge the duties assigned to him by the de-

defendant, unless such incompetency arose from his habitual negligence and carelessness in the performance of his duties. It was the duty of the defendant to exercise reasonable and ordinary care and diligence in providing proper and fit servants to manage and conduct its affairs. If it did not exercise such care, but negligently or knowingly employed a servant who was unfit to perform the duties assigned to him by reason of his habits of negligence, or failed to dismiss him after it had knowledge of his habitual negligence, or after it might have acquired such knowledge by the exercise of reasonable care and diligence, it was liable to respond in damages to its other employees engaged in the same service for any injury sustained by reason of such unfitness. The care to be exercised by a master in the selection of the servants employed and retained by him in his service is such as is reasonable and proper, in view of the nature and character of the business, and the consequences likely to flow from a negligent or unskillful execution of the work. The law, however, presumes that that duty was performed, and before the plaintiff could recover in this action she was bound to prove, not only that Shay had previously been negligent in the discharge of his duties, but that the defendant knew of his negligence, or was negligent in not ascertaining it. *Cahill v. Hilton*, 106 N. Y. 512, 13 N. E. Rep. 839. The plaintiff's evidence tends to show that during the summer preceding the accident Shay had on numerous occasions run engines through the defendant's yard, and in and across the streets of Oswego, without giving any notice of their movements. There is also evidence which tends to show that this was known to the train dispatcher and superintendent of the defendant's road, and that this course of action upon his part was so frequent and continuous that it should have been known to the defendant's officers if they had properly discharged their duty. We think that the evidence was sufficient to justify the submission to the jury of the question whether the defendant's officers, whose duty it was to employ and discharge servants occupying the position held by Shay, knew, or ought to have known, that Shay was thus habitually negligent; that the court committed no error in submitting the question of defendant's negligence to the jury; and that its finding upon that question should be upheld. *Coppins v. Railroad Co.*, 48 Hun, 292.

This brings us to the consideration of the question of contributory negligence. The appellant contends that the burden of showing affirmatively that the decedent was free from any negligence which contributed to his injury was upon the plaintiff, and that she has failed to sufficiently establish that fact to sustain the recovery in this action. The burden of showing affirmatively, either by direct evidence or by surrounding circumstances, that the decedent was free from contributory negligence, was upon the plaintiff. But, as was said by FINCH, J., in *Tolman v. Railroad Co.*, 98 N. Y. 203, "the burden of establishing affirmatively freedom from contributory negligence may be successfully borne, though there were no eye-witnesses of the accident, and even although its precise cause and manner of occurrence were unknown. If, in such case, the surrounding facts and circumstances reasonably indicate or tend to establish that the accident might have occurred without negligence of the deceased, that inference becomes possible, in addition to that which involves a careless or willful disregard of personal safety, and so a question of fact may arise to be solved by a jury, and require a choice between possible, but divergent, inferences." In *Greany v. Railroad Co.*, *supra*, it was held that where "there is any evidence, direct or inferential, of care or caution on the part of the person injured, the question as to contributory negligence is for the jury." The question is whether the injured party, under all the circumstances of the case, exercised that degree of care and caution which prudent persons of ordinary intelligence usually exercise under like circumstances. This rule must in all cases, except those marked by gross and inexcusable negligence, render the question involved one of fact for the jury.

BUGER, C. J., in *Parsons v. Railroad Co.*, 113 N. Y. 364, 21 N. E. Rep. 145.

When this case was heard on a former appeal, one of the members of this court was of the opinion that the decedent was guilty of contributory negligence "in not hearing the signal, or, if he heard it, in not respecting it." This opinion was based on the assumption that the signal was given. The jury have found to the contrary. If we are correct in our conclusion that the evidence was sufficient to sustain that finding, it follows that the decedent was not guilty of contributory negligence in that respect. We think the question of the decedent's negligence was, under the proof in this case, a question of fact for the jury, and that the court properly refused to hold as a matter of law that he was guilty of such negligence. It was for the jury to say what inferences should be drawn from the facts and circumstances disclosed by the evidence. *Newell v. Ryan*, 40 Hun, 286; *Palmer v. Railroad Co.*, 112 N. Y. 234, 243, 19 N. E. Rep. 678. Nor do we think that the defendant's claim, that it should be held that the decedent knew that Shay was habitually negligent, or should have known it, can be upheld. We think the judgment and order appealed from should be affirmed. Judgment and order affirmed, with costs. All concur.

PEOPLE v. WOOD.

(Supreme Court, General Term, Fourth Department. November, 1889.)

1. REFERENCE—ACTION OF TORT—COUNTY CLERK.

An action against the clerk of a county to recover money paid him upon false and fraudulent claims for services and money expended for the county, founded on Code Civil Proc. c. 16, tit. 1, art. 4, allowing an action in the name of the people for the misappropriation of public property, is an action sounding in tort, and hence the court is not authorized to compel a reference.

2. SAME—ACCOUNT.

Though it may be necessary to establish the damage sustained by resort to defendant's bills, they do not constitute an account between the parties.

Appeal from special term, Herkimer county.

The defendant, Palmer M. Wood, appeals from an order directing a reference, granted on the application of plaintiff, and against defendant's objection.

Argued before MARTIN, MERWIN, and PARKER, JJ.

A. M. Mills, for appellant. Thomas Richardson, for respondent.

MARTIN, J. The court had no authority to compel a reference of this action, unless it was founded on contract, and involved the examination of a long account. *Townsend v. Hendricks*, 40 How. Pr. 143, 162. Thus at the outset we are presented with the question whether this action was founded on contract, and, if so, whether it required the examination of a long account. The character of the action in this respect must be determined by the complaint, and the answer cannot change it. *Untermeyer v. Betinbauer*, 105 N. Y. 521, 11 N. E. Rep. 847. This action was brought by the people, under and in pursuance of the provisions of article 4, tit. 1, c. 16, Code Civil Proc., to recover several sums of money alleged to have been wrongfully and illegally obtained by the defendant from the treasurer of Herkimer county. The allegations of the complaint were, in substance, that the defendant was county clerk of Herkimer county; that he performed services and expended money for that county, for which he was entitled to reimbursement from the county in the manner provided by law, through the audit of the board of supervisors; that in each of the years 1880, 1881, 1882, 1883, 1884, 1885, and 1886 he made out and presented to the board his account and claims for alleged services and money expended for the county; that each of such bills was audited and allowed by the board of supervisors at the defendant's request; that for the sums so allowed each year the defendant received one or

more orders upon the treasurer of the county, which were paid out of the money of the county; that each of the claims or accounts so presented was to a large extent illegal, false, fictitious, and fraudulent, in excess of the legal fees and proper charges allowed by law, and that said board had no authority or power to audit the same; that each of the many charges or items set forth in the complaint was either excessive or wholly illegal; that the amount thereof was illegally audited by such board, and was illegally paid to and received by the defendant on such bills or claims; that he had no lawful right to receive or retain the same, or to convert it to his own use; that he has not restored any part of the moneys so illegally received by him, and is justly indebted to plaintiff therefor. The respondent contends that this was an action on contract, and therefore referable. It is not pretended that there was any express contract between the parties, or between the appellant and the county of Herkimer. But the claim is that there was an implied contract on the defendant's part to refund the moneys which were illegally and wrongfully obtained by him, and that this was an action on such implied contract. We cannot assent to this claim. The plaintiff's right of recovery in this action is not based upon any contract, either express or implied, but is founded upon a right given by statute to recover for the defendant's wrongful appropriation of moneys to which he was not entitled. We think it is quite manifest that the causes of action set out in the complaint were not on contract. The action was one sounding in tort, and therefore the court was not authorized to compel a reference. *Townsend v. Hendricks, supra*; *Wickham v. Frazee*, 13 Hun, 431; *Willard v. Doran*, 1 N. Y. Supp. 345, 588.

The cases cited by the respondent, where the question of a compulsory reference was involved, are not, we think, so essentially in conflict with the views above expressed as to justify us in holding that this is an action on contract. In the case of *Town of Westchester v. Henderson*, 24 Wkly. Dig. 237, which was an action by the town against its supervisor for moneys of the town received by him as such supervisor, it was held that it was an action on contract, and might be referred. In that case the moneys sought to be recovered were received by the defendant as the moneys of the town, and it was clearly intended by the parties that they should be paid out for, or returned to, the town. In such a case, a contract to pay out or return such moneys may well be implied. In *Mining Co. v. Knowlton*, 6 N. Y. St. Rep. 526, it was held that where it appears from the action that the defendant is rightfully in possession of money or property, either in a fiduciary capacity or otherwise, in accordance with the provisions of an agreement, contract, or arrangement made with the plaintiff, and an action is brought for an accounting, a reference may be ordered, although it is alleged that the defendant has converted or applied such moneys to his own use. While the cases of *People v. Peck*, 57 How. Pr. 315, and *Mayor v. Genet*, 67 Barb. 275, more nearly sustain the contention of the respondent than any other to which our attention has been called, still in the *Peck Case* the services performed and material furnished were performed and furnished under and in pursuance of two written contracts between the parties, and the issue in the case was whether under those contracts there was due the defendant the amount that had been paid him; and the special term held that the action was upon contract, and ordered a reference therein. In the case at bar there was no such contract. In the *Genet Case* a reference was denied, and the order was upheld on the ground that it was discretionary. Therefore the remarks of the judge as to the referability of the action were clearly unnecessary to the decision of the case. Besides, the question whether the action was on contract was not in fact decided, and the account involved was one existing between the parties. We have examined the other cases cited by the respondent as bearing upon this question, but do not think they sustain the doctrine contended for. We are of the opinion that both upon principle and authority it should be held

that this is an action sounding in tort, and therefore not referable. The respondent has also cited numerous cases where the actions were on contract, but where there were insufficient allegations of fraud or conversion in the pleadings; and it was held that notwithstanding such allegations the actions were on contract. We do not think those authorities have any important bearing upon the question here, as the complaint in this action shows that the action is one sounding in tort, independent of the allegation that the defendant's bills were fraudulent.

Moreover, there was no account between the parties, in the ordinary acceptance of that term. The action was for money illegally and wrongfully obtained. Until the appellant had obtained the money, no liability on his part existed. While it may be necessary on the trial to resort to the bills presented by the defendant to establish the amount of damages or loss sustained, still the defendant's bills do not constitute an account between the parties. "It has repeatedly been held that when there is no 'account' between the parties, in the ordinary acceptance of the term, the cause cannot be referred, although there may be many items of damage. * * * This rule has been applied in actions on policies of insurance, where there are many items of loss." *Untermeyer v. Beinhauer*, 105 N. Y. 524, 11 N. E. Rep. 847; *Camp v. Ingersoll*, 86 N. Y. 433; *Clafin v. Drake*, 38 Hun, 144; *Hyatt v. Roach*, 52 How. Pr. 115; *Kain v. Delano*, 11 Abb. Pr. (N. S.) 36; *Read v. Lozin*, 31 Hun, 286. As was said by CLERKE, J., in *Sharp v. Mayor*, 18 How. Pr. 216, the constitutional right of "trial by jury in all cases in which it has been heretofore used" cannot be too faithfully preserved; and compulsory references should be rigorously confined to cases involving the examination of a *bona fide* account in an action on contract. Here is an action brought by the people, charging the defendant with the misappropriation of public funds, with having charged illegal fees,—acts involving great moral turpitude, and which, if committed, constitute a crime. He asks that the question which is of such vital importance to him shall be tried before a jury. We think that right should not have been denied him. Order reversed, with \$10 costs and disbursements.

MERWIN, J., concurred, on ground that action was not on contract.

PARKER, J., concurred.

FORD v. BINGHAMTON HYDRAULIC POWER CO.

(Supreme Court, General Term, Fourth Department. November, 1892.)

CORPORATIONS—ACTION ON NOTE—NOTICE OF ISSUES.

An action against a domestic corporation by an indorser of its accommodation paper, to recover for payment of protested notes, is an action to recover damages for non-payment, within the meaning of Code Civil Proc. N. Y. § 1773, providing that in an action against a foreign or domestic corporation, to recover damages for non-payment of a promissory note, unless defendant serves with a copy of his answer or demurrer a copy of an order of the judge directing that the issues presented by the pleadings be tried, plaintiff may take judgment, as in case of default in pleading, at the expiration of 20 days.

Appeal from special term, Broome county.

Action by William L. Ford against the Binghamton Hydraulic Power Company to recover for payment, as accommodation indorser, of two promissory notes. On taking the default of defendant, judgment was entered for plaintiff, and defendant appeals.

Argued before HARDIN, P. J., and MARTIN and MERWIN, JJ.
Canniff & Peurie, for appellant. A. D. Wales, for respondent.

MARTIN, J. The appellant, a domestic corporation, made two promissory notes, payable to its order, which were indorsed by the respondent for the ac-

commodation of the appellant. When due, they were not paid. After protest, and notice to respondent of non-payment and protest, he paid and took up the notes, and brought an action against the appellant to recover the amount thereof. The defendant demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action. No copy of an order of a judge directing that the issues raised by the demurrer should be tried, was served with such demurrer. At the expiration of 20 days after the personal service of the summons and complaint herein, the respondent entered judgment as in case of default in pleading. The appellant then moved at special term to set aside and vacate such judgment, on the ground that the appellant had no authority to enter it until the issues raised by such demurrer were tried and determined. This motion was denied. Section 1778 of the Code of Civil Procedure provides: "In an action against a foreign or domestic corporation to recover damages for the non-payment of a promissory note or other evidence of debt, for the absolute payment of money upon demand, or at a particular time, * * * unless the defendant serves with a copy of his answer or demurrer a copy of an order of a judge directing that the issues presented by the pleadings be tried, the plaintiff may take judgment, as in case of default in pleading, at the expiration of twenty days after service of a copy of the complaint, either personally with the summons, or upon defendant's attorney, pursuant to his demand therefor."

The only question presented on this appeal is whether this was an action to recover damages for the non-payment of a promissory note, or other evidence of debt, for the absolute payment of money, within the intent and purpose of this statute. Where an indorser of a promissory note has paid and taken it up, he becomes a holder for value, and may maintain an action to recover the amount of the maker. 2 Daniel, Neg. Inst. 219; *Kelly v. Burroughs*, 102 N. Y. 93, 6 N. E. Rep. 109. That an action by such an indorser and holder against the maker is an action to recover damages for the non-payment of a promissory note, and within the provisions of section 1778, is, we think, quite manifest. Nor do we find anything in the case of *Insurance Co. v. Insurance Co.*, 88 N. Y. 424, in conflict with this conclusion. In that case the action was upon an insurance policy, which was held to be a conditional contract, and not within the provisions of that section. We do not think the case of *Storer v. Publishing Co.*, 6 N. Y. Supp. 63, in principle like the case at bar. In the *Storer Case* the action was against a domestic corporation, as indorser of a promissory note, and it was held that the contract of indorsement was not an instrument which was of itself evidence of debt; that the indorser's liability was not absolute, but contingent,—requiring proof *altunde* the instrument of presentation, demand, non-payment, and notice, to show that the contingent liability had become absolute, and hence not within the provisions of section 1778. In the case at bar the contract of the corporation was evidenced by two promissory notes made by it, whereby it became absolutely liable for the payment at a particular time of the amounts of money mentioned therein. The liability of the defendant was in no wise a contingent one. It was fixed at the inception of the notes, and by the express provisions thereof. No proof *altunde* the note was required to establish the defendant's liability, nor to show that it was absolute. We are of the opinion that this action was against a domestic corporation, to recover damages for the non-payment of a promissory note, and that the special term properly refused to vacate the judgment entered herein. Order affirmed, with \$10 costs and disbursements. All concur.

JOHNSON v. THOMPSON-HOUSTON ELECTRIC CO.

(Supreme Court, General Term, Fourth Department. November, 1889.)

MUNICIPAL CORPORATIONS—CONTROL OF STREETS—POWERS OF TRUSTEES.

Where the act incorporating a village gives the trustees control of the streets, they may authorize the erection of poles therein for the purpose of lighting the streets; and the fact that a pole erected in front of plaintiff's premises, without his consent, may also be intended for private purposes, does not entitle him to have it removed, so long as it is reasonably necessary and proper for the public service.

Appeal from special term, Oswego county.

Action by Willard Johnson against the Thompson-Houston Electric Company, to compel the removal of an electric light pole erected in the street in front of plaintiff's premises. From a judgment in plaintiff's favor defendant appeals.

Argued before HARDIN, P. J., and MARTIN, J.

Giles S. Piper, for appellant. Mead & Stranahan, for respondent.

MARTIN, J. We are of the opinion that the plaintiff was not entitled to the relief awarded by the judgment herein. The defendant erected a pole in one of the streets of the village of Fulton, in front of the plaintiff's premises, without his consent. The board of trustees of the village granted to the defendant a license to erect poles and wires in the streets and grounds of the village. The act incorporating the village conferred upon such board jurisdiction and control over the streets therein. The special term found that the board had power to maintain lights in the streets of the village, and to procure and erect necessary fixtures for lighting such streets. The pole in question was erected for the purpose of supplying electricity for electric lights to light the streets of the village, and also for private use. It was also intended that a street light should be suspended therefrom. The learned trial judge held that the license of the board of trustees did not justify its erection or maintenance, and directed its removal. It must be admitted that the streets of a populous village or city are subject to greater burdens and to a greater variety of uses than a rural highway, and that the extent of an easement in a street is to be measured by the necessities of the public. In *Lahr v. Railroad Co.*, 104 N. Y. 292, 10 N. E. Rep. 528, RUGER, C. J. said: "Statutes relating to public streets, which attempt to authorize their use for additional street uses, are obviously within the power of the legislature to enact. * * * Such are the cases in respect to changes of grade, the use of a street for a surface horse railroad, the laying of sewers, gas, and water pipes beneath the soil, the erection of street lamps and hitching posts, and of poles for electric lights used for street lighting. All of these relate to street uses sanctioned as such by their obvious purpose, and long-continued usage, and authorized by the appropriation of land for a public street." In *Tuttle v. Illuminating*, 50 N. Y. Super. Ct. 464, it was held that city authorities had full power over the matter of lighting streets, and might authorize the erection of poles to be used for that purpose. See, also, *Gas-Light Co. v. Mayor, etc.*, 33 N. Y. 327, and other cases cited in opinion in *Tuttle Case*. In *Telegraph Co. v. Lead Co.*, 50 N. Y. Super. Ct. 488, it was held that the streets could not be used for the erection of poles to conduct telegraph and telephone wires, and in the *Tuttle Case* the right to use the streets for the purpose of supplying electricity to private persons was doubted. We think it quite clear that the trustees of the village of Fulton had power, under and by virtue of the provisions of the charter, to authorize the defendant to erect the pole in question for the purpose of lighting the streets of the village. That the board could properly authorize its erection, for the purpose of supplying light for private use, may well be doubted, as it could not devote the street to purposes other than those for which it was intended without compensation to the owner. *Mahady v. Rail-*

road Co., 91 N. Y. 148. We think it must be held that under the license given by the trustees the defendant had the right to erect this pole, and use it for the purpose of supplying electricity necessary to light the streets in that vicinity, and to use it as a point from which to suspend a street light. One, and perhaps the chief, purpose of locating the pole at this place was to furnish a proper light for the streets in that locality. So far as its erection was for that purpose, it was lawful, and did not invade the plaintiff's just rights. The fact that the defendant might have intended to use it for other and unjustifiable purposes may have entitled the plaintiff to an injunction restraining such unauthorized use, but did not, we think, entitle him to have it wholly removed, so long as it was reasonably necessary and proper for the public service.

It is true that the court found "that this pole * * * was not necessary for the public use alone, and there were other places where it might have been located so as to answer the same purpose." Whether the trial judge intended by this finding to decide that no pole was necessary at that place for public use, or whether his intention was to find that it was not alone necessary for that purpose, but was also necessary for private use, is not quite clear. If the former, it is, we think, adverse to the concession of the parties, and against the weight of the evidence. On the trial it was conceded that this pole "was convenient and reasonably necessary to the furnishing light for public and private use." This concession involved the necessity of this pole to furnish light for public as well as for private use, and the evidence tended to show quite conclusively that such a pole in that vicinity was necessary for the proper maintenance of a street light which was required at that place. We do not think it an answer to the right claimed to say that this pole might have been placed on the land of others. If it was necessary that it should be located in that vicinity, the burden could as properly be imposed upon the street in front of the plaintiff's premises as upon the street in front of the premises of his neighbor. Upon the evidence, admissions, and facts, as presented on this appeal, we are of the opinion that the judgment directing the removal of the pole in question was not justified; that the court erred in directing such judgment; and for that error the judgment should be reversed. Judgment reversed, with costs to abide the event.

BALDWIN v. SHORT *et al.*

(*Supreme Court, General Term, Fourth Department. November, 1889.*)

FRAUDULENT CONVEYANCES—FICTITIOUS DEBTS.

A deed to secure two debts of the grantor to the grantees, one of which is fictitious, though the other is actually due, is void *ab initio*, as against creditors of the grantor, and cannot stand as security even for that debt which is actually due.

Appeal from special term, Onondaga county.

Action by Charles G. Baldwin, as assignee for the benefit of the creditors of Hezekiah F. Dow, Henry W. Short, and Orinda B. Sperry, against Fannie M. Short and Orinda B. Sperry, to set aside as fraudulent a deed executed by defendant Sperry to defendant Short. Judgment for plaintiff. Defendants appeal.

Argued before HARDIN, P. J., and MARTIN and MERWIN, JJ.

Louis Marshall, for appellants. *Charles G. Baldwin*, for respondent.

MARTIN, J. The plaintiff sought by this action to set aside a conveyance to the defendant Fannie M. Short by the defendant Orinda B. Sperry of the premises described in the complaint. The ground for the relief asked was that such transfer was made and received with the intent to hinder, delay, and defraud the creditors of the grantor, and therefore fraudulent and void. The learned trial judge at special term found that at the time of such transfer

the defendant Sperry was justly indebted to the defendant Fannie M. Short in the sum of \$8,688.96; that the premises conveyed were of the value of \$12,000; that the defendant Fannie M. Short claimed that the defendant Sperry was indebted to her in the sum of \$3,482 for the board of Mrs. Sperry and her daughter; that the deed in question was delivered and received in payment and satisfaction of both of said debts; that the defendant Sperry was not indebted to Mrs. Short for the board of herself and daughter, or for the board of either; that the deed in question was given by Mrs. Sperry with the intent to hinder and defraud her creditors, which intent was known to and participated in by Mrs. Short; and directed a judgment in plaintiff's favor, adjudging the deed from Mrs. Sperry to Mrs. Short to be fraudulent and void, and that Mrs. Short convey the premises described to the plaintiff. The validity of this decision, and the judgment entered thereon, is challenged by the appellants upon the grounds (1) that the findings of fact are against the evidence; (2) that upon the facts as found the plaintiff was not entitled to the relief awarded.

The evidence seems to be sufficient to sustain the findings of the trial judge, and therefore we do not think the judgment should be disturbed on the first ground.

But the appellants contend that, even if the facts were as found, still the plaintiff was not entitled to the judgment directed. Their claim is that as the court found that the grantor in this deed was justly indebted to the grantee in the sum of \$8,688.96, and that the deed was given in payment of such debt, it should have been upheld so far at least as to have permitted it to stand as security for the sum actually due to the grantee. The authorities cited by the appellants to sustain this claim are to the effect that if a grantee purchases without actual notice of a fraudulent intent on the part of his grantor, but for a consideration so inadequate that it would be inequitable to allow the deed to stand as a conveyance, a court of equity may give it effect as a security for the actual consideration. *Van Wyck v. Baker*, 16 Hun, 168; *Boyd v. Dunlap*, 1 Johns. Ch. 478; *Pond v. Comstock*, 20 Hun, 492, affirmed, 87 N. Y. 627; *Bigelow v. Ayrault*, 46 Barb. 143. Admitting the doctrine of the cases cited, it does not aid the appellants. The court has found that a part of the consideration for this transfer was fictitious, and that it was made by the grantor with a fraudulent intent, which was known to and participated in by the grantee. None of the cases cited sustain the doctrine that a deed may be upheld as security for the actual consideration where such is the case. In *Van Wyck v. Baker* the court said: "If a grantee purchases with a notice of a fraudulent intent on the part of his grantor, the deed is void, though he pays the full value of the property." In *Boyd v. Dunlap* it was said: "A deed fraudulent in fact is absolutely void, and it is not permitted to stand as security for any purpose of reimbursement or indemnity." In *Pond v. Comstock* the deed was upheld as a security upon the express ground that the grantee "took the transfer in actual good faith and with good motives." In *Bigelow v. Ayrault* the purchase was not made with any fraudulent intent. In *Sands v. Codwise*, 4 Johns. 537, it was held that, where deeds are void on the ground of absolute fraud, they are to be considered as void *ab initio*, and are not allowed to stand as security to the grantee for advances he may have made, or responsibilities he may have entered into on account of them. In *Davis v. Leopold*, 87 N. Y. 620, it was held that where a conveyance is made that is fraudulent as to the creditors of the grantor, and the grantee is a party to the fraud, he is not entitled to protection for any sum paid or liability incurred; the conveyance is absolutely void, and is not permitted to stand as security for any purpose of indemnity or reimbursement. The same doctrine is held in *Bank v. Warner*, 12 Hun, 306; *Wood v. Hunt*, 38 Barb. 302; *Swift v. Hart*, 35 Hun, 128. In *Billings v. Russell*, 101 N. Y. 226, 4 N. E. Rep. 531, it was said by RUGER, C. J.: "From this review of

the authorities, it seems clear that, where there is an actual intent to defraud, no form in which the transaction is put can shield the property so transferred from the claims of creditors, even though a full and adequate consideration be received for the same." We do not think the principle of these cases has been changed by anything decided in *Loos v. Wilkinson*, 113 N. Y. 485, 21 N. E. Rep. 392. It is true it was held in that case that a fraudulent grantee who was a participant in the fraud was entitled to be allowed the sums he had paid for taxes, interest on mortgages on the premises, and for repairs and agent's commissions for managing the property and collecting rent; but in the opinion in that case the doctrine "that a fraudulent grant to a grantee who is a guilty participant in the fraud must, as to the creditors of the grantor, be treated as void *ab initio*," was again asserted. In view of the uniformity with which it has been held by the courts of this state that a grant made and accepted with fraudulent intent is absolutely void, and will not be allowed to stand as security for the consideration, we think it must be held that the court committed no error in holding that the deed in question was fraudulent and void against the creditors of Mrs. Sperry, and in directing judgment setting it aside, and requiring the defendant Fannie M. Short to convey the premises to the plaintiff. We think the admission of evidence of the declarations of Mrs. Sperry was justified by the doctrine of *Loos v. Wilkinson*, 110 N. Y. 195, 211, 18 N. E. Rep. 99. We have examined the other exceptions to the admission of evidence to which our attention has been called, but they disclose no error that would justify a reversal of the judgment herein. We think the judgment should be affirmed. Judgment affirmed, with costs. All concur.

BECKWITH v. NEW YORK CENT. & H. R. R. Co.

(*Supreme Court, General Term, Fourth Department. November, 1889.*)

RAILROAD COMPANIES—INJURIES TO PERSONS ON TRACK—NEGLIGENCE.

In an action for injuries to a person on a railroad track, there was evidence that several of defendant's tracks crossed the road where the accident occurred; that plaintiff stood and waited for a west-bound train to pass, and then, in crossing the tracks, was struck by an east-bound train; that, before crossing, plaintiff looked both ways, and saw no train approaching. The evidence as to ringing the bell and blowing the whistle of the east-bound train was conflicting. The track could be seen for a long distance, looking west. The west-bound train made considerable noise. There was a head-light on the east-bound train, but there was a switch-engine with a head-light standing near, and various other lights at different points along the tracks. The night was dark and hazy. *Held*, that the questions of negligence and contributory negligence were properly submitted to the jury.

Appeal from circuit court, Oneida county.

Action by Joseph H. Beckwith, an infant, by John H. Beckwith, his guardian, against the New York Central & Hudson River Railroad Company, for damages sustained by reason of his being struck by a passing train on defendant's road. Judgment was entered on a verdict for plaintiff, and a motion for a new trial on the minutes was denied. Defendant appeals.

Argued before HARDIN, P. J., and MARTIN and MERWIN, JJ.

C. D. Prescott, for appellant. S. Cromwell, for respondent.

MARTIN, J. On the 25th day of February, 1888, Joseph H. Beckwith was injured by a passing train on the defendant's road at its intersection with Peterboro street, in the village of Canastota, N. Y. The defendant's road runs east and west through the village, and at right angles with Peterboro street. Its tracks are straight for about a mile and a half west of this crossing. There was a side track on the north, and from that direction the defendant's through tracks were in the following order: *First*, No. 4; *second*, No. 3; *third*, No. 2; and, *fourth*, No. 1. South of the defendant's road was the track of the Elmira, Cortland & Northern Railroad. The plaintiff lived

near, and was familiar with, this crossing. At about 10 o'clock on the evening of this accident the plaintiff and his brother approached the crossing from the north, and stopped about 20 feet from track No. 4, while a train was passing to the west, on track No. 3. When that train had passed, they walked onto track No. 4, and were struck by an east-bound train. There was a head-light on the engine. The train was moving at about 12 miles an hour. From the center of the side track the view west, on track No. 4, was unobstructed for a distance of about 635 feet. From a point between the side track and track No. 4, it was unobstructed for about two miles. The night was cloudy, hazy, and dark. A switch-engine, upon which there was a head-light burning, stood on the side track west of, and facing, the crossing. There was also several switch-lights near. The train going west on track 3 was a long one, and made considerable noise. On the trial the defendant moved for a nonsuit, on the ground that the evidence of the defendant's negligence and plaintiff's freedom from contributory negligence was insufficient to authorize the submission of those questions to the jury. The motion was denied, and an exception taken. The plaintiff had a verdict. The defendant now asks for a reversal of the judgment, and order denying a new trial, on the ground that the court erred in denying its motion for a nonsuit.

Thus the question presented for review by this court is whether there was sufficient evidence of the defendant's negligence, and plaintiff's freedom from contributory negligence, to justify the submission of those questions to the jury. The negligence imputed to the defendant was that it failed to sound the whistle or ring the bell upon its engine as the train approached this crossing. On the trial several witnesses, who were at or near the crossing at the time, testified that no whistle was sounded, nor bell rung. The defendant's witnesses testified that the whistle was blown for the station, and the bell was rung for about 80 rods before reaching the crossing. Upon this proof, we think the question whether the defendant was negligent in omitting to ring its bell or sound its whistle was a question of fact, and properly submitted to the jury. A more difficult question is whether there was sufficient proof of the plaintiff's freedom from contributory negligence. The burden of showing affirmatively, either by direct evidence or by surrounding circumstances, that the plaintiff was free from contributory negligence was upon the plaintiff. *Tolman v. Railroad Co.*, 98 N. Y. 203. But where there is any evidence, direct or inferential, of care or caution on the part of the person injured, the question of contributory negligence is for the jury. *Greany v. Railroad Co.*, 101 N. Y. 419, 5 N. E. Rep. 425. As was said by RUGER, C. J.: "The question is whether the injured party, under all of the circumstances of the case, exercised that degree of care and caution which prudent persons of ordinary intelligence usually exercise under like circumstances. This rule must in all cases, except those marked by gross and inexcusable negligence, render the question involved one of fact, for the jury." *Parsons v. Railroad Co.*, 113 N. Y. 364, 21 N. E. Rep. 145. In this case the plaintiff testified that he looked both ways before attempting to cross the defendant's track; that he neither saw nor heard the approaching train. The evidence also discloses that the night was dark and hazy; that an engine, with a head-light burning, stood near, and facing the crossing; that there were several switch-lights in the neighborhood; that the train that had passed was making considerable noise; and there were several lights on the rear of the caboose. With this proof, we do not think the court could have properly held, as a matter of law, that the plaintiff's failure to see and avoid this train was such contributory negligence on his part as would release the defendant from liability for its negligence. *Greany v. Railroad Co.*; *Parsons v. Railroad Co.*, *supra*; *Sherry v. Railroad Co.*, 104 N. Y. 652, 10 N. E. Rep. 128. We are of the opinion that the defendant's motion for a nonsuit was properly denied. We have examined the other exceptions in the case to which our attention

has been called, but have found none that require special consideration, or that disclose any error that would justify a reversal of the judgment. Judgment and order affirmed, with costs. All concur.

BECKWITH v. NEW YORK CENT. & H. R. R. Co.

(*Supreme Court, General Term, Fourth Department. November, 1889.*)

RAILROAD COMPANIES—INJURIES TO PERSONS ON TRACK—NEGLIGENCE.

In an action for the negligent killing of plaintiff's intestate by a locomotive, there was evidence that decedent was 13 years old; that he was with his older brother; that his brother looked both ways before attempting to cross the track; that, not seeing or hearing the approaching train, he told the decedent to come on, and they hurried across. *Held*, that the evidence showed that the accident may have occurred without contributory negligence on decedent's part, and was properly submitted to the jury.

Appeal from circuit court, Oneida county.

Action by John H. Beckwith, as administrator of Walter Beckwith, deceased, against the New York Central & Hudson River Railroad Company for the negligent killing of plaintiff's decedent by a train on defendant's road. Judgment was entered on a verdict for plaintiff, and a motion for a new trial on the minutes was denied. Defendant appeals.

Argued before HARDIN, P. J., and MARTIN and MERWIN, JJ.

C. D. Prescott, for appellant. S. Cromwell, for respondent.

MARTIN, J. The evidence and facts in this case are substantially identical with those in the case of Joseph H. Beckwith, by his guardian, against the defendant, (*ante*, 719,) which was submitted at the same time with this case, except that in that case the plaintiff testified that he looked both ways before attempting to cross defendant's tracks, and neither heard nor saw the approaching train, while in this case the plaintiff's intestate was killed, and could not testify. In the case at bar there was no direct evidence that the decedent looked or listened before attempting to make this crossing. There was, however, proof that decedent was about 13 years of age; that he was in company with his older brother; that his brother looked both ways before attempting to cross; that, not seeing or hearing the approaching train, he told the decedent to "come on," and they hurried across. The only question we need specially consider in this case is whether, in the absence of direct proof that the decedent looked and listened before attempting to cross the defendant's track, the plaintiff so far failed to show that his intestate was free from contributory negligence as to require the trial court to hold, as a matter of law, that the plaintiff was not entitled to recover. In *Tolman v. Railroad Co.*, 98 N. Y. 203, FINCH, J., in delivering the opinion of the court in that case, said: "The burden of establishing affirmatively freedom from contributory negligence may be successfully borne, though there were no eye-witnesses of the accident, and even although its precise cause and manner of occurrence are unknown. If, in such case, the surrounding facts and circumstances reasonably indicate, or tend to establish, that the accident might have occurred without negligence of the deceased, that inference becomes possible, in addition to that which involves a careless or willful disregard of personal safety; and so a question of fact may arise, to be solved by a jury, and require a choice between possible, but divergent, inferences." In this case, there were facts and circumstances which at least tended to show that the accident might have occurred without the negligence of the decedent; and we think it was for the jury to say what inferences should be drawn from the facts and circumstances disclosed by the evidence. *Newell v. Ryan*, 40 Hun, 286, 290; *Palmer v. Railroad Co.*, 112 N. Y. 234, 243, 19 N. E. Rep. 678. An examination of the defendant's exceptions as to the admission of evidence, and to the judge's charge, has failed to disclose any error which requires a reversal
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of this judgment, or that would seem to require special discussion. We think the judgment should be affirmed. Judgment and order affirmed, with costs. All concur.

HOGAN v. BURTON.

(Supreme Court, General Term, Fourth Department. November, 1889.)

CONTRACTS—PERFORMANCE—TENDER—EXTENSION OF TIME.

Where plaintiff tenders performance of a contract, and demands performance by defendant, and states that it would be satisfactory if defendant closed the matter up in a few days, but immediately afterwards again tenders performance, there is no such extension of time as involves either a withdrawal of plaintiff's tender or waiver of defendant's default.

Appeal from circuit court, Onondaga county.

Action by Thomas Hogan against Wilmot E. Burton, for breach of contract. There was judgment for plaintiff, from which, and from a denial of his motion for a new trial on the minutes, defendant appeals.

Argued before HARDIN, P. J., and MARTIN and MERWIN, JJ.

J. C. Fowler, for appellant. Hogan & Stearns, for respondent.

MARTIN, J. On the 2d day of October, 1886, the plaintiff was the owner of premises on Gertrude street; Edward H. Ryan owned premises on Taylor street; and William P. Kelly owned a house and lot on Warren street,—all in the city of Syracuse, N. Y. The defendant was a real-estate broker, and had all the pieces of real estate mentioned in his hands for sale or exchange. On the day named the plaintiff conveyed the premises on Gertrude street to Ryan, and Ryan conveyed the Taylor-Street property to the plaintiff. This exchange was made by the plaintiff at the defendant's request, and upon the express condition that the defendant would within two months deliver to the plaintiff a deed of the Kelly house and lot, subject only to a mortgage for \$4,600; the plaintiff to give a deed of the Taylor-Street premises, subject to the existing liens at that date. In case of the defendant's failure to deliver the deed of the Kelly property, he was to pay the plaintiff \$1,200 for his equity in the Taylor-Street premises, and the plaintiff was to deed them to the defendant subject to the incumbrances existing thereon as plaintiff received them from Ryan; the plaintiff to receive \$1,200 for said premises, free of all commissions and expenses. It was also agreed that, in case the defendant failed to perform, the plaintiff should be entitled to recover the sum of \$500 as liquidated damages. This contract was in writing, and signed and sealed by the parties. No action under this contract was taken by either party until December 2, 1886, when the plaintiff went to defendant's office. As to what transpired between the parties at that time there was a conflict in the evidence. The plaintiff testified that he said to the defendant: "Mr. Burton, I came here to perform the contract which I have with you, and I have a deed of the Taylor-Street premises, and I wish that you would perform your part of the contract, and pay me twelve hundred dollars, or give me the Warren-Street property." * * * I told him that I did not think it was incumbent upon me to make any tender of the deed of the Taylor-Street property, but, in order to be sure, I had procured the deed to be executed, and that I then tendered him the deed of that property; that I came there for the purpose of performing my contract; and that I desired to do everything that was necessary to be done under the contract. I handed him the deed, * * * and he took it in his hand, and examined it, and returned it to me, and said he would call in a few days and see me, and close it up; that he was short of money; that he didn't have any money just then. I told him that I wished that he would do that; that I wanted to use the money; but that if he called and saw me in a few days that would be satisfactory. * * * Afterwards Burton said he was short of money then, but that he would have it; that he

would call and see me, and close it up in a few days. I told him then that I was there to complete my part of the contract to-day,—all that was necessary for me to have done,—and that I made him this tender.” The defendant’s evidence as to what transpired between the parties at that time was essentially different. The jury found with the plaintiff. Therefore, in examining the questions involved in this case, we must assume that the evidence of the plaintiff, as to what occurred between the parties at that time, is correct. After the transaction which occurred between the parties at the defendant’s office on December 2, 1886, nothing was done by the defendant towards the fulfillment of the contract. On the 15th day of December, 1886, the plaintiff wrote to the defendant that he had waited several days beyond the time asked; that he wanted to use the money very much, and would like the matter settled that day. The next day the defendant replied by letter, in which he stated the efforts he had made to secure the Warren-Street property, and that he had failed to secure it. On the same day or the day following the plaintiff again wrote the defendant, stating that he did not want the Kelly property. All he wished was that the defendant would carry out his contract, and that he should insist upon that being done at once. This action was then commenced to recover the sum of \$500 as liquidated damages for the defendant’s failure to perform the said contract. The defendant claims that the covenants between the parties were mutual, and that the plaintiff could not maintain this action until he had tendered a performance of his part of the agreement; that no such tender was made; and hence the recovery in this action was unauthorized. We think it must be admitted that the agreement between the parties was mutual, and, unless the plaintiff tendered a performance of his part of the agreement, this action could not be maintained. Therefore the question whether such tender was made became an important one, and was in fact the principal question litigated on the trial. As we have already seen, the evidence of the plaintiff was to the effect that such tender was made, while the evidence of the defendant tended to show that there was no such tender. That question was properly submitted to the jury. The verdict was adverse to the defendant. We think the evidence justified the verdict, and that the finding of the jury upon that question should be regarded as final.

But the appellant contends that, upon the plaintiff’s own showing, there was an extension of the time for the performance of this contract which effected a withdrawal of the plaintiff’s tender of performance, and hence a second tender was necessary before this action could be maintained. We do not think so. The evidence of the plaintiff was, that there was in fact no postponement of the time when the contract was to be performed. The plaintiff insisted to the end in tendering performance upon his part, thus placing the defendant in default. The plaintiff did not withdraw his tender. It is true the plaintiff said it would be satisfactory if the defendant called and closed the matter up in a few days. It will, however, be observed that after this statement was made the plaintiff still insisted that he was there to complete his part of the contract on that day, and to do all that was necessary to fulfill the contract on his part, and that he then made a tender of the deed. In the light of this evidence, we do not think it can be held that there was such an extension of the time for the performance of this contract, as involved either a withdrawal of the tender made by the plaintiff, or a waiver by the plaintiff of the defendant’s default. The only extension given was upon the sole condition that the defendant should close the matter in a few days. As that condition was not performed, although the plaintiff twice demanded its performance, the plaintiff’s tender remained good, and the defendant’s default was complete when this action was commenced.

We think the deed tendered was in compliance with the terms of the contract between the parties, and that no tender to the plaintiff of commissions was necessary to place the defendant in default. We are also of the opinion

that the court properly held that the sum of \$500, expressed in the contract as liquidated damages, was not in the nature of a penalty. The intention of the parties, as indicated by the language employed in the contract, the nature of the transaction between them, and the circumstances attending it, all tended to sustain the conclusion that the sum expressed in such contract was intended as liquidated damages, and not as a penalty. The question was one of the intent of the parties, as evinced by the entire agreement, construed in the light of the circumstances under which it was made. *Kemp v. Ice Co.*, 69 N. Y. 58; *Little v. Banks*, 85 N. Y. 266. We have examined the other exceptions in the case, but have found none that would seem to justify a reversal of the judgment. We think the verdict was sustained by the evidence, and that the judgment should be affirmed. Judgment and order affirmed, with costs. All concur.

PEOPLE v. CARR.

(Supreme Court, General Term, Fourth Department. November, 1889.)

CRIMINAL LAW—APPEALABLE ORDER—COSTS AGAINST PROSECUTOR.

Code Crim. Proc. N. Y. §§ 719, 720, relating to judgment in special sessions, provide that if defendant be acquitted, and the jury find that the prosecution was malicious, or without probable cause, the court must order the prosecutor to pay the costs of the proceeding, which if he fail to do, or to give satisfactory security therefor, the court may enter judgment for the amount thereof, which may be enforced in the same manner as a judgment rendered by a justice's court, held by a justice of the peace. *Held*, that this is a judgment in a criminal action, and there is no appeal from it allowed by Code Civil Proc. §§ 8044, 8045, which provide for appeals to the county court from judgments rendered by justices of the peace in civil actions.

Appeal from Otsego county court.

The defendant, A. E. Carr, was charged with larceny, E. A. Andrus being the prosecutor. Code Crim. Proc. N. Y. §§ 719, 720, relating to judgment in courts of special sessions, provide that when the defendant is acquitted, either by the court or the jury, if the court certify upon its minutes, or the jury find, that the prosecution was malicious, or without probable cause, the court must order the prosecutor to pay the costs of the proceeding, and that if he do not pay the costs, or give security therefor, the court may enter judgment against him for the amount thereof, which may be enforced in the same manner as a judgment rendered by a justice's court, held by a justice of the peace.

Argued before HARDIN, P. J., and MARTIN and MERWIN, JJ.

W. J. Palmer, for appellant. Charles T. Brewer, for the People.

MARTIN, J. The defendant was arrested for petit larceny, on the complaint of the appellant, and tried before a court of special sessions in Otsego county. A jury was called by the defendant. The trial resulted in a verdict of "Not guilty." The jury also found "that the prosecution was malicious." The court thereupon ordered the appellant, who was the prosecutor, to pay the costs of the proceedings, which amounted to \$12.50. The costs were not paid, nor did the appellant give security to pay the same to the county within 30 days. The court then entered judgment against the appellant for the amount of such costs. From that judgment the appellant appealed to the Otsego county court, where the appeal was dismissed. An appeal was then taken to this court from the order of the county court dismissing such appeal.

The sole question presented on this appeal is whether the appellant had a right of appeal to the county court from the judgment thus entered. That the right of appeal in such a case is not given by section 749 of the Code of Criminal Procedure, was held in *People v. Norton*, 33 Hun, 277, 2 N. Y. Crim. R. 322, and is admitted by the appellant. The appellant claims that the right is given by sections 3044 and 3045 of the Code of Civil Procedure. Those sections provide that the only mode of reviewing a judgment rendered by a justice of the peace in a civil action is by appeal to the county court. It will be

observed that the right of appeal there given is limited to an appeal from a judgment rendered in a civil action, and no provision is made for an appeal in any other. Therefore, unless the judgment sought to be reviewed can properly be said to have been rendered in a civil action, it is quite obvious that no authority for this appeal can be found in the sections mentioned. Thus, the question is presented whether the judgment entered by the court of special sessions in this case was a judgment rendered in a civil action. That the trial, verdict, and order to pay costs were had, rendered, and made in a criminal, and not in a civil, action is not denied. But the appellant's claim is that the judgment was "a civil judgment, and must be enforced in all respects as if rendered in a civil action." While it must be admitted that such a judgment, when rendered, is to be enforced in the same manner as a judgment rendered by a justice's court, yet it does not follow that the judgment is rendered in a civil action, nor that it falls within the provisions of the Code of Civil Procedure relating to appeals in civil actions. That this was a criminal action there can be no doubt, and we know of no process by which such an action could be transformed into a civil action. The right given by the Code of Criminal Procedure to impose costs upon the prosecutor, where the prosecution is found to have been malicious, is a mere incident to the action, and the proceeding to enforce their collection is a proceeding in the action. The judgment is to be entered by the court in which the action is tried, and not by the justice, acting in his capacity as a civil magistrate. Code Crim. Proc. § 720. It was not intended that the provisions of section 720 should have the effect to change the action from a criminal to a civil action; but the purpose of that section was to prescribe a mode of procedure to be adopted in a criminal action for the collection of such costs when imposed. We do not think a judgment rendered in pursuance of sections 719 and 720 of the Code of Criminal Procedure can be held to be a judgment in a civil action. Nor do we think the provisions of sections 3044 and 3045 of the Code of Civil Procedure applicable to such a case. But it is claimed that unless this appeal is sustained there can be no review of the judgment appealed from. If this were admitted, and if it were conceded that a right to review such a judgment should exist, still, we would not be justified in holding that a right of appeal from a judgment rendered in a criminal action is given by those sections of the Code of Civil Procedure. If the law is defective, its defects should be supplied by legislative, rather than judicial, action. As was said by SMITH, P. J., in *People v. Norton*, *supra*: "It may well be that the legislature intended to provide no appeal from judgments of this nature, as they do not involve the merits of the prosecution, and the amount of costs chargeable upon a prosecutor in a court of special sessions can never be large." We think the county court properly dismissed the appeal in this case, and that the order appealed from should be affirmed. Order affirmed. All concur.

DANIELS v. STATEN ISLAND RAPID TRANSIT R. CO.

(*Supreme Court, General Term, Second Department. December 10, 1889.*)

RAILROAD COMPANIES—INJURIES TO PERSONS ON TRACK—INSTRUCTIONS.

In an action against a railroad company for the killing of plaintiff's intestate, caused by defendant's alleged negligence in not having a head-light on its locomotive, a verdict in plaintiff's favor on conflicting evidence will not be disturbed where the question respecting the light was submitted to the jury in the following language: "Was it because there was no head-light that he did not discover the train, and thus avoid the accident? If you are satisfied of that, then the defendant was negligent; and if the plaintiff was free from negligence the defendant is liable."

Appeal from circuit court, Richmond county.

Action by Catherine P. Daniels, as administratrix of John W. Daniels, deceased, against the Staten Island Rapid Transit Railroad Company, for the alleged negligent killing of her intestate. From a verdict and judgment in

plaintiff's favor, and an order denying defendant's motion for a new trial, it appeals.

Argued before BARNARD, P. J., and DYKMAN and PRATT, JJ.

Tracy, MacFarland, Boardman & Platt, for appellant. *De Groot, Rawson & Stafford*, (Sidney F. Rawson, of counsel,) for respondent.

DYKMAN, J. This is an appeal from a judgment and order denying a motion for a new trial in an action for the recovery of damages for causing the death of the intestate, husband of the plaintiff. The testimony presented the usual questions which arise in this class of cases, and the principal accusation against the defendant was the absence of lights sufficient to enable the deceased man to discover the approach of the train that caused his death. The evidence made a case for the consideration of the jury, and the charge of the trial judge laid a burden upon the plaintiff of which the defendant can make no complaint. The attention of the jury was very pointedly directed to the question of lights in the following language: "Was it because there was no head-light that he did not discover the train, and thus avoid the accident? If you are satisfied of that, then the defendant was negligent; and if the plaintiff was free from negligence the defendant was liable." Under that charge it may well be assumed that all other questions of negligence on the part of the defendant were eliminated from the consideration of the jury, and the defendant was found guilty of negligence respecting the head-light of the locomotive engine, and that the intestate of the plaintiff was found free from negligence in all respects. Such a finding leaves but small scope for the action of an appellate court. The testimony respecting the lights was quite conflicting. The accident occurred at a highway crossing, and trains from opposite directions were run over the crossing very nearly at the same time.

We do not therefore feel at liberty to interfere with the verdict of the jury, and the judgment and order appealed from should be affirmed, with costs. All concur.

RYERSON v. RYERSON.

(Supreme Court, General Term, Second Department. December 10, 1889.)

1. REFEREE'S REPORT—MOTION FOR JUDGMENT.

On application to the special term for judgment on report of a referee appointed by consent to hear and determine the issues in an action for dissolution of a marriage, it is error to set aside the report, and to direct the issues to be tried at circuit, but the court should either grant or deny the application only, where there is no charge of misconduct on the part of the referee, and no application to vacate the order of reference, or for the referee's removal.

2. SAME.

Where there is no irregularity and no collusion or fraud charged, and there is evidence to sustain the referee's report, judgment should be rendered thereon.

Appeal from special term, Orange county.

Action by Edmond F. Ryerson against Milly Ann Ryerson, his wife, to dissolve the marriage. From a denial of his motion for judgment on report of a referee, plaintiff appeals.

Argued before BARNARD, P. J., and DYKMAN and PRATT, JJ.

M. N. Kane, (J. J. Beattie, of counsel,) for appellant. *P. V. Sanford*, (Geo. W. Greene, of counsel,) for respondent.

DYKMAN, J. This is an action by the husband against his wife, to procure a dissolution of the marriage tie on the ground of adultery. Upon the stipulation of the parties a referee was appointed by the court to hear and determine the action, and after a trial before him he made a report in favor of the plaintiff. Thereupon an application was made to the special term of the su-

preme court for judgment upon the referee's report for the relief demanded in the complaint, and the court denied the motion, and ordered the issues in the action sent to the circuit for trial; and the appeal now before us is from that order.

When an action is tried before a referee, appointed by the court to hear and determine the same, his report stands as a decision of the court, but in an action to annul a marriage a judgment cannot be entered upon such report without the direction of the court; but it has been many times decided that the court will not review the findings or report of the referee in such a case upon an application for judgment thereon. The question was very fully examined by the general term in this department in the case of *Schroeter v. Schroeter*, 23 Hun, 231, and *Ross v. Ross*, 31 Hun, 140, and, although one of the members of the court dissented from the conclusion reached in the last case, his dissent was upon a question not involved in this appeal. We have found no decision adverse to those named, and the same doctrine was recognized in the recent case of *Mattheus v. Mattheus*, 6 N. Y. Supp. 589. Our views were fully expressed in the two opinions delivered in the case of *Ross v. Ross*, *supra*, and a restatement of them here will be neither necessary nor profitable. We have found no reason to modify our views. So far as the supreme court can determine the question, we regard it as settled that, upon an application to the special term for judgment upon the report of a referee appointed to hear and determine a matrimonial action, the court will not examine the case upon the merits, or set aside the report for errors committed upon the trial. The court, upon such an application, will only make such examination as may be necessary to ascertain whether the report has any support in the evidence, or whether there has been fraud or collusion, or any evil practice, in the case by either party. After such examination the application for judgment will be either granted or denied, and the court will proceed no further, because no other subject is presented for its action. It is beyond the province of the court, upon such a motion, to set aside the report, because no such application is made, no such relief is sought, and neither of the parties are heard upon such a question. Neither will the court, upon such an application, direct the issues in the action to be tried at the circuit. The action was referred by consent, and when the parties adopt that mode of trial they do so in the exercise of a legal right; and the court is vested with no jurisdiction or authority, in the absence of a reason sufficient in law, to vacate the order of reference, and nullify all that has been accomplished under and in pursuance of the same. *Maicas v. Leony*, 113 N. Y. 619, 20 N. E. Rep. 586. In this case there has been no charge of misconduct against the referee, and no application to vacate the order of reference, or for the removal of the referee, or for a trial in any other manner than before the same referee; and yet the order from which this appeal is taken destroys the order of reference, nullifies all the proceedings upon the trial, and prescribes a mode of trial which the parties have repudiated by an express agreement for the appointment of a referee to try the cause, instead of the court and jury.

Neither do we find any reason for the denial of the motion for judgment upon the report of the referee. There was no irregularity, and there was no collusion or fraud charged or claimed. On the contrary, the cause was fairly tried and severely contested, and two unequivocal acts of adultery were sworn to by two different witnesses; and, if their testimony is true, it is sufficient to sustain the report of the referee. Whether the denial of the defendant and the co-respondent should be taken to answer such testimony; or whether, upon a full consideration of all the evidence and all the circumstances, the plaintiff has sustained his case by sufficient evidence; or whether the referee reached a wise or erroneous conclusion,—can only be properly determined upon an appeal from the judgment, and a case made and settled in the usual and orderly way. We therefore reach the conclusion that the order from

which this appeal is taken should be reversed, with costs and disbursements, and the motion for judgment upon the report of the referee should be granted, with \$10 costs. All concur.

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GREENHALGH v. MARGGRAF.

(*Supreme Court, General Term, Second Department. December 10, 1889.*)

WILLS—CONSTRUCTION—DURATION OF ESTATE.

Testatrix gave her husband all her property on condition that he execute to testatrix's daughter, E., a bond and mortgage of certain of the property, "to secure the payment of \$2,000 to my said daughter, should my said husband marry again.

* * * It is my will that if my beloved husband remain single he shall enjoy the benefit of the property given, devised, and bequeathed as above for and during his natural life, and from and immediately after his decease I devise and bequeath the said property to my beloved daughter, E., and her heirs forever." *Held*, that the husband had a life-estate in all the property on condition that, in case he remarried, he execute the mortgage for the payment of \$2,000 to the daughter..

Appeal from special term, Kings county.

Action to determine the construction of a will, and for an accounting, by Emma L. Greenhalgh against Franz Marggraf. From the judgment entered, defendant appeals.

Argued before BARNARD, P. J., and DYKMAN and PRATT, JJ.

Wm. P. Pickett, for appellant. *John McCrone*, for respondent.

DYKMAN, J. The plaintiff in this action is the only child of Sophia D. Marggraf, deceased, and the defendant was her husband; and the rights of both of the parties are derived from the last will and testament of the deceased mother and wife. The portion of the will involved in this action reads as follows: "I give, devise, and bequeath to my beloved husband, Franz Marggraf, all my property, real and personal, subject to the condition, nevertheless, that he execute a bond and mortgage on my house and lot situate, lying, and being on the easterly side of Sixth avenue, in the city of Brooklyn,—said house is known as 'House No. 586,'—to my beloved daughter, Emma L. Marggraf, or her guardian, should she be a minor at the time of my decease. The bond and mortgage to be executed by my said husband is to secure the payment of two thousand dollars to my said daughter, should my said husband marry again, or, if my said daughter is a minor at the time of that event, then the said sum of two thousand dollars shall be given in trust to her guardian hereinafter appointed, until she has attained the age of twenty-one years, when her guardian shall put her in full possession of the said sum of money. It is my will that if my beloved husband remain single he shall enjoy the benefit of the property given, devised, and bequeathed as above for and during his natural life; and from and immediately after his decease I devise and bequeath the said property to my beloved daughter, Emma L. Marggraf, and her heirs forever. I nominate and appoint Andreas P. Anderson, of 212 Conover street, Brooklyn, as a guardian for my beloved daughter, Emma L. Marggraf. I hereby nominate and appoint my beloved husband, Franz Marggraf, executor of this, my last will and testament, and revoke all other and former wills made and executed by me." The will was dated April 13, 1883. The testatrix died June 26, 1887. The defendant remarried August 15, 1888, and the will was proved March 5, 1889. Upon the trial the plaintiff insisted upon a construction of the will which would terminate the interest of the defendant in the property upon his remarriage, while the husband insisted that the design of the testatrix was to give him a life-estate in the property, with remainder to her daughter, the plaintiff, provided the husband remained single; but that in the event of his remarriage he took the fee, upon payment of \$2,000 to the daughter. The court, at the trial at special term, decided that the true construction of the will gave all the property to the defendant for life, with remainder to the plaintiff, but in the event of the remarriage of the defendant

he took the life-estate upon condition that he should execute to the plaintiff a mortgage upon the property for \$2,000. Both parties were dissatisfied with the decision; but the plaintiff acquiesced, and the defendant appealed.

We can discover no merit in the appeal, for there is nothing to satisfy us that the testatrix intended to offer a premium to the defendant for his remarriage by an enlargement of a life-estate into a fee in that event, to the detriment of her daughter, for whom she provided with so much care. The great question for the defendant is whether his life-estate did not depend upon his remaining in celibacy; but, as the plaintiff has not appealed, we cannot consider that question. The judgment should be affirmed, with costs. All concur.

LENT *et al.* v. NEW YORK & M. RY. CO.

(*Supreme Court, General Term, Second Department. December 10, 1899.*)

1. PARTIES—JOINDER—EMINENT DOMAIN.

The report of commissioners appointed to appraise land taken by the right of eminent domain awarded a large sum to the owner, and a small sum to another, as special guardian of the owner. The general term, in affirming the appraisal, made the whole amount payable to the guardian. *Held* that, though the guardian could sue on the award in his own name alone, under Code Civil Proc. N. Y. § 449, authorizing a trustee of an express trust to sue without joining the person for whose benefit the action is prosecuted, yet it was proper, under section 446, providing that all persons interested may be joined as plaintiffs, to join the owner as plaintiff.

2. EMINENT DOMAIN—COMMISSIONERS' AWARD—ACTION ON.

If a railroad company, which has condemned land under the right of eminent domain, elects, after the report of the commissioners, to proceed and procure the confirmation of the report, the relation of vendor and vendee is established, and the company is bound to pay the award; and this rule is not abrogated by Laws N. Y. 1876, c. 198, amending Laws 1850, c. 140, § 18, [3 Rev. St. (8th Ed.) p. 1745,] and providing that, if the company neglects to record the order confirming the award, and to make payment or deposit for 10 days after the date of the order, any party may record a copy of the order, and the moneys directed to be paid shall be a debt against the company, except that the company may abandon the proceedings by filing a notice to that effect within 80 days after written notice of the recorded order, etc.

Appeal from special term, Dutchess county.

Action by John R. Lent and Henry M. Taylor, special guardian of John R. Lent, against the New York & Massachusetts Railway Company, on an award of commissioners of appraisal of land condemned by defendant. Judgment for plaintiffs, and defendant appeals. Code Civil Proc. N. Y. § 446, provides that all persons interested in an action may be joined as plaintiffs. Section 449 provides that a trustee of an express trust may sue without joining the person for whose benefit the action is prosecuted. Laws 1850, c. 140, § 17, [3 Rev. St. (8th Ed.) p. 1745,] provides for the making and entry by the court of an order confirming the award of the appraisers. Section 18 provides that a certified copy of the order shall be recorded at full length, etc. The amendment of May 3, 1876, (Laws 1876, c. 198,) provides that if the company shall neglect to record the order, and to make the payment or deposit for 10 days after the date of the order, any party to such proceedings, and interested therein, may cause a copy of the order to be recorded; and thereupon the moneys directed to be paid shall be a debt against the company, except that the company may abandon such proceedings by filing, within 80 days after notice in writing of the recorded order, a notice of abandonment.

Homer A. Nelson, for appellant. *Henry M. Taylor*, for respondents.

DYKMAN, J. This is an action upon the award of commissioners appointed to determine the compensation to be made to John R. Lent for certain lands and premises belonging to him, and proposed to be taken by the defendant for the purposes of its incorporation, in addition to certain other lands already

condemned for such purpose. The complaint alleged the incorporation of the defendant; the presentation of a petition by the company praying for the appointment of commissioners of appraisal for the land of John R. Lent; the appointment of three commissioners for that purpose; and the appointment of Henry M. Taylor, one of the plaintiffs, as special guardian of John R. Lent, the other plaintiff in this action, in such proceedings. Then the complaint stated the hearing before the commissioners; the making of their report on the 14th day of July, 1888, of \$14,270.79 in favor of John R. Lent, and of \$300 to H. M. Taylor, as such special guardian; the confirmation of such report, on motion of the defendant, by an order of the court duly entered in the office of the county clerk of Dutchess county, which directed the defendant to pay to Henry M. Taylor, as such special guardian, the award of \$14,270.79, as well as the sum of \$300 so awarded to him as special guardian. The complaint finally set up the appeal by the defendant to the general term of the supreme court from the report of the commissioners, and the order confirming the same, and the affirmance of both, (*Railroad Co. v. Lent*, 4 N. Y. Supp. 88,) and then demanded judgment for both sums so awarded by the commissioners. To this complaint the defendant objected by demurrer, upon five specified grounds: *First*, that plaintiffs have no legal capacity to sue. *Second*, that there is a misjoinder of parties plaintiff; and, *third*, that there is a defect of parties plaintiff. *Fourth*, that causes of action have been improperly united; that a cause of action in favor of John R. Lent and a cause of action in favor of Henry M. Taylor, as special guardian of John R. Lent, have been united in one complaint. *Fifth*, that the complaint does not state facts sufficient to constitute a cause of action. The demurrer was overruled at special term, and the defendant has appealed from the final judgment awarding to the plaintiffs the relief demanded in the complaint, and also from the interlocutory order and judgment entered upon the decision of the special term.

After a most thorough and careful examination, we have failed to discover any merit in the defendant's demurrer, or in the questions of law presented thereby. We can find no reason why the plaintiffs have not legal capacity to sue, and the defendant has pointed out none, as he is required to do by section 490 of the Code of Civil Procedure. The second and third specification of grounds in the demurrer present the same question respecting the parties plaintiff, and in relation thereto we deem it sufficient to say that, under the order of affirmance of the general term, the whole amount was made payable to the plaintiff Henry M. Taylor, and he could therefore maintain this action in his own name alone. But the whole amount did not belong to him, and when he received the same he would hold the great part of the same for John R. Lent, to whom it belonged. While, therefore, Mr. Taylor might maintain the action alone under section 449 of the Code, yet as John R. Lent had an interest in the subject of the action, and in obtaining the judgment demanded, it was proper to join him as plaintiff. Code, § 446; *Hubbell v. Medburg*, 53 N. Y. 102. In relation to the fifth ground specified by the demurrer, it is deemed sufficient to say that the complaint, after alleging the facts in relation to the petition for the appointment of commissioners and their appointment, and the report which they made, then states that such report was presented to the court, and, on motion of the defendant, in all things confirmed. The rule seems to be now that, if the company in proceedings like these elect to proceed and procure the confirmation of the report of the commissioners of appraisal, the relation of vendor and vendee becomes thus established between the parties, and the corporation is bound to pay the award. *In re Railroad Co.*, 67 N. Y. 242. In our view, this salutary principle has not been abrogated or affected by the amendment of May 3, 1876, and our conclusion is that the judgments and order from which this appeal was taken should be affirmed, with one bill of costs on this appeal.

MORGAN v. NEW YORK & M. RY. CO.

(Supreme Court, General Term, Second Department. December 10, 1889.)

EMINENT DOMAIN—APPRAISERS' AWARD—RECORDING.

3 Rev. St. N. Y. (8th Ed.) p. 1745, § 18, providing that a certified copy of the order confirming the award of appraisers in condemnation proceedings shall be recorded "in the clerk's office of the county in which the land described in it is situated," does not require recording in the book of conveyances, but a recording in the office of the county clerk is a sufficient compliance.

Appeal from circuit court, Dutchess county.

Action by Mary L. Morgan against the New York & Massachusetts Railway Company on an award of commissioners of appraisal of land condemned by defendant. Judgment for plaintiff, and defendant appeals. 3 Rev. St. N. Y. (8th Ed.) p. 1745, § 18, provides that a certified copy of the order confirming an award of appraisers in condemnation proceedings shall be recorded "in the clerk's office of the county in which the land described in it is situated.

Homer A. Nelson, for appellant. Horace D. Hutcuff, for respondent.

DYKMAN, J. The appeal in this action presents the same questions, substantially, as those raised in the case of John R. Lent against the same defendant, *ante*, 729, (decided at the present term of the court.) Both actions were upon awards of commissioners of appraisal in the same proceedings, but in this action there was an answer to the complaint, and a trial before a jury, at which a verdict was directed for the plaintiff by the trial judge. The questions of law involved in this case are the same as those in the *Lent Case*, and the objection respecting the recording of the order of confirmation of the report of the commissioners of appraisal is a question of fact, founded upon an erroneous construction of the statute which requires the order to be recorded. The contention of the defendant is that the order should be recorded in the book of conveyances, but such a construction would render a compliance with the statute impossible in those counties having a register's office, where all conveyances are required to be recorded. The order was recorded in the office of the county clerk of Dutchess county, and we think the statute received compliance in that respect. There being no question of fact involved upon the trial, the trial judge was justified in directing a verdict. The judgment should be affirmed, with costs.

DOLLE v. RHINEHART *et al.*

(Supreme Court, General Term, Second Department. December 10, 1889.)

SALE—RECOVERY OF GOODS—TENDER OF PRICE.

The rule that one seeking to recover goods from a fraudulent purchaser must return or tender the money paid therefor is not applicable to an action for the recovery of the goods from a third person, who is not a *bona fide* purchaser for value.

Appeal from circuit court, Kings county.

Action by Frederick Dolle against Charles D. Rhinehart, sheriff, and Patrick Monaghan, to recover personal property seized under execution. Trial by jury, and verdict for plaintiff, and from the judgment entered thereon defendants appeal.

Argued before BARNARD, P. J., and DYKMAN and PRATT, JJ.

Hobbs & Gifford, for appellants. Abram Kling, for respondent.

DYKMAN, J. This is an action for the claim and delivery of personal property, and it is based upon the fraudulent representations of the vendee which induced the sale. The purchaser was Patrick Monaghan, and the action is against him and the sheriff of Kings county, who seized the property by vir-

tue of executions issued against the property of Monaghan, and held the same in his possession at the time of the commencement of this action. The evidence upon the trial was sufficient to require the submission of the questions of fact involved to the jury, and no error was committed in refusing to dismiss the case at the close of the testimony on the part of the plaintiff. In his charge to the jury the trial judge said: "You must be satisfied on this proof that Monaghan went to these parties—Dolle and this Indiana company—with the intent to deprive them of their property, intending never to pay for it, and that he made certain false statements to them which he knew to be false, which were material, and which induced them to trust him, and that upon the faith of these statements they parted with their property. If you find that to be the fact, then no title passed, and in that case Dolle had either of two remedies: If he found that there was fraud, (if there was,) he could affirm the sale if he chose, and sue for the value of the property; or he could disaffirm the sale, repudiate it, and sue for the return of the goods by replevin." The jury must have found that the evidence brought the case up to this severe standard, for a verdict was rendered in favor of the plaintiff.

It appeared upon the trial that \$250 had been paid on account of the goods sold by the Indiana company which had not been returned or tendered, and it was claimed on the trial, and it is claimed here, that no recovery can be had of those goods for that reason. The general rule of law would require such tender or return if the property had remained in the possession of the fraudulent purchaser but the rule is not the same where, as in this case, the property has passed into the possession of a third person other than a *bona fide* purchaser for value. *Pearse v. Pettis*, 47 Barb. 276; *Kinney v. Kiernan*, 49 N. Y. 164. With the facts relied upon by the plaintiff determined in his favor upon evidence sufficient to sustain the verdict, this appeal is destitute of merit, and presents no error. The judgment and order denying a motion for a new trial should be affirmed, with costs.

BANKER v. FISHER *et al.*

(*Supreme Court, General Term, Second Department. December 10, 1889.*)

TRIAL—INSTRUCTIONS—EXCEPTIONS.

After the cause was given to the jury a recess was taken, and plaintiff's counsel retired to prepare his exceptions to the charge, but before he returned, and before the expiration of the recess, the jury had come into court, rendered their verdict, and been discharged. *Held*, that the exceptions were properly disallowed.

Appeal from Kings county court.

Action by Evelina Banker against James A. Fisher and John S. Ferguson and another, to recover money paid by plaintiff on a contract to purchase land, on the ground that the title was not good, as represented. After the jury had rendered their verdict, plaintiff moved the court to allow exceptions, which motion was denied. Plaintiff appeals.

Argued before BARNARD, P. J., and DYKMAN and PRATT, JJ.

George W. Wilson, for appellant. Charles J. Patterson, for respondents.

DYKMAN, J. This is an appeal from an order of the county court of Kings county denying the motion of the plaintiff to allow exceptions to the charge of the county judge on the trial of this action. It appears from the papers that after the cause was given to the jury a recess of the court was taken for a short time, and the counsel for the plaintiff then retired to prepare his exceptions to the charge; but before he returned with his exceptions, and before the expiration of the recess, the jury returned into court, and rendered the verdict, and were discharged, and the exceptions were never taken. Under those circumstances, the exceptions could not be allowed, and the motion for their allowance was properly denied. The order should be affirmed, with \$10 costs and disbursements.

STOKES v. AMERMAN et al.*(Supreme Court, General Term, Second Department. December 10, 1889.)***1. TRUSTS—POWERS OF SUBSTITUTED TRUSTEE—JUDGMENT.**

A judgment entered in the name of two testamentary trustees, after the death of one and resignation of the other, vests without assignment in their successor, who can enforce it by any proceeding open to a judgment creditor.

2. FRAUDULENT CONVEYANCES—RIGHTS OF JUDGMENT CREDITORS.

A judgment creditor can maintain an action to reach property where it is alleged the debtor has bought and paid for it with his own money, but has taken the title in his wife's name, for the purpose of defrauding his creditors.

Appeal from special term, Kings county.

Action by Stephen B. M. Stokes, as sole trustee for the benefit of Mary A. Hewitt, under the last will and testament of Caroline L. Stokes, deceased, against Richard Amerman, Eleanor Amerman, and others, to subject land held in the name of his wife to the satisfaction of a judgment against Richard Amerman. Eleanor Amerman appeals from a judgment overruling her demurrer to the complaint.

Argued before BARNARD, P. J., and DYKMAN and PRATT, JJ.

Bristow, Peet & Opdyke, (David Willcox and L. E. Opdyke, of counsel,) for appellant. *Stephen B. M. Stokes, pro se.*

DYKMAN, J. According to the complaint in this action, Charles W. Stokes and Sarah P. Powell, as testamentary trustees of Mary A. Hewitt, recovered a judgment in the supreme court against the defendant Richard Amerman on the 5th day of November, 1886, for \$4,537.58, with interest from February 1, 1873. Two executions were issued upon such judgment in a regular way against the property of Richard Amerman, and both were returned unsatisfied. Charles W. Stokes, one of the testamentary trustees, has since died, and Sarah P. Powell, the other trustee, has resigned, and the plaintiff has been appointed sole trustee in their place, and the judgment against Amerman has been assigned to him, and he has succeeded to the rights of the original plaintiff. On the 1st day of September, 1883, Robert S. Walker and Frances H., his wife, the son-in-law and daughter of the defendant Richard Amerman, conveyed the lands and premises described in the complaint to the defendant Eleanor Amerman, the wife of Richard Amerman. The purchase price of the property was \$7,500, and the property at the time of the purchase was subject to three mortgages,—one for \$3,500, one for \$1,000, and one for \$900; and, besides assuming those mortgages, the grantee made and delivered to Robert S. Walker her promissory note for \$2,100, and so paid no cash on account of the said purchase. Since the purchase the defendants have paid with money belonging to Richard Amerman the promissory note of \$2,100, the \$900 mortgage, and the interest upon the other mortgages. Then there is a general allegation that Richard Amerman was in fact the purchaser of the premises, and the title was taken in the name of his wife to cheat and defraud his creditors, and hinder and delay the collection of his debts. Then a judgment is demanded which shall give a lien upon the premises to the extent of the money paid therefor by Richard Amerman; that the premises be sold, and the proceeds be applied to the payment of the judgment held by the plaintiff. The defendant Eleanor Amerman demurred to the complaint, because it did not state facts sufficient to constitute a cause of action against her, and the demurrer was overruled on the trial, and she has appealed, and that is the way the cause came here.

The first objection of the appellant relates to the capacity of the plaintiff to maintain this action; the insistence being that he is not a judgment creditor. The foundation for this argument lies in the fact that the judgment was actually entered in the name of the original trustees after the death of one and

the resignation of the other, and after the plaintiff was appointed sole trustee. But the most to be said upon that subject is that the practice may have been irregular, but such irregularity did not impart invalidity to the judgment. In whatever form it vested, the claim belonged to the plaintiff from the time of his appointment, and when it assumed the shape of a judgment the title to the same was vested in him, and he could enforce the same by any proceeding open to a judgment creditor. An assignment of the judgment to him was but a form, because he succeeded to the interests and rights of his predecessors in the trust. It is essential to the maintenance of an action by a creditor to set aside a fraudulent conveyance that the claim which underlies the action has been reduced to a judgment by the plaintiff, and that requisite has received compliance by the plaintiff in this action. The judgment having been thus entered upon a valid claim against the judgment debtor, and being all the time the property of the plaintiff, there is no reason why it should be assailed collaterally in this action, and no reason why the effort to perpetrate a fraud upon the beneficiary in the trust should succeed upon technical grounds alone.

Upon the merits, the effort of the appellant in favor of the demurrer seems to be to show that no trust resulted either to the judgment debtor or to the judgment creditor, and that the action cannot be maintained upon the ground of an express trust secretly created by the debtor and his wife. It is also insisted that the plaintiff cannot sustain this suit as an action to reach property fraudulently conveyed by the judgment debtor, because he neither owned nor conveyed the premises. The answer to all those arguments is that the complaint was not framed to contain such a case. The theory and claim of the plaintiff is that the judgment debtor has devised and executed a fraudulent scheme to buy property, and take the title in the name of his wife, to elude and defraud his creditors and perpetrate the fraud; that the money of the husband has been applied to payment of the land subsequent to the purchase, in pursuance and consummation of the fraudulent scheme; and that the wife has paid nothing. Such allegations constitute a cause of action in favor of a judgment creditor, and are sufficient, when admitted or proven, to enable him to reach the interest of the judgment debtor in the property, and procure the application of the same to the payment of his judgment. Any other rule would enable a judgment debtor to purchase property at will and to any extent, and place the title in a third person, and thus put his creditors at defiance. There is no statute and no rule of law to bar the equitable right of the plaintiff to reach the interest of his judgment debtor in the property in question. Fraud vitiates all transactions into which it enters, and, no matter what form or complexion it may assume, a court of equity will permit no advantage to be derived from its perpetration. The judgment appealed from should be affirmed, with costs. All concur.

COFFIN et al. v. HOLLISTER.

(*Supreme Court, General Term, Third Department. December 11, 1893.*)

1. FALSE REPRESENTATIONS—EVIDENCE.

In an action for about \$2,000 worth of goods alleged to have been obtained by a firm from plaintiffs on credit, by false representations, it appeared that the representations were made about 18 months before the sale, and that during that time the firm had bought of plaintiffs and paid for many goods. A short time after the sale of the goods sued for the firm assigned, and a statement of their financial condition showed a deficiency of about \$7,000, exclusive of a debt due one of the partners. This partner had about \$11,000 applicable to the firm debts. He died before trial, and the other partner testified that the goods were bought with an intention of paying for them. The evidence as to the representations was conflicting, and it was not shown that they were untrue when made. The firm was then doing a good business. *Held*, that the evidence showed no intent by the firm not to pay for the goods at the time of their purchase, and a judgment for defendant was warranted.

2. SAME.

Debts due by the firm to one of the partners cannot be considered in examining its financial condition.

3. SAME.

Evidence of false statements made by one of the partners after the sale, as to the firm's financial condition, is immaterial.

Appeal from judgment on report of referee.

Action by Lemuel Coffin and others against William H. Hollister, Jr., assignee of Perry E. Toles and Phineas S. Pettit, individually and as copartners under the firm name of Toles & Pettit. From a judgment for defendant, plaintiffs appeal.

Argued before LEARNED, P. J., and FISH and PUTNAM, JJ.

Hall & McGregor, (B. H. Hall, of counsel,) for appellants. *Nelson Davenport*, for respondent.

LEARNED, P. J. This is an action to recover from Hollister, the general assignee of Toles & Pettit, certain goods which, the plaintiffs aver, belong to them, and which they aver were fraudulently obtained from them by Toles & Pettit about October 31, 1881, on a credit of 60 days, and have not been paid for. When this case was previously before this court we held that it was competent for plaintiffs to prove that in March, 1880, Toles & Pettit had made certain statements as to their property to plaintiffs before the first sale of goods, and had made confirmatory statements, down to October 31, 1881, and we granted a new trial for the exclusion of this evidence. 31 Hun, 81. On the second trial the referee before whom the case was then tried found that there were no facts which authorized plaintiffs to rescind the sale or to retake the goods, and that at the time of the commencement of the action the said defendant was the actual owner of the goods. The plaintiffs now appeal, and the principal, if not the only, ground of appeal is that the referee erred in his findings of fact. We may refer to the opinion given when the cause was here before, as it contains an examination of much of the testimony then given, some of which seems to have been given also on the last trial. 31 Hun, 81.

As to the general principle governing this case, we need only cite *Morris v. Talcott*, 96 N. Y. 107; *Nichols v. Pinner*, 18 N. Y. 295; *Bank v. Bogart*, 81 N. Y. 108; *Macullar v. McKinley*, 99 N. Y. 353, 2 N. E. Rep. 9. In brief, there must have been an intent, when the property was purchased, not to pay for it; and a condition of known insolvency is not enough. "The intention not to pay can no more be inferred from the mere fact of insolvency than the fact of insolvency can be inferred from the existence of an intention not to pay." Yet it should be remarked that there might be such a condition of utter and hopeless inability to pay as would justify the belief of a fraudulent intent. The sale of goods in question, amounting to about \$2,000, was made October 31, 1881. As to the condition of the firm soon after that time, we have the testimony of their book-keeper. In the statement of their condition he places, among their liabilities, over \$12,000 owing to Toles, one of the partners. Now, plainly, this liability is not to be considered in examining their condition. Omitting this, the statement shows liabilities of little less than \$43,000. The same statement shows assets over \$48,000. The witness states that during the two years since the firm commenced business it had lost about \$14,000. But in making this statement he includes the loss of capital, and of money lent by the partner, Toles; for it appears that Toles put in \$600, and Pettit \$3,000. Toles had also put in (including rent not paid to him) about \$12,000. In the schedules attached to the assignment made January 3, 1882, it appears that the actual (not nominal) value of assets was about \$40,000; the nominal, about \$57,000. The liabilities, exclusive of the debt to Toles, were about \$45,000. From these schedules it also appears that Toles had property, above incumbrances, of the value of about \$30,000;

liabilities, about \$19,000. Now, it is true that this property was also mortgaged to secure liabilities of Toles & Pettit and of Toles. But, of course, these mortgage liabilities are not to be added to the liabilities already stated; that is, we are not to deduct the mortgages first from the assets, and then to set up the total debts against the balance. We must take the total debts and the total assets in order to see what was the condition of the firm. We have deducted from Toles' real estate the taxes, and those mortgages which were not collateral to debts of Toles & Pettit, or to debts of Toles, and that makes the value of the real estate \$20,000. The same witness made up a statement after the assignment, by which he shows unpreferred liabilities of Toles & Pettit about \$24,000, and assets to pay them about \$7,000, leaving deficiency \$17,000. But it is evident that in these unpreferred liabilities is included the debt to Toles of over \$10,000. Deducting this, the unpreferred liabilities are about \$14,000, and the deficiency about \$7,000. And we have already seen that of Toles' property there was about \$11,000 surplus applicable to these debts of Toles & Pettit. So much for the financial condition of the firm and the partners at the time of the purchase. Mr. Toles died before the first trial. Mr. Pettit testifies that he made the purchase with a view of paying for it, and not with any intent to avoid payment.

The plaintiffs charge an act in the nature of a crime, which must be proved, and cannot be presumed. *Morris v. Talcott, ut supra*. The representations alleged to have been made by Toles & Pettit were made in March, 1880, when plaintiffs, through their salesman, solicited the custom of this firm. During the two years the firm bought some \$7,000 worth of the plaintiffs, and (excepting the last bill) paid for the same. The plaintiffs also charge that the rating of the firm on a mercantile agency, as it first appeared in December, 1879, and was continued through 1880 and 1881, was too high, and that they were deceived thereby. A letter of the firm to one of the firms of whom they bought, in March, 1880, refers to the rating as from \$40,000 to \$75,000, and says that it is not too high. This came to the knowledge of plaintiffs. There is evidence, too, that Toles & Pettit were subscribers to this agency. There is a conflict of evidence as to the alleged statements made by Pettit to the salesman. These alleged statements contained an assertion as to Toles that he was worth \$75,000. There is no proof as to what Toles was then worth. It is therefore not shown that the statement was untrue, or that the rating was then too high. It is shown that the firm did a very good, if not large, business, and it is probable that they did business at a loss. But it does not appear when that loss was enough to make the firm insolvent, if, indeed, (including the assets of Toles,) it became insolvent. We do not think it would be profitable for us to detail the testimony in this case. We have examined it carefully. The question, as already stated, must be one of the intent of the firm at the time of the purchase. While we may review the report of the referee on questions of fact, we are strongly of the opinion, as we have repeatedly said, that generally the conclusion of an able and impartial referee, who hears and sees the witnesses, is better on questions of fact than that of an appellate court, which must only read the testimony. Even if we should think that we might have come to a different conclusion, we should still hesitate to reverse, on that ground, the referee's findings. But in the present case we think the report is justified by the evidence. The alleged representations were made some 18 months before the sale in question. It can hardly be assumed that these representations were made with intent to defraud. The firm went on and did business for nearly two years. Their sales during 1881 were about \$80,000. They did an increasing business, and were behind their orders; but it evidently appears that their expenses were too great, and thus they lost money. We think, from an examination of the evidence, that, when they made the purchase in question, it is not proved that they did not intend to pay for the goods, or even that they knew themselves to be in such a con-

dition that they could not pay for them. They were probably hopeful, and more hopeful than the event warranted. They are, however, to be judged by the condition as it then appeared to them.

The plaintiffs urge that Pettit in January, 1882, made a false statement of the condition of the firm to one Smith, manager of a mercantile agency. But this statement could have had no effect on the plaintiffs in their sale of October previous. The same witness testifies to a conversation in December, 1881, in which Pettit said their rating was correct. This, too, was after the sale in question, and thus was immaterial as to the plaintiffs. The rating originally given in the books of the agency was made, as testified, on the report of one Sims, made December 5, 1879. It does not appear that Toles or Pettit made any statements to Sims, or to the mercantile agency, on which that rating was based. It may be argued that the firm knew of the rating, because they were subscribers to the agency, and because of the letter of March 3, 1880, to Whitier & Collins. Now, it is not shown that at that time the members of the firm were not worth the sum at which the firm was rated. Mr. Toles was evidently the man of capital in the firm. How much his property may have shrunk between March 3, 1880, and October 31, 1881, is not in evidence. Without repeating the evidence any further, we need only say that we see no ground to reverse the report on the facts. There are no questions as to the exclusion or admission of evidence which need be considered. Judgment affirmed, with costs. All concur.

PEOPLE *ex rel.* DAY v. MOUNT MAGDALEN SCHOOL OF INDUSTRY.

(Supreme Court, General Term, Third Department. December 11, 1889.)

1. DISORDERLY CHILD—ARREST AND COMMITMENT.

Pen. Code N. Y. § 291, which enumerates various acts and conditions of children for which they may be arrested and committed to any reformatory, and provides that any child coming within the descriptions mentioned may be arrested "as a vagrant, disorderly, or destitute child," was amended in 1886 by omitting the words quoted. *Held*, that a commitment under this section, on a charge of "being a disorderly child," was illegal, as that is not one of the grounds mentioned.

2. SAME.

The provision of section 291, that "whenever any commitment of a child shall * * * be adjudged or found defective a new commitment of the child may be made or directed by the court or magistrate, as the welfare of the child may require," does not authorize another magistrate, almost two years after the commitment, and after a writ of *habeas corpus* has issued, on finding that the commitment was defective, to commit the child for a different offense mentioned in the section, without having the child brought before him, and without any new examination, or legal evidence of what occurred at the former examination.

Appeal from special term, Rensselaer county.

Petition for *habeas corpus* by Margaret Day against the Mount Magdalen School of Industry, to deliver Mary Day from the custody of the latter. Following is the opinion of the court below on the hearing:

"EDWARDS, J. The arrest and commitment of Mary Day were made under section 291 of the Penal Code. That section enumerates various acts and conditions of children, under 16 years of age, for which they may be arrested and brought before a proper court or magistrate, by whom they may be committed to any incorporated charitable reformatory or other institution. There is no question that the defendant is a proper institution to receive and care for this child, if she was properly committed. The question is as to the validity of the warrant of commitment by virtue of which she is detained. This warrant was made by M. H. Myers, assistant police magistrate of Troy, and is dated October 24, 1887. It recites that Mary Day was brought before him, charged 'with being a disorderly child,' and that she had been 'duly arraigned and tried upon such charge.' The statute nowhere provides that one may be arrested, convicted, and committed to such an institution on the charge of 'be-

ing a disorderly child.' Prior to 1886 this section provided that a child coming within any of the descriptions or doing any of the acts therein mentioned might be arrested 'as a vagrant, disorderly, or destitute child.' The amendment of 1886 omitted the words in quotation. The magistrate has no jurisdiction to commit, except for one of the several causes enumerated in the section. Being a disorderly child is not one of these. I think, therefore, that the commitment was illegal. This is one of the grounds on which the relator, who is the mother of the child, asks for her discharge.

"The counsel of the defendant, evidently appreciating the fact that this warrant of commitment is defective, seeks to have the child detained by virtue of another warrant of commitment, made by another magistrate, after the writ of *habeas corpus* herein was allowed and served. This last warrant is dated July 29, 1889, and is made by William Donohue, police magistrate of Troy. It recites that Mary Day had been brought before him,—which, however, is conceded by defendant's counsel on the argument to be an error; recites a conviction by Michael H. Myers on October 24, 1887; and that the commitment by Myers 'is defective, in that it describes the said Mary Day with being charged with being a disorderly child.' It then orders and adjudges 'that a new commitment be made, and that the said Mary Day be convicted of frequenting houses of prostitution, and being in concert saloons, dance-houses,' and of various other acts,—all of which are enumerated in section 291 of the Penal Code as causes for which a child under 16 years may be committed. Doubtless this was done under the provision of section 291 which says: 'Whenever any commitment of a child shall, for any reason, be adjudged or found defective, a new commitment of the child may be made or directed by the court or magistrate, as the welfare of the child may require.' The purpose is to permit the committing magistrate to make a new commitment where the child has been regularly arrested, brought before him, convicted of some act mentioned in the section, and the commitment made by him thereupon is found to be defective. In this case we have another magistrate, nearly two years after the conviction, after a writ of *habeas corpus* has been served, finding that the commitment is defective, making out a new commitment for a different offense; and this, without having the child brought before him, without any new examination or legal evidence, without legal evidence or even personal knowledge of what occurred on the former examination, or that the charge against the girl was different from that specified in the warrant of commitment. A bare statement of the facts is all that is necessary to make the error apparent.

"The defendant sets up an adjudication on the merits by the county judge of Rensselaer county in November last, on return to a writ issued upon the application of the father of the child. Although previous adjudications in proceedings by *habeas corpus* are no answer to a new writ, (*People v. Brady*, 56 N. Y. 182,) yet, if there had been such adjudication by the learned judge, I would at least hesitate to entertain these proceedings, but it now clearly appears that there was no such adjudication. Indeed, this question was not presented to him. For the reasons stated, Mary Day must be discharged."

The people and defendant appeal.

Argued before LEARNED, P. J., and LANDON and FISH, JJ.

James H. Ryan, for defendant. Lewis E. Griffith, Dist. Atty., for the People. J. S. Wheeler, for relator.

No opinion. Judgment affirmed, on opinion of court below.

CAMERON v. TRIBUNE ASS'N.

(Supreme Court, General Term, First Department. December 2, 1889.)

1. LIBEL AND SLANDER—MALICE—EVIDENCE. •

In an action for libel, defendant pleaded, in mitigation of damages, that the alleged libelous publications were based on a telegram received from its correspondent, and were published in good faith, and without malice, as items of public news. It appeared that this telegram was based on one received by the correspondent, and the publication charged that plaintiff had been convicted of swindling, while the original telegram simply charged that he had been convicted of violating the laws. *Held*, that the correspondent's testimony as to how the discrepancy occurred, and as to the grounds of his belief that the telegram sent by him was true, was admissible to disprove malice, as bearing on plaintiff's right to punitive damages.

2. SAME—INSTRUCTIONS.

One of the alleged libelous publications charged plaintiff generally with being an "ex-convict," and defendant pleaded justification. On cross-examination of plaintiff as a witness, after he had testified that he had been convicted of violating the liquor law, and served a term of imprisonment therefor, the record of such conviction was admitted in evidence. *Held*, that it was error to charge that the record was to be considered only on the question of plaintiff's credibility, as its object was to show the truth of the charge that he was an "ex-convict," and the question of what was meant by that term was for the jury, in connection with a previous charge that plaintiff had been convicted of swindling. VAN BRUNT, P. J., dissenting.

Appeal from circuit court, New York county.

Action by Alexander Cameron against the Tribune Association for libel. Judgment on verdict for plaintiff, defendant's motion for new trial denied, and defendant appeals.

Argued before VAN BRUNT, P. J., and BRADY and MACOMBER, JJ.

Sackett & Bennett, (James C. Carter, of counsel,) for appellant. *Wallace MacFarlane*, for respondent.

BRADY, J. This was an action to recover damages for two libelous publications injuriously affecting the plaintiff's character. The first was published on the 8th of May, 1885, by the defendant, and the second upon the 9th of May, 1885. The first publication contains three distinct assertions, each of which is clearly libelous, if not proved to be true: *First*, that the plaintiff had swindled a relative; *second*, that he was indicted, convicted, sentenced, and served a term of imprisonment for this offense; *third*, that he swindled the state of Maine by procuring the payment of fraudulent bills. To the first of these a justification was set up in the answer. The second was unfounded. The third was also justified. The second publication, namely, that which was made upon the 9th of May, contained three distinct charges, each of which was libelous, unless proved to be true: *First*, that the plaintiff was a swindler; *second*, that he was an ex-convict; *third*, that he had served a term in prison for swindling. To the first of these charges the same justification against the prior charge of swindling a relative was alleged. This charge was a repetition substantially of the libel contained in the first publication to the same effect. To the second charge, namely, that he was an ex-convict, a justification was set up, and also to the third charge. These two publications, united, show four separate charges, of which three were sought to be justified; or, to state it in another way, the answer alleged a justification of all the charges, except that part of the publication which asserted that the plaintiff had been indicted for swindling his relatives, and was tried, convicted, and sentenced therefor. The defendant alleged, in addition to the justification and other matters, that the plaintiff was a man of bad character, that his general character and reputation were bad, in mitigation of damages; and also, for the same purpose, that the articles complained of were based upon a telegram received from its correspondent in Boston, in the usual course of business, and were printed by the defendant in good faith and without malice, as items of public news, and containing matters of public interest, which it was its duty to publish for the information of the public and the readers of

the newspaper; and that the defendant, its editors and publishers, believed the facts contained in the articles to be true.

Upon the various issues springing out of this condition of the pleadings a large amount of evidence was taken, the defendant seeking to establish the truth of the charges for which justification was pleaded, and the plaintiff to overcome their asserted truth, so far as it could be done, by the evidence which was introduced on his behalf. Inasmuch, however, as the plaintiff was entitled to punitive damages in addition to those which he alleged he had sustained both generally and by special averment, everything that legitimately bore upon the question of malice the defendant was entitled to prove. The rulings in reference to testimony of the character suggested, and which were naturally germane to the subject stated, were not received, at least in instances, and the effect of testimony designed to justify the charge that the plaintiff was an ex-convict was not given its full legal effect, but limited in its operation, in violation of the rules of evidence. The first publication was predicated of a dispatch received by the Boston correspondent of the defendant from Bangor, in the state of Maine, which charged, among other things, that the plaintiff had been indicted for violating the laws of that state, and compelled to pay a heavy fine, and to serve a term of imprisonment in the Hancock county jail. The article based upon this stated, among other things, that he was indicted for the offense of swindling a relative, tried, convicted, and sentenced to pay a heavy fine, and to serve a term in jail. There was a decided discrepancy between the original dispatch and the publication; the original dispatch only stating, in reference to a conviction, that the plaintiff had been indicted and convicted for violating the laws of the state of Maine. Mr. Bryant, the Boston correspondent of the defendant, was asked whether he could state how the discrepancy between the two dispatches—that which was received from Maine and that which he sent to the defendant in a condensed form—occurred. The question was objected to by the plaintiff as immaterial and incompetent, and the objection sustained, to which the defendant excepted. The witness then stated that the dispatch was sent to the defendant by him in entire good faith, and in the belief that the facts stated in it were true. He was then asked what were the grounds of his belief, and this was objected to as immaterial. A colloquy then took place between the court and the defendant's counsel, but the result was that the question with regard to the attempted explanation of the discrepancy remained intact, and the explanation was therefore excluded.

The importance of this evidence is made clear from the fact that the learned justice, in submitting the case to the jury, charged them that if the evidence showed that the defendant acted in good faith, and used all proper and reasonable care and caution in procuring the news items complained of, that fact should be taken into consideration by them in mitigation of damages; and, further, that if the publication was made in good faith, and in the belief that it was true, the plaintiff would not, under such circumstances, be entitled to exemplary damages. The learned judge also charged that, this being an action for libel, the defendant, although pleading a justification in part, might notwithstanding prove mitigating circumstances; and, further, that if the jury believed that an unintentional error crept into the dispatch in condensing the news in the Boston office, they should not consider that as showing malice, if it was unintentional and made in good faith. The object of the evidence considered, and which was excluded, might have had a very important bearing upon the question of punitive damages, for the reason that the defendant's object was to show that the error was unintentional, and therefore not malicious. It thus not only related to that part of the charge of the learned judge already suggested, namely, that, if an unintentional error crept into the dispatch, the change occasioned by it, in the character of the original dispatch, was not to be considered as evidence of malice, but also to the as-

sertion that the plaintiff was convicted for swindling, and which was a very important feature of the defamatory publication. The result was that, while it was declared that if the discrepancy was "unintentional and in good faith" it must not be considered as evidence of malice, the evidence leading to an explanation which might have shown it to be unintentional and in good faith, and thus deprive it of any malicious element, was excluded. There can be no doubt that this was error. It was in hostility to the rule in relation to punitive damages, which the learned judge laid down for guidance of the jury on that subject, and evidence was clearly admissible to disprove malice, if the explanation sought could be satisfactorily made.

In actions of this character the damages are compensatory and punitive, (*Bush v. Prosser*, 11 N. Y. 347,) and the rule is well settled, as stated by Mr. Starkie, that the defendant may, with a view to the damages, give evidence to disprove the existence of a malicious motive at the time of publishing the defamatory matter. *Folk. Starkie, Sland.* (Wood's Notes, § 720.) The adjudicated cases bearing upon this principle are numerous and uniform. *Bennett v. Smith*, 23 Hun, 50-53; *Taylor v. Church*, 8 N. Y. 452; *McKown v. Hunter*, 30 N. Y. 625; *Dolevin v. Wilder*, 34 How. Pr. 488; *Bush v. Prosser, supra*. In *Bennett v. Smith* the defendant, called on his own behalf, was asked, in regard to the libel, "Why did you write it?" but the question was excluded. This was held to be erroneous. The law, it was said in that case, presumes the existence, not the character, of the defendant's malice. That character, therefore, becomes a material fact, and hence the defendant's motive or intent equally material. In *Dolevin v. Wilder* it is said that one of the rules of evidence is to admit proof of any fact which may possibly bear on the question of malice. In *Taylor v. Church* the plaintiff's witness, who was employed to print the defamatory matter, was asked whether the defendant requested him to do it in as private and confidential a way as he could, and whether it was not agreed between him and the defendant that it should be done in that manner, which was excluded. This was held to be error. JEWETT, J., said the evidence called for was pertinent and material in respect to the motives of the defendant in procuring the publication complained of. It tended to disprove that the defendant was influenced by malice to injure the plaintiff by publication, and therefore pertinent upon the question in respect to the amount of damages to be given, beyond a full compensation for the injury, by way of punishment or example. See, also, *Samuels v. Association*, 9 Hun, 295, where it was said by DAVIS, P. J., that when the defendant gives evidence tending to prove malice, then it is the duty of the judge to submit to the jury the question, as one of fact, whether such malice existed in the publication. This view was affirmed in 75 N. Y. 604, the court of appeals adopting the dissenting opinion of the presiding justice in this court. The rule, it must be observed, requires the admission of evidence tending to show the absence of actual malice, as contradistinguished from malice presumed, and for the reason that, if such proof be not given, the double burden may be imposed, one for a proper compensation for injury sustained, and the other one by way of exemplary punishment.

It appears, further, that during the cross-examination of the plaintiff the defendant's counsel produced an authenticated copy of the record of the conviction of the plaintiff for violating the Maine liquor law, and this incident occurred after he had stated that he was tried by a jury for such an offense, found guilty, and sentenced to imprisonment in the county jail, which he therein served. This was admitted, however, only as a part of the cross-examination of the witness, and declared by the court competent only for that purpose, and in the course of the charge the jury were substantially told that the conviction mentioned was to be considered by them in determining the truth or the credibility that should be given to the plaintiff's testimony; and for that reason, and for that reason only, the judge said it was admissible in

evidence. To this the defendant's counsel excepted, the exception appearing upon the record being: "The defendant's counsel duly excepted to that part of the charge in which the court charged that the record of conviction put in evidence can only go to the credibility of the plaintiff." This part of the charge appears to have been erroneous. The object of the record was to show that the statement that the plaintiff was an ex-convict is true. The defendant insists, upon this subject, and properly, that a person who is found guilty by a proper tribunal of a crime against the laws of any state becomes by virtue thereof a convict, and thereafter he is correctly termed an "ex-convict." This might perhaps, under some circumstances, be regarded as a very ungenerous view of the subject, but it is nevertheless legally correct. All the definitions of the words "convict" and "conviction" (as asserted by the defendant's counsel) in the English lexicons and law dictionaries in general use, as well as by the chief text-writers, agree in including within the term "convict" every person duly found guilty by a legal tribunal of a crime, whether it be a misdemeanor or a felony. Webst. Dict.; Worcester. Dict.; Burrill, Law Dict.; Bouv. Law Dict.; Stormouth, Eng. Dict. By the Code of Criminal Procedure, § 3, it is provided that no person can be punished for a crime except upon legal conviction in a court having jurisdiction thereof. And in *Blaufus v. People*, 69 N. Y. 109, FOLGER, J., said: "In ordinary phrase, the meaning of the word 'conviction' is the finding by a jury of a verdict that the accused is guilty." And again, in *Schiffer v. Pruden*, 64 N. Y. 52, the same judge also said: "Doubtless the word 'conviction' ordinarily signifies the finding of the jury by a verdict that the accused is guilty. Yet the word sometimes denotes the final judgment of the court."

If by the phrase "ex-convict" the defendant meant to assert that the plaintiff was an ex-convict because he had been convicted of the offense of swindling a relative, and sentenced therefor, as charged in the first publication, the designation was unjustified; and doubtless it was this view which controlled the learned justice in the court below in limiting the effect of a record showing a conviction for another offense. Nevertheless the question of what was intended should have been submitted to the jury, as was done in the case of *Perry v. Man*, 1 R. I. 263. There the libel was in a printed circular in which the person was called a "convicted felon." In justification the defendant was permitted to allege and prove that the plaintiff had been convicted upon a charge of violating the excise law. The learned judge there said: "If the jury think the term 'convicted felon' in the publication, taken in connection with the context, and with the evidence in the cause, would be understood by the public to mean only an offender against the license law, then the plaintiff has no cause of action for this part of the publication. If, on the other hand, the jury think the terms are to be understood in the strictly legal and technical sense, then the defense of this part of the publication fails." And this latter view was predicated of the proposition that at common law the term "felony" comprehended a large class of high crimes, as well as those of a less atrocious character; felony at common law, however, always drawing after it a forfeiture of goods and chattels. The limitation placed upon the effect of the record, therefore, and by which, as we have seen, it was admitted only for the purpose of affecting the plaintiff's credibility and for no other purpose, was erroneous. It should be borne in mind, in considering this feature of the appeal, that the plaintiff was designated generally as an "ex-convict" in the second publication, and not directly in connection with the charge of swindling, which was also general, although it might have been found by the jury to have meant that, upon proper deliberation upon that subject under the guidance of the court. The learned judge, however, by his ruling, excluded absolutely all other considerations, and the defendant had no benefit whatever of the proof mentioned relating to that issue.

Although other questions are presented on behalf of the defendant by ex-

ceptions duly taken, it is not deemed necessary to consider them, inasmuch as those considered make it necessary for us to reverse the judgment, and order a new trial.

MACOMBER, J. I concur. I also concur in that portion of the opinion of the presiding justice which holds to be erroneous the ruling of the trial court by which the facts and circumstances showing the good faith of the sender of the condensed dispatch were excluded.

VAN BRUNT, P. J., (*dissenting*.) I cannot concur in the conclusion arrived at by Mr. Justice BRADY in respect to some of the rulings upon which he founds his conclusion that the judgment appealed from should be reversed and a new trial ordered. It is said that the learned judge erred in limiting the effect of the judgment roll showing that the plaintiff had been convicted of violating the excise law of the state of Maine to the question of his credibility. An examination of the publication complained of shows conclusively that the word "ex-convict" was used in connection with the charge of swindling his relatives, and that it in no manner referred to any other offense for which the plaintiff had been tried and convicted. The publication of the 7th of May expressly states that the plaintiff was indicted for the offense of swindling his employers, tried, convicted, and sentenced therefor to pay a heavy fine, and to a term in jail. The publication of the 9th of May, 1885, calls plaintiff a swindler and ex-convict; and that the term "ex-convict" was applied because of a conviction for swindling, and was intended to refer to such a conviction, and nothing else, is evident from another clause of the same article, which says: "It gladdens the heart of the mugwump, does it, to learn that a man who has served his term in prison for swindling is now chosen treasury agent by a reform president?" Under this state of the proof, there was no opportunity for the jury to draw the conclusion that the term "ex-convict" was used in any other connection than that referring to his conviction for the offense of swindling. There seems, therefore, to have been no error committed by the learned judge in excluding this record of the conviction of the plaintiff for violation of the excise law from the consideration of the jury, except, so far as it impaired his credibility.

As to the exclusion of the question, "Can you state how the discrepancy between the two occurred?" The whole of the paragraph which concluded with this question is as follows: "In the original dispatch, as received by you, occurs the following: 'Mr. Cameron came to Ellsworth, Maine, from Aberdeen, Scotland, before he was of age, and went to work for a relative at that place for \$15 a month. At the expiration of about two years and a half he had swindled his employer out of about \$4,000, leaving him nearly ruined; and he had also been indicted for violating the laws of the state of Maine, and compelled to pay a heavy fine, and serve a term of imprisonment in the Hancock county jail.' The condensed dispatch reads: 'At the end of a couple of years his employer found that his relative had nearly ruined him, swindling him out of several thousand dollars. He was indicted for the offense, tried, convicted, and sentenced to pay a heavy fine, and to serve a term in jail.' Can you state how the discrepancy between those two occurred?" This question called for facts,—those facts and circumstances which caused the witness to fall into the error which was contained in the condensed dispatch. Although I do not think that the mental operations of the witness were competent evidence, yet the facts and circumstances surrounding the sending of the condensed dispatch were very pertinent upon the question of malice. These the witness was not allowed to state, except in a very restricted manner, and he was expressly precluded from stating by an express ruling what the witness knew of the character of the sender of the original dispatch. This certainly was an important element to be considered by the jury in determining

whether punitive damages should be imposed or not, and also the amount. Although the high character of the sender might not entirely excuse, it might mitigate, in the minds of the jury. The witness, therefore, was not allowed to state the facts and circumstances attending the sending of the condensed dispatch; and after he had testified that this dispatch was sent in entire good faith, and in the belief that the facts stated were true, he was precluded from showing why he believed it to be true, or that he had not given credence to the statements of a mere adventurer, but had relied upon the representations of a person of character and standing. I cannot but conclude that the exclusion of this evidence worked great injustice to the defendant, and that because of it the judgment appealed from must be reversed, and a new trial ordered, with costs to the appellant to abide event.

BARBER ASPHALT PAVING CO. v. BRAND *et al.*

(Supreme Court, General Term, First Department. December 2, 1889.)

1. ACTIONS ON CONTRACTS—BREACH—PLEADING—COMPLAINT.

A complaint in an action for breach of a covenant not to sell asphalt for pavements and blocks, except to certain persons in certain cities, alleging sales by defendant without any provision that the asphalt should not be used for the specified purposes, that it had been used by defendant's vendee for those purposes, and that defendant had notified plaintiff of his intention to sell more for the same purposes, is not demurrable in that it contains an averment that defendant's vendee knew of defendant's covenant, and purchased subject thereto.

2. SAME—RESTRAINT OF TRADE.

The complaint does not show *prima facie* that the contract is void as tending to create a monopoly, or to enhance the price of asphalt pavements.

3. SAME—PARTIES—ASSIGNMENT.

Where plaintiff's assignor entered into the contract with defendant in his own name, and assigned all his interest to plaintiff, it is immaterial that he referred to himself in the contract as representing a certain company, which is not made a party to the action.

4. SAME.

Even if the company were the principal, an averment in the complaint that certain persons, whom it may be fairly implied constituted the company, assigned all their interests in the contract to plaintiff, sufficiently shows that plaintiff is vested with the company's interest.

5. ASSIGNMENT—CONTRACTS.

Such a contract is assignable, and enforceable in equity.

Appeal from special term, New York county.

Action by the Barber Asphalt Paving Company against James Brand and Matthew Taylor, impleaded with the National Vulcanite Company. Defendants Brand and Taylor separately demurred to the complaint, and from a judgment overruling their demurrers they appeal.

Argued before VAN BRUNT, P. J., and DANIELS and BARRETT, J.J.
Coulvert Bros., (Paul Fuller, of counsel,) for appellant Brand. *Shepard & Osborne*, (William H. Shepard, of counsel,) for appellant Taylor. *Wm. W. Niles, Jr.*, (Wm. W. Niles, of counsel,) for respondent.

BARRETT, J. Brand's demurrer is solely upon the ground that the complaint does not state facts sufficient to constitute a cause of action as against him. This complaint sets forth a contract between Brand and one Barber, whereby, for a good consideration, Brand covenanted "not to sell asphalt to be used in the laying of sheet-asphalt street pavements, or in making asphalt blocks," except to certain persons in Philadelphia, Baltimore, Washington, and Brooklyn, for use in their respective cities. All rights acquired under this contract were subsequently assigned to the plaintiff, who now charges a violation of his covenant by Brand, acting in collusion with Taylor and the Vulcanite Company. Transfers from Brand to Taylor, and from Taylor to the Vulcanite Company, are set forth; and it is averred that such transfers,

with accompanying agreements for the purchase and use of asphalt, were made without any condition or provision that such asphalt should not be used for street-paving. It is further averred that under these transfers and agreements the Vulcanite Company has already purchased asphalt, and used it in laying down sheet-asphalt street pavements of substantially the same kind as those which the plaintiff is engaged in laying, and that Brand has notified the plaintiff that he was about to furnish asphalt to the Vulcanite Company for such purposes. The main ground of the demurrer seems to be that Brand notified the Vulcanite Company of his covenant with Barber, and that that company purchased "subject thereto." I am unable to see what answer this is to the charge that Brand has violated his covenant, and proposes to continue such violation. The statement in the complaint that the Vulcanite Company "bought subject" to the contract between Brand and Barber is simply the pleader's conclusion as to the legal effect of the facts. Those facts are that the transfers and agreements under which the Vulcanite Company is proceeding contain no condition or provision corresponding to that embodied in the agreement between Brand and Barber. The company, however, had notice of the condition contained in the latter agreement; and the effect of that notice, in the pleader's estimation, is that the company, notwithstanding the absence of a similar covenant or condition in its agreement, took subject to the original covenant. Brand, in effect, says to the company: "I am bound, but I will sell asphalt to you in violation of my agreement; asphalt which you are to use for the very purposes debarred to me. Now, if you are stopped from so using it, remember I showed you my covenant; and you must not have recourse to me." To say that under such circumstances there is no cause of action against Brand, amounts to the contention that a conspiracy to evade one's bargain cannot be checked, if the conspirators are perfectly frank with each other. There is not a word in the complaint indicating that either Brand's or Taylor's transfers or agreements contained any provision to the effect that they were subject to the original covenant with Barber. On the contrary, the plain effect and meaning of the statements made is that nothing of the kind was embodied in these instruments; that they were entirely without limitation; that their objects and purposes were to evade Brand's covenant,—a covenant which was well known to all parties; that such objects and purposes have been acted upon, and partly effected, through the instrumentality of the Vulcanite Company,—a corporation organized by Brand and Taylor to effect their ends; and that it is proposed, in defiance of the original covenant, to proceed with the sale of asphalt, and to use that substance in the laying of pavements of substantially the same character as those laid by the plaintiff.

Taylor's demurrer raises other questions. It is claimed that there is a defect of parties, because Barber, in the contract with Brand, refers to himself as "representing the Trinidad Asphalt Pool." On this it is contended that the pool, or the persons who constitute it, should have been made parties. The answer is that the contract was Barber's, individually. He entered into it in his own name, and so signed it. Having taken that position, it is immaterial whom he represented. Having assigned all his right, title, and interest in the contract to the plaintiff, that company, so far as these defendants are concerned, became fully vested.

But, even if the pool were treated as the principal, it is fairly to be implied from the language of the complaint that the plaintiff, (Barber himself), James Archibald, and J. Joseph Albright constituted such pool. It follows, in view of the averment, that Barber, Archibald, and Albright subsequently assigned to the plaintiff all their right, title, and interest in the contract; that the plaintiff is vested with the pool's interest.

The other points made by counsel for Taylor do not require extended consideration. However it may turn out upon the trial, when all the facts are

developed, it is quite clear that the complaint, standing alone, is not amenable to the criticism that the contract sought to be enforced is void, as tending to enhance the price of asphalt pavements, or to create a monopoly. The complaint on its face is perfectly good, under the cases of *Match Co. v. Roeber*, 106 N. Y. 484, 13 N. E. Rep. 419, and *Leslie v. Lorillard*, 110 N. Y. 533, 18 N. E. Rep. 363. Upon demurrer, all the facts alleged, tending to show that the purpose of the contract was lawful, are admitted; and these facts fully support the complaint on this head. The case of *Match Co. v. Roeber*, *supra*, is also an authority in support of the assignability of the contract, and the propriety of enforcing it in equity. The interlocutory judgments should be affirmed, with costs against each of the parties demurring. All concur.

HELLWIG v. BLUMENBERG et al.

(Supreme Court, General Term, Second Department. December 10, 1899.)

1. CONTRACT—CONSTRUCTION—EXCAVATING—BLASTING.

Where plaintiff contracted to do "all the excavating" in building a house for a certain sum, and upon discovering rock it was agreed that the expense of blasting it should be borne by him and defendants equally, the settlement was a fair one, and he is entitled to recover the amount agreed on in addition to the contract price, as the term "excavating" does not necessarily include blasting.

2. MECHANICS' LIENS—CONTRACT—RATIFICATION BY OWNER.

Though a person may not be a party to the contract for the building of a house, proof of her knowledge and approbation of the work is sufficient to subject her interest in the land on which it is built to the operation of the builder's lien.

Appeal from Westchester county court.

Action by Michael Hellwig against John H. Blumenberg and Henrietta Blumenberg, to foreclose a mechanic's lien. There was a judgment for plaintiff, and defendants appeal.

Argued before BARNARD, P. J., and DYKMAN and PRATT, JJ.

Norman A. Lawlor, for appellants. *Walter S. Alleton*, for respondent.

PRATT, J. The principal question made on the appeal is as to the charge of \$183 for blasting. The written contract was to the effect that plaintiff should do "all the excavating, grading," etc., for the sum of \$674. The defendant claims that the blasting is included in the written contract under the term "excavating," and that no extra charge can be made therefor. The proof is to the effect that when the existence of a large mass of rock was disclosed this question arose between the parties. It was then agreed that plaintiff should blast the rock, and the expense thereof should be borne equally by the parties. The charge of \$183 is one-half of the cost paid out by plaintiff for wages of men in blasting. We do not think that blasting rock is so clearly included in the term "excavating" as to raise any suspicion of plaintiff's good faith when at or near the beginning of his work he insisted on his interpretation of the contract. The question of interpretation was a fair one, and seems to have been settled by the parties at the time in a fair way. That settlement was properly sustained by the court below when plaintiff was allowed judgment for one-half the expense of blasting.

The objection is made that the judgment requires the interest of Henrietta Blumenberg in the premises to be sold to satisfy plaintiff's lien, when it does not appear that she was a party to the contract for the building of the house, or in any way made herself liable for the expenditure. It is to be observed that neither when the motion to dismiss was made, nor at any time during the trial, was the attention of the court called to this point. Proof of her knowledge and approbation of the work would have been sufficient to subject her interest in the land to the operation of the lien. The case does not show

that all the testimony given upon the trial is before us. It may well be that such knowledge and approbation were shown. Judgment affirmed, with costs. All concur.

PRICE v. MAPES *et al.*

(*Supreme Court, General Term, Second Department. December 10, 1889.*)

ASSIGNMENT FOR BENEFIT OF CREDITORS—SALE BY ASSIGNEE—FRAUD.

The sale, by an assignee for benefit of creditors, of the real property of his assignor, at public auction, in a "lump" instead of by parcels, without notice to creditors, and for an apparently inadequate consideration, affords sufficient grounds for suspicion of fraud to justify a general creditor of the assignor in suing to set the sale aside, so as to relieve him from costs.

Appeal from special term, Orange county.

Action by John R. Price, a general creditor of Asa Morehouse, against Thomas A. Mapes, assignee for benefit of creditors of Asa Morehouse and Linn Morehouse, to set aside a sale of the real property of Asa Morehouse, made by Mapes, as assignee, to Linn Morehouse, on the ground of collusion and fraud. The complaint was dismissed, with costs, and plaintiff appeals.

Argued before BARNARD, P. J., and DYKMAN and PRATT, JJ.

Davenport, Smith & Perkins, (*Edward C. Perkins*, of counsel,) for appellant. *George M. Bush*, for respondent Mapes. *T. F. Bush*, for respondent Linn Morehouse.

PRATT, J. The case is a very close one on the evidence; and, while the better position of the trial judge to pass upon doubtful questions gives such weight to his opinion as to prevent a reversal of the judgment, it is thought a modification as to costs will be consonant with justice. The sale of the various lots of ground in a "lump," instead of by parcels, the lack of notice to the creditors, and an apparent inadequacy of consideration, we think, were such grounds of suspicion that the plaintiff was justified in bringing his action; and we think he ought to be relieved from costs. Judgment appealed from modified by striking out the costs and allowances granted, and, as thus modified, affirmed, without costs of appeal. All concur.

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BEADLESTON v. ALLEY *et al.*

(*Supreme Court, General Term, Second Department. December 10, 1889.*)

CORPORATIONS—ACTIONS BY STOCKHOLDERS—DISCONTINUANCE.

The receiver of a corporation in which plaintiff was a stockholder refused her request to sue defendants for an injury to the rights of stockholders, and plaintiff herself brought the suit, making the receiver a party. The latter appeared and answered, asking a dismissal of the action, with costs, but served no answer seeking affirmative relief on the principal defendants. *Held*, that plaintiff might discontinue the action before entry of judgment without notice to the receiver, whether or not a new action would be barred by limitation.

Appeal from special term, Kings county.

Action by Mary Beadleston, a stockholder in the Las Nueve Minas de Santa Maria Gold & Silver Mining Company, on behalf of herself and other stockholders, against John B. Alley and Asbury Harpending, for an accounting, and to recover the amount found due. Before bringing her action, plaintiff requested the United States Trust Company, which had been appointed receiver of the mining company, to bring the action, but it refused, and she made it a party defendant. On the trial an interlocutory decree was directed, but before it was entered plaintiff settled her claim against the principal defendants, and procured an order of discontinuance, without notice to the United States Trust Company. On motion of the latter, the order of discon-

tinuance was set aside, and the interlocutory decree and findings ordered to be filed *nunc pro tunc*, and plaintiff and defendants Alley and Harpending appeal.

Argued before BARNARD, P. J., and DYKMAN and PRATT, JJ.

O. H. La Grange, (*Grove M. Harwood*, of counsel,) for appellant Beadleston. H. M. Herman, for appellant Harpending. R. H. Griffin, (*Robert G. Ingersoll*, of counsel,) for appellant Alley. Stewart & Sheldon, (*Edward W. Sheldon*, of counsel,) for respondent the United States Trust Co.

PRATT, J. The attitude of the trust company, and those whom it represents in this case, does not commend itself to any especially favorable consideration. It was appointed receiver of the mining company April 8, 1884, in a sequestration suit brought by Robbins upon a judgment in his favor for some \$20,673.51. On May 3, 1887, the plaintiff, a stockholder of the company, by letter requested it to bring an action against the other defendants for the relief sought by this action. After six days the company replied by letter through its counsel, from which it may be fairly presumed that they had satisfied themselves that such an action could not be maintained, and formally refused to sue. Thereupon the plaintiff and two or three of the smaller stockholders, who were clients of Mr. La Grange, and to whom alone he owed professional duties in this matter, brought separate suits, joining the trust company as defendant, as they were bound to do, to compel Alley, Harpending, and others to account for alleged misconduct in fiduciary relations towards the mining company, whereby the rights of stockholders had been injured. This suit was in behalf of the plaintiff and other stockholders, but it was, nevertheless, her suit, and wholly subject to her control. The trust company quite unnecessarily appeared and served an answer, in which it demanded that the complaint should be dismissed, with costs. There is no intimation that it, or any other defendant, ever sought any affirmative relief as against any other defendant, and certain it is that no defendant ever served its or his answer against any other defendant. Under those circumstances, I think we must hold that since the Code (sections 521, 1204) no relief could have been granted as between these co-defendants, unless in consequence of some duty which arose out of the peculiar relations of the trust company to the action,—a point which I shall examine later on. Having commenced the suit, plaintiff sought the assistance of other parties interested in the mining company. None of them ever formally came into the action as parties, so that they were ever in a position of peril from liability for costs. They finally concluded that it was desirable for them to participate in the trial; but they did not depend upon the plaintiff or her counsel in that respect at all. On the contrary, they employed their own counsel; and, as I judge, pretty clearly drew the distinction between their position and that of the plaintiff. Their counsel was careful on the trial to state to the court that he appeared for them, which was another form of stating that he did not appear for the plaintiff. I do not overlook the agreement between Mr. La Grange and Mr. Prince, but that seems to have been purely personal, so far, at least, as Mr. Prince was concerned; and if any wrong has been done there, it may be fully redressed in a proper action for that purpose. True, these outside stockholders did pay some money towards the prosecution of the action, but it was all done with the express qualification that they were not parties, or entitled to the rights of parties; certainly not subject to the liabilities of parties. They wanted to fish from the plaintiff's boat, and with her tackle, and simply brought along their own lunch, and offered plaintiff some of it in consideration of her courtesy in permitting them to fish at all. Nothing can be plainer than that they had no standing whatever in the action. The best commentary on this phase of the case is that they do not now claim any standing in court. We may therefore dismiss all allegations by way of criticism, whether moral or legal, on plain-

tiff's conduct in settling the case, so far as they are concerned, unless, perhaps, the receiver may in some way represent them.

It is thus far plain that the plaintiff had the right to settle her own grievance against the parties who had done her the alleged wrong; and it was none of the other stockholders' business how or by what means she did it. Indeed, I fail to see why they were not treated with fair courtesy and reasonable consideration in this very particular. Mr. La Grange seems to have fully conferred with the counsel about all negotiations for the settlement; and she did not cut loose from them until they made demands for greater proportions than she was disposed to accept, and thus became a positive obstruction to her disposition to settle. They had been invited to ride; she simply refused to allow them to drive. She stood alone liable for the costs of the action, the event of which was by no means certain. Indeed the learned trial judge had clearly expressed grave doubt about his conclusion to sustain the action at all. Hence, the settlement and discontinuance of the action fall wholly within, and are justified by the rule established in this district in the *Tremain Case*, 11 Hun, 286, unless there is something in the peculiar relation of the trust company to the action,—a point which I will now examine.

Let us in the first place observe that the trust company's rights are *strictissimi juris*. Under the circumstances disclosed on the trial, it would seem to have been a pretty strong case for original action on its part. Perhaps it was not originally bound to bring the suit unless indemnified against expenses and costs; but no such question arose. Its refusal to act was placed on other grounds. Its lawyers said: "As at present informed of the rights of the parties, we must decline," etc. This was, therefore, a clear election that it would not act, because it then thought that there was no cause of action. It therefore elected to have nothing to do with the action voluntarily. Plaintiff then brought the company in as a formal party. Again did it have an opportunity of coming in and asking the benefit of the action; but it did not do that. It might have suffered default without harm to itself, for it cannot be presumed that the court having discretion over the matter of costs would have suffered it to be injured in that respect if it had not appeared at all. But it did appear, and did repudiate all responsibility for the action by a practical denial, or that which amounted to a denial, of the plaintiff's material allegations. It therefore did all that it could to obstruct the plaintiff, and prevent her from the establishment of her alleged rights at that stage of the action. Doubtless that was not the motive, but it was nevertheless the result, of its conduct. Not only this, it asked costs for being thus involuntarily brought into the controversy; and thus, in every way, did this trust company manifest its refusal to avail itself of this action, instead of interposing a general answer, pleading its ignorance of its rights and duties, and making itself the instrument of the court in protecting the rights of the stockholders, as it might, not to say ought to, have done. True, it took no active part in the trial, and there is no evidence of its active opposition there; but it is somewhat significant that Robbins, at whose instance the company was appointed, did not seek his opportunity of appearing on the trial through this receiver as his trustee, but through the mere courtesy of the plaintiff. I have already adverted to the fact that no answer seeking affirmative relief was ever served on the principal defendants. Indeed that was precluded by the very nature and character of the trust company's answer itself. And thus do we plainly see that that company elected to have nothing to do with this action as a means of assisting anybody interested in this mining company. It is not material to inquire into the motives which led to this election. Doubtless they were expressed in the original letter of its counsel declining to bring the suit. But no matter,—the fact of its election stands out strong and clear. It is therefore plain that this company's technical standing as a party to this action ought not to be made use of to break up and destroy the rights of the plaintiff

secured through this settlement, unless it be necessary in order to protect the rights of others. Let us now see if any such necessity exists. I see none. The discontinuance did not in any way embarrass the trust company in the performance of any duty, nor any other party interested in the mining company in securing any right; at least, if there was any difficulty of that character, it was not disclosed by the moving papers. I do not overlook the point that it had the right to apply for costs; but that was not a substantial right in this equity action, and, when we consider the attitude of the trust company in the action,—really aiding defendants in obstructing the plaintiff's efforts to obtain relief,—it is difficult to understand how any trial judge, in view of the decision in the case, could have awarded costs in its favor as matter of discretion. Now the plaintiff doubtless relied upon all these considerations in determining to abandon further efforts in the action, and to accept the settlement which was offered, and which she had the undoubted right to accept. The discontinuance was not as a mere matter of favor, but in reality was doubtless the consideration for the payment by the defendants who settled. I fail to see why plaintiff and these defendants had not a plain right to rely on this situation. How, on the one hand, is the trust company injured by the discontinuance? Manifestly neither the action nor the order of discontinuance can operate as a bar or estoppel upon any right of the trust company or any beneficiary of its trust. It may therefore bring its own action, if its doubts about the validity of the cause of action have been removed by the result of the trial. So, too, if they remain, it may again refuse to proceed, and let Mr. Clews, or any other interested party, sue for himself. Why, on the other hand, should the plaintiff be deprived of, or imperiled in realizing, the fruits of her diligence, which have been thus obtained in spite of the opposition of her trustee? Considered as a matter of equity, it is extremely difficult to suggest an answer. I confess my inability to see any.

But it is said that the trust company had a right to come in under this judgment. But there was, as yet, no judgment. All that can be said is that there might have been a judgment if plaintiff had chosen to enter it; that there were findings, and a judgment drawn and all ready to enter. But that does not alter the fact that it was not entered. Plainly the whole force of the trust company's argument lies in the assumption that it was plaintiff's duty to enter it, and it is just there that the company's argument utterly fails, as it seems to me. Plaintiff owed no such duty to anybody. And besides that, it is more than doubtful if she would have owed that duty to this company, if to anybody, after its plain election. Was this suit in behalf of this trust company? Nay; was it not in behalf of the beneficiaries of this company's trust as receiver, as distinguished from the company itself, and despite of the company? Did not this company *quo ad hoc* repudiate the trust obligations? Could there have been any right of action in favor of any stockholder—the plaintiff or anybody else—until the trust company repudiated the right to sue? How then had this company any right to control this action in any sense? Where is the basis for the suggestion of duty by this plaintiff to this trust company which had thus refused to perform its duty towards her? Is not this a plain case where the trustee renounces the trust *quo ad hoc*, and the beneficiary accepts that renunciation by bringing suit in his own behalf? Who then owns the cause of action,—the beneficiary or the defaulting trustee? On what possible ground can it be said that plaintiff in any way represented that company? She may, in a certain qualified sense, have represented stockholders and creditors, but that is another affair. She had a right to stop that sort of representation at any time when she chose to do it. *Non constat*, she deliberately went to the very verge of her choice in that respect,—procuring the decision and filing it; procuring the settlement of the judgment of the trial judge, and his *flat* thereon, but keeping it,—withholding its entry for the express purpose of saving her control of the action. Very likely some of

the other parties might have caused the entry of the judgment, but that would have been for the purpose of appeal. Could this trust company have done even that? How was it assigned? We by no means concede that this judgment was such a judgment as would have terminated plaintiff's control over the action. We incline to think it was not. We simply hold that until that judgment was entered there is no ground for that contention. The case is therefore reduced to the simple question whether or not a plaintiff, after or as part of a settlement, may, without notice to a purely nominal party, discontinue a suit in which parties have deliberately taken the positions in which these parties stood. I see no reason why it should not be done, or why plaintiff should be compelled to risk the benefit of a settlement, and the peril of costs and expenses of the appeal, which was plainly intended for the sole benefit of a defendant whose conduct and attitude in the action was such as this trust company's obviously was up to that time. Could it take back its election thus deliberately made on the advice of counsel, after this prolonged and uniform affirmance of it? The notice of motion would have been a mere and meaningless formality. The only effect would have been to afford an opportunity to make an appeal to the discretion of the court for costs,—a discretion which ought not to have been exercised in its favor. The trust company therefore stands upon a purely technical rule of practice,—the want of notice,—which represents no real or substantial right.

We have not overlooked the point that possibly the statute of limitations might have been an obstacle to a new action. We do not see how that could well be so in view of the fact that these defendants were liable as trustees, if at all. But be that as it may, no such question can be raised on these papers, and, even if it could be, it is a question which the trust company must settle between itself and the defendants when it gets ready to sue, or between itself and the beneficiaries of its trust when it comes to render an account of its stewardship.

If these views are correct, the order must be reversed. All concur.

JESSUP v. MCGARRY.

(*Supreme Court, General Term, Second Department. December 10, 1889.*)

PROMISE TO PAY DEBT OF ANOTHER.

In an action to recover for milk sold, plaintiff testified that defendant told him, if he would send his milk to W., defendant would send his check for the price. Plaintiff was corroborated by one witness. Defendant and W. denied the conversation, and there was some evidence that plaintiff had made an effort to have defendant sign an agreement as surety for the debt. *Held* that, since, if plaintiff's testimony was believed, defendant was the original debtor, a verdict for plaintiff would not be set aside.

Appeal from circuit court, Orange county.

Action by Charles L. Jessup against John McGarry to recover the sum of \$134, with interest and costs,—the price of certain milk delivered to defendant or his agent, for which defendant promised to pay. Plaintiff, in his testimony, (referred to in opinion as at folios 20 and 28,) testified that he and one Woodruff went to defendant's saloon, and while there a Mr. Von Winkle stated to defendant that plaintiff and Woodruff had dairies of milk, which he wanted to buy; that he was a stranger to them, and wanted to make it satisfactory; that defendant said he would do what he could, and plaintiff asked him if he would give his checks, and he said he would; that the milk was shipped to Von Winkle; that he had received payment for part of the milk delivered in checks of the defendant,—two of which were payable to plaintiff's order, the others to Mr. Von Winkle, and introduced to plaintiff. On cross-examination, it appeared that a letter had been sent to Von Winkle by plaintiff and Woodruff, asking him to get defendant's signature to an agreement to become surety for Von Winkle; also, letters from plaintiff to Von Winkle, stating that he had not received his checks, were introduced in evidence.

The bills were all made out against Von Winkle. From a judgment entered for plaintiff for the amount claimed, and an order overruling a motion for new trial on the minutes, defendant appeals.

Argued before BARNARD, P. J., and DYKMAN and PRATT, JJ.
H. T. Marston, for appellant. *Alton J. Vail*, for respondent.

PRATT, J. This case involves only questions of fact, as the case was clearly and fairly submitted to the jury by the judge's charge, and no exception taken thereto. At folios 20 and 28 of the case, it appears that plaintiff testified to a conversation with defendant wherein defendant agreed, if plaintiff would serve his milk to Von Winkle, he (McGarry) would send plaintiff a check for the amount. If this was the agreement,—and the jury must have so found,—then McGarry was the original debtor, and liable in this action. This view is corroborated by Mr. Woodruff at folio 50 of the case. The conversation, as detailed by these persons, is denied by defendant and Mr. Von Winkle, and their testimony is somewhat corroborated by the fact that bills were made out to Mr. Von Winkle, and an effort was made by plaintiff to have defendant sign an agreement as surety or guarantor for the payment of the debt; but, after all, it was a question of fact, to be determined by the jury, and the verdict is not so manifestly against the weight of evidence as to require it should be set aside. Judgment affirmed, with costs.

KELLY v. BROWER.

(*Supreme Court, General Term, Second Department. December 10, 1889.*)

VENDOR AND VENDEE—RIGHTS OF VENDEE.

One who has contracted to purchase vacant lots with a frontage of 75 feet is not entitled to be discharged from such contract because of his vendor's failure of title to 14 inches frontage, to which, it appears, no especial value attaches, but only to an abatement in the price.

Appeal from special term, Kings county.

Action by Edward E. Kelly against James C. Brower. The complaint was dismissed without costs, and judgment entered, decreeing specific performance of the contract mentioned in the opinion, without costs. Plaintiff appeals from the dismissal of his complaint, and defendant appeals from that portion of the judgment denying him costs.

Argued before BARNARD, P. J., and DYKMAN and PRATT, JJ.
Jackson & Burr, (*Jos. A. Burr, Jr.*, of counsel,) for plaintiff. *William T. Gilbert*, for defendant.

PRATT, J. The plaintiff contracted to purchase from defendant some vacant lots on Elm street, Brooklyn, with a frontage of 75 feet. Upon an examination of the title, his counsel were of the opinion that as to 14 inches of the front the defendant's title was not perfect. Thereupon plaintiff refused to take the title, and brings this action to recover the earnest money, and the expense of searching the title. The defendant answers, averring that the title is perfect, and asking that plaintiff be required to take the title and pay the purchase price.

An examination of the testimony satisfies the court that the special term correctly sustained defendant's claim. But, were it otherwise, the judgment would not necessarily be disturbed; for, by plaintiff's own admission, defendant was in position to substantially perform his contract, and offered to do so. On that state of facts, the most plaintiff could reasonably ask would be an abatement in the contract price. Were it conceded that the title failed as to the 14 inches in dispute, the abatement would be about \$70 from the stipulated price of \$4,500. The lots being vacant, it sufficiently appears from the maps filed and the other testimony that no especial value attaches to the disputed 14 inches. The plaintiff does not ask for any abatement, but for a full discharge, to which, upon his own showing, he is not entitled. Judgment affirmed, with costs. All concur.

HART et al. v. METROPOLITAN EL. R. Co. et al.

(Common Pleas of New York City and County, General Term. December 2, 1889.)

1. ACTION—MISJOINDER—TORT AND CONTRACT.

In an action for damages, occasioned by the erection and maintenance of an elevated railroad in front of plaintiffs' premises, it is an improper joinder of causes of action to unite in the same complaint a charge against defendant company for trespass and tortious invasion of easements with a charge against defendant sureties on a bond conditioned for the payment of such damages as might be assessed by the final judgment of a court of competent jurisdiction.

2. PARTIES—JOINDER—EXECUTOR AND DEVISEE.

The executors and devisees of the deceased owner of such premises cannot join in such complaint, as the action is one at law, and the executors sue for loss of rent during testator's life, while the devisees sue for the permanent injury to the freehold. *DALY, J.*, dissenting.

3. SAME—BENEFICIARY UNDER VOID TRUST.

Where deceased attempted to create a trust by his will, which trust is void, and operates to vest the legal estate to a share of the premises in the intended beneficiary, she is a necessary party to such action.

Appeal from special term.

Action by Julian B. Hart and others, individually and as executors of and trustees under the will of Benjamin I. Hart, deceased, against the Metropolitan Elevated Railway Company, the Manhattan Railway Company, its assignee, and José F. Navarro and John Baird, their sureties, for damages occasioned by the erection and maintenance of an elevated railroad in front of plaintiffs' premises. From an order overruling a demurrer to the complaint, defendants appeal.

Argued before *LARREMORE, C. J.*, and *DALY* and *VAN HOESEN, JJ.*

Davies & Rapallo, (Edward S. Rapallo and Brainard Tolles, of counsel,) for appellants. *Morrison & Kennedy, (H. Morrison and L. J. Morrison, of counsel,)* for respondents.

LARREMORE, C. J. This is an appeal from an order overruling a demurrer interposed by defendants to the plaintiffs' complaint, and an interlocutory judgment entered upon such order. The action is one at law, brought to recover damages by reason of the erection and maintenance of the elevated railroad. One Benjamin I. Hart owned the real estate in question at the time when the Gilbert Elevated Railroad first proposed to construct such road on Sixth avenue, and he died seised of such premises before the commencement of this suit. On or about the 7th day of December, 1877, he said the Gilbert Elevated Railroad, whose name has since been changed to the "Metropolitan Elevated Railway Company," executed a bond to said Benjamin I. Hart, upon which the defendants Navarro and Baird were sureties, and in and by which said company bound itself to pay, or cause to be paid, to said Hart "any sum which, by the final judgment or order of a court of competent jurisdiction, shall be adjudged or directed to be paid to him, as damages to said premises, by reason of the taking of the Sixth avenue in front of the said premises for the purposes of said road." No judgment or award has ever been made by any court for or on account of said damages, and the present suit is the first proceeding which has been instituted to recover or assess the same. It is quite evident that the plaintiff has attempted to unite a cause of action on tort with one on contract. The claim against the Manhattan Railway Company is for trespass and tortious invasion of easements. The claim against Navarro and Baird is on a sealed obligation for the payment of money. Clearly, defendants' demurrer should be sustained on this ground. It is true that the cause of action against Navarro and Baird is not completely alleged in said complaint. It is, moreover, the fact that such cause of action has not yet arisen, and does not actually exist, because no damages have ever been ascertained or awarded in the manner provided for by the bond, and therefore such bond has never become operative.

But these considerations are immaterial upon the present application. The declaration is on a sealed instrument for the payment of money, and the technical rules of pleading are all that can be considered upon this branch of the demurrer.

We think this omnibus complaint is also demurrable on another of the grounds raised. It must be remembered that this action is not on the equity side of the court, and that both parties concede that it is a suit at law. There are joined as parties plaintiff both the executors and the devisees of the original owner. The devisees are, undoubtedly, in a proper action, authorized to sue for the permanent damage to the fee of the land. The executors of the deceased owner are permitted by statute to sue for the aggregate loss of rents during the testator's life; but, under the rules of pleading, they should bring separate actions to establish their respective rights. The manner in which this is practically raised on demurrer is by an objection to the complaint on the ground of misjoinder of parties plaintiff. Both the executors and the devisees may have separately good causes of action against the defendant; but the capacities in which they must sue are in law as distinct as if they were actually different persons. The point will undoubtedly be made that in various actions the practice now under consideration has been approved. The ground taken with regard to that class of cases is that when the suit is brought for an injunction, and it incidentally demands indemnity for damages both past and present, such suit shall be taken as an action generally founded upon and affecting the title to real estate. See the opinion in *Sanders v. Railroad Co.*, ante, 641, (general term of this court, November, 1889.) The arguments adduced in that case do not apply in an action of the present character; and we see no reason for allowing here a conglomeration of causes of action in the same suit by separate plaintiffs, merely because they are against the same defendant.

Still a third point may be noticed briefly. As far as the suit of the devisees is concerned, there is a defect of parties plaintiff, in that the name of Mary H. Dessau, individually, is omitted. The allegation of the complaint with regard to her individual interest shows that in the will there was an attempt to create a trust for her benefit, which trust is clearly void, and the effect of which is to vest the legal estate to her share of the property in her. She would therefore be a necessary party plaintiff in an action to recover damages for the permanent injury to the fee.

The judgment and order appealed from should be reversed, and the demurrer should be sustained, with leave to the plaintiff to amend upon payment of costs.

DALY, J. I concur with the chief justice that the demurrer should be sustained on the ground that two causes of action—that is to say, one upon contract and one for a tort—have been improperly united; also that the complaint does not state facts sufficient to constitute an action upon the bond, because no damages have ever been awarded to the obligee. But, if these objections did not exist, I think that a recovery at law for damages might be had by these plaintiffs, who are suing as devisees as well as representatives of the deceased owner in this action, in which they claim the damages accruing up to the death of the testator, and these sustained by them individually since his death, under the authority of *Armstrong v. Hall*, 17 How. Pr. 76. But in its present shape the complaint is demurrable, and the order should be reversed and demurrer sustained, with leave to amend on payment of costs.

VAN HOESEN, J., concurs.

QUINN v. WINTER.¹

(*Common Pleas of New York City and County, General Term.* December 2, 1889.)

1. COSTS—RIGHT TO—DISPUTED TITLE TO LAND.

Where, in an action for damages for the maintenance of an alleged nuisance on defendant's land, consisting of noises which rendered plaintiff's houses uninhabitable, there are no allegations of trespass on plaintiff's land, or injury to the freehold, and case would have been the proper remedy before the adoption of the Code, a claim of title to land is not in issue, within Code Civil Proc. N. Y. § 3228, subd. 1, providing that plaintiff is entitled to costs of course on the rendering of a final judgment in his favor in an action triable by jury, in which a claim of title to land arises on the pleadings, as plaintiff need only prove possession.

2. SAME—PLEADING—IMMATERIAL ALLEGATIONS.

Plaintiff's allegation that she was the owner of the houses, and defendant's joinder therein, did not raise the issue of title to land, as such allegation was not necessary to enable plaintiff to sue, and need not be proved.

3. APPEAL—APPEALABLE ORDER—DENIAL OF COSTS.

An appeal lies from an order denying a statutory right to costs.

Appeal from city court, general term.

Action by Virginia J. Quinn against Herman T. Winter for damages for the maintenance of an alleged nuisance. Code Civil Proc. N. Y. § 3228, subds. 1, 4, provide that plaintiff is entitled to costs, of course, on a final judgment in his favor, in an action in which a claim of title to real property arises on the pleadings, or is certified to have come in question on trial, or in an action for money where the judgment amounts to \$50 or more. Verdict for plaintiff for six cents damages, and from an order which reversed an order vacating a judgment in favor of plaintiff for costs defendant appeals.

Argued before LARREMORE, C. J., and DALY and VAN HOESEN, JJ.

Geo. W. Blunt, for appellant. *Henry W. Leonard*, (*T. M. Tyng*, of counsel,) for respondent.

VAN HOESEN, J. The right to costs that a positive statutory provision awards to a party on the happening of a certain event is a substantial right, and an appeal lies from an order that denies such a right. *Sturys v. Spoford*, 58 N. Y. 103.

As the plaintiff recovered no more than six cents as damages in an action cognizable by a justice of the peace, the defendant is, under the Code, entitled to costs, unless the title to land was brought in question by the pleadings. There is in this case no certificate of the justice that a claim of title arose on the trial. The only inquiry that we are called upon to make is this: Did a claim of title arise upon the pleadings? To that inquiry only one answer can be made. A question of title arises where the plaintiff must prove the ownership of land in order to succeed, or where he is under the obligation of proving his right to the possession of the land. If it be sufficient for him to show merely that he is in possession, without proving either title or his right to the possession of the land, there is no reason for saying that a claim of title is involved in the issue to be tried. The plaintiff sought in this action to recover damages because the defendant, by tainting the atmosphere and by loud noises, rendered her houses unfit for habitation. The nuisance that caused the noise and the pollution of the air was situated upon the land of the defendant. No trespass upon the plaintiff's land is alleged, but an action of trespass on the case would have been the plaintiff's remedy under the forms of pleading that prevailed before the Code was adopted. There is no allegation of any injury to the freehold. The injury is necessarily of an intermittent and transient character, for it proceeds from the use of a screen for sifting coal. The disuse of the screen would terminate the nuisance. The use of the screen makes the occupation of the plaintiff's houses uncomfortable at

¹Reversing 4 N. Y. Supp. 865.

times, and this action is, as has been said, to recover damages for such discomfort. It was not for the defendant to call in question the right of possession of any occupant of the plaintiff's houses who had been aggrieved by the nuisance. There is nothing to show that the plaintiff did not herself dwell in one of the houses. The questions to be litigated are—*First*, was the plaintiff in possession of the houses? and, *secondly*, did the nuisance that the defendant maintained upon his premises seriously annoy her, and prevent her full enjoyment of her houses? The only question then remaining is as to the quantum of damages. It will be seen that the question of title did not necessarily arise, nor was the plaintiff under the necessity of proving her right to the possession of her houses. As against a wrong-doer, naked possession is all that the plaintiff was under obligation to prove; and the person maintaining a nuisance is a wrong-doer. Wood, Nuis. § 825. It is apparent, therefore, that a claim of title was not part of the issues to be tried.

It is said, however, that the plaintiff herself dragged the question of title into the case by alleging in her complaint that she is the owner of the houses, and that the defendant joined issue upon that allegation. The answer to that suggestion is that the allegation of ownership is unnecessary, and, though made, need not be proved. It was otherwise at the common law, for the rule used to be that "a party may in general traverse a material allegation of title or estate, to the extent to which it is alleged, though it need not have been alleged to that extent." Steph. Pl. marg. p. 247, and note 11 of second appendix. The court of appeals has decided that that rule is no longer in force, and so has the supreme court; so that it must now be considered as settled in the state of New York that by alleging that she was the owner the plaintiff did not bind herself to prove her title, since bare possession was sufficient to maintain her action. The following authorities will be found to support the views that I have expressed: *Ehle v. Quackenboss*, 6 Hill, 537; *Rathbone v. McConnell*, 20 Barb. 311, 21 N. Y. 466. The result of the examination I have made of all the cases cited by Mr. Tyng is to satisfy me that the title to land did not arise upon the pleadings, and that the defendant has a statutory right to the costs of the action. The order and judgment appealed from must be reversed, with costs. All concur.

GOLDSTEIN v. WALTER.

(*Common Pleas of New York City and County, General Term. December 2, 1892.*)

FACTORS AND BROKERS—REAL-ESTATE AGENTS—COMMISSIONS.

A real-estate agent who fails to induce the vendee to pay the price of land demanded by the owner, but predicts that the vendee will ultimately pay such price, is not entitled to commissions where the owner afterwards sells the land to others for such price, without knowledge that it was actually purchased for the vendee.¹

Appeal from sixth district court.

Action by Gerson Goldstein, a real-estate broker, against George Walters, for commissions alleged to be due plaintiff for the sale of defendant's land. Judgment for plaintiff, and defendant appeals.

Argued before LARREMORE, C. J., and DALY and VAN HOESEN, JJ.

August L. Martin, for appellant. *David A. Sullivan*, for respondent.

PER CURIAM. The plaintiff was not the procuring cause of sale. There is no doubt that he made fruitful efforts to induce Thomas to buy the property, but he did not succeed. The proof is that Martin and Ray were the procuring cause of sale. The plaintiff utterly failed to induce Thomas, the

¹As to when a real-estate broker will be held to have earned his commissions, see *Hannan v. Moran*, (Mich.) 38 N. W. Rep. 909, and note; *Putnam v. How*, (Minn.) 40 N. W. Rep. 258, and note; *Ward v. Cobb*, (Mass.) 20 N. E. Rep. 174, and note.

purchaser, to give the price that the defendant demanded and received for the property. Then Ray and Martin succeeded in getting Thomas to agree to pay the sum that the defendant had all the time named as his *minimum pretium*. The mere fact that he hazarded a prophecy that Thomas would at some future time accede to the defendant's terms does not at all aid the plaintiff. There is no room for charging collusion between the defendant and Martin and Ray, nor had the defendant notice of anything that could apprise him that Thomas was the secret purchaser of the property. The defendant did not sell to Thomas, to whom the plaintiff was endeavoring to sell the property. The sale was made to Martin, who professed to be, and was by the defendant believed to be, the purchaser. It is true that Martin bought for the benefit of Thomas, but that fact was studiously concealed from the defendant. The plaintiff himself conceded in his letter that he was not entitled to the commissions. He knew that he did not induce the purchaser to accept the terms on which the defendant agreed to sell, and finally did sell, the property. It seems to be the opinion of some of the justices of the district court that the broker who first brings the property to the notice of the purchaser is entitled to the commissions, even though the broker fails to obtain the price named by the seller, and though that price is afterwards obtained by the seller through the independent efforts of another broker. That erroneous view of the law seems to have led to the decision that was made in the court below. Judgment reversed.

LEWIS v. BACHE *et al.*

SAME v. CAHN *et al.*

(*Common Pleas of New York City and County, General Term. December 2, 1889.*)

1. ASSIGNMENT FOR BENEFIT OF CREDITORS—PREFERENCES—PARTNERSHIP.

P. and A., partners in business, drew from the firm, during the month before their assignment, an amount slightly in excess of their usual drawings. It was in small amounts, distributed through the month, and it did not appear that the assignment was in contemplation more than a few days. In their schedule of liabilities were notes given their wives for money furnished to and used by the firm, though the notes on the books were charged to the personal accounts of the partners. In the assignment the fathers of the partners were preferred for amounts loaned the firm. The name of H., a partner, who had retired from the firm a month before the assignment, was inserted in the schedules as a creditor of the firm, for notes given to him by P. and A. for his interest. By the books it appeared that the firm was solvent at that time. P. testified that the cause of the failure was embarrassment and delay in payments by firm debtors. *Held*, that these facts did not show that the assignment was made with intent to defraud creditors.

2. SAME—PRESUMPTIONS—FAILURE TO CALL WITNESSES.

Where the creditors fail to prove any fraud, no unfavorable inference will be drawn from the fact that the wives of the partners were not called as witnesses.

Appeal from judgment on report of referee.

Actions by David H. Lewis against Semon Bache and others and Henry H. Cahn and others. Charles E. Hughes, Esq., referee, filed the following report:

"On May 29, 1886, Phraner & Arthur, a firm composed of Wilson S. Phraner and Frank D. Arthur, made a general assignment of their copartnership property to the plaintiff, for the benefit of creditors. Semon Bache & Co. and Henry B. Cahn, respectively, defendants in the above actions, afterwards obtained judgments against Phraner & Arthur, and levied execution upon the assigned property. The plaintiff had already arranged for a sale, and, to avoid probable loss, all parties agreed that the assignee's sale should take place, and out of the proceeds there should first be paid to the sheriff the amount of the judgments of Bache & Co. and Cahn, together with the sheriff's fees, which the sheriff should hold in lieu of the said property, without prejudice to the right of the said assignee claiming the said moneys in any action against the

sheriff, the same as though the sheriff had sold the property.' The plaintiff, as assignee, accordingly paid to the sheriff, under protest, \$859.74, on account of the Bache & Co. judgments, and \$881.05 on account of the Cahn judgments. These actions were brought by the assignee against the sheriff and the judgment creditors, to recover the sums so paid. The sheriff's indemnitors were subsequently substituted in his place as defendants. No objection is urged to the right of the assignee to maintain the actions. The sole defense is that the assignment was made with intent to defraud creditors, and the property levied upon was, as against defendants, the property of Phraner & Arthur. The acts of fraud alleged are: (1) Drawings by the partners of firm moneys for individual use. (2) The making of firm notes for the individual liabilities of the partners to their wives, and the insertion of the names of the latter as firm creditors in the schedules. (3) Preference of individual liabilities to the fathers of the partners. (4) Insertion of the name of a former partner in the schedules as a creditor of the firm on notes given him on his retirement, for his interest in the business.

"These will be considered in order.

"(1) *Drawings of the Partners.* Prior to May, 1886, Wilson S. Phraner's monthly drawings averaged \$167.13. In May he is charged with \$1,421.03, against which he is credited with \$619.95, leaving his apparent drawings in May, \$801.08. One of the items of charge is a firm note of \$200, which has not been paid, and is now held by his wife, and is set forth in the schedules as a firm liability. Unless this note was given to discharge Phraner's individual debt, which will be considered hereafter, it is clear that he derived no personal benefit from it. Deducting the amount of this note, Phraner's net drawings in May appear to be \$601.08. On May 5th, Phraner is charged with \$402.25. This was the amount of two firm checks, drawn on this day, one for \$300, in favor of S. W. Coe, and one for \$102.25, in favor of Wilson Phraner, the father of Wilson S. Phraner. Both sums had been loaned in April, and were then credited to Phraner's personal account. The \$300 was, however, deposited in the firm bank account as soon as received, and Phraner testifies positively that both sums were borrowed and used to defray firm expenses. If they are considered Phraner's personal debts, still fraudulent intent cannot be implied from a withdrawal of money three weeks before the assignment to pay sums borrowed by him for the use of the firm. The money was received by the firm and used by the firm, and upon the evidence it is not clear that the indebtedness was not a firm indebtedness. On May 22d, Phraner is charged with \$100, the entry being 'To J. B. McN., \$100.' J. B. McNabb on that day was debtor to the firm for \$129.63. His account was then credited with \$100, and Phraner's account is debited with the same amount. This must mean either that Phraner assumed \$100 of the McNabb debt, and thus diminished the firm assets to that extent, or that he received this amount, and kept it instead of depositing it with the firm. In either event, it was an open appropriation of firm property, and should be included in his May drawings. Taking into account this \$100, and deducting the \$402.25, and the \$200, of which Phraner had no personal benefit, and to which there does not appear to be any corresponding May credit, we find his net drawings for that month to be \$198.83. Arthur's total drawings for May amount to \$366.43. His credits against this are \$36.39, leaving a net debit balance of \$330.04. Of this \$200 consists of a note made by the firm, and now held by his wife under the same circumstances as the note held by Mrs. Phraner. Deducting this, we find Arthur's cash drawings for the month to be \$130.04. For the two years previous his monthly drawings had averaged \$112.20. It does not appear that the assignment was in contemplation for more than a few days. The drawings above noted are in small amounts and distributed through the entire month. There is no such logical connection between the drawings and the assignment as to make the latter unlawful, even were the former excessive

and improper, and the drawings themselves can hardly be considered fraudulent. *Vietor v. Nichols*, 13 N. Y. St. Rep. 461.

"(2) *Notes to Wives of Partners*. On May 24, 1885, the account of each partner is charged with bills payable, \$200. These notes are recited in the schedules as being respectively in the hands of their wives. That these notes were made by the firm, have not been paid, and are now held by Mrs. Phraner and Mrs. Arthur, is not disputed. It is claimed, however, that they were without consideration as against the firm, being given for individual debts of the partners, and that the insertion of the names of the wives as creditors in the schedules is proof of a fraudulent purpose to misappropriate firm assets by means of the assignment. Reliance is placed upon the fact that the notes were charged in the books to the personal account of the partners. It appears that the moneys for which these notes were given were handed over to the firm and used by the firm. The firm, and not the partners, benefited by the transaction, and the firm recognized its liability by the making of the notes. Both Mrs. Phraner and Mrs. Arthur, upon the evidence in this case, could recover upon the notes against the firm. The entries on the books are counterbalanced by the giving of the notes, and the proof that their consideration inured to the firm's benefit. There is not sufficient evidence to justify the conclusion that the notes were improperly made to pay the partners' individual debts, and that the names of the wives were inserted in the schedules with fraudulent intent.

"(3) *Bills Payable Preferred*. Wilson Phraner and George D. Arthur, the fathers of the partners, are preferred in the assignment for the sums of \$2,850 and \$2,600, respectively. George D. Arthur's preference is for the amount of two notes,—one for \$2,000, made April 19, 1886, and the other for \$600, made May 15, 1886. The \$2,000 note was given by the firm in renewal of a note for the same amount, discounted for the firm by George D. Arthur, in February, 1886. The \$600 was for cash received by the firm on the day the note was given. There is no evidence that the firm was not justly indebted on these notes, or that the preference was improper. Wilson Phraner, the father of Wilson S. Phraner, is preferred for a note of \$2,000. This was given in renewal of a note discounted with him by the firm, which received the proceeds of the discount. He is also preferred for a note of \$850, made May 15, 1886. A firm note for \$250 was then outstanding for money received by the firm on May 4th. On May 15th the firm received \$600 additional, and the note of \$250 was surrendered, and the note for \$850, the subject of the preference, was given. It is not disputed that Wilson Phraner holds the notes preferred. It is insisted, however, that they were given for the individual indebtedness of Wilson S. Phraner, the partner. The avails of the discounted note of \$2,000 and the \$600 are credited and the notes charged in the bills payable account of the firm, and do not appear in the personal account of Wilson S. Phraner. The \$250 received on May 4th, though paid to the firm, was credited to his personal account in which the note for the same amount was charged. The original checks for both the \$1,969, (dated February 12, 1886, the proceeds of the \$2,000 discount,) the \$600, (dated May 14th,) and the \$250, (dated May 4th,) are produced and are in evidence, all drawn by Wilson Phraner,—the first to the order of Hough & Phraner, the other two to the order of Phraner & Arthur. Upon this evidence it cannot be said that there was no firm liability, and that the preference was fraudulent.

"Much that is said in hostility to the assignment is based upon entries in the personal accounts of the partners in the firm books. Upon these it is claimed that the notes held by their wives were given for the individual debts of the partners, and that no firm liability was incurred, though the moneys loaned were immediately devoted to the firm uses. The \$250 loaned by Wilson Phraner on May 4th was clearly loaned to the firm, used by the firm, the firm recognizing its liability by giving its note, and then preferring it. Still

this sum is credited, and the note charged to Wilson S. Phraner's personal account. Little reliance can be placed upon a book-keeper's entries which are so lacking in method, in the absence of any other evidence, invalidating the obligations admittedly given by the firm.

"It is suggested, however, that the advances of \$200 each by the fathers in February, 1886, were advances to their sons for the purpose of increasing their interests in the firm. Reference is had to the fact that the fathers started their sons in business by loaning them their necessary capital in 1883 and 1884. It is also urged that as Mr. Hough, then a member of the firm, in January, 1886, contributed \$2,057 in notes as capital, these almost simultaneous advances of similar sums must also be considered as contributions to capital. The assignment cannot be set aside upon mere suspicion. The difficulty with the contentions of counsel is the absence of evidence to support them. There is no evidence that the advances were to increase the holdings of the two partners, and a mere coincidence in time and amount with another partner's contribution to his capital account is insufficient to determine the character of independent transactions. There is no pretense that the firm expected to fail in February, and no reason why the advances, if made as capital, should not appear in the capital account. They do not so appear, however, although Hough's capital account is duly credited with his contribution, which was admittedly for the purpose of increasing his interest. Six hundred dollars borrowed by Phraner of his father for a similar purpose in January, 1886, appeared in his capital account, and the absence of the sums in question from this account negatives the inferences drawn by counsel.

"(4) *The Hough Notes*. Prior to April 14, 1886, L. W. Hough was a member of the firm. The firm had taken an inventory on January 1, 1886, showing a surplus of over \$9,000. This surplus had been credited to the capital account of the three partners. On January 22, 1886, Hough contributed, as capital, \$2,057.07 in notes. On April 14, 1886, the firm dissolved, and the interest of Hough was purchased by Phraner & Arthur, the consideration being the return of the notes for \$2,057, and the notes of P. & A. for \$1,747.76, Hough's share in the surplus. There is no evidence to impugn the good faith of the transaction. The firm was abundantly solvent, according to its books, on January 1st. The books showed no marked change on April 14th. The members of the firm believed that it was solvent, and, so far as the evidence shows, bought out the retiring partner in good faith, by giving notes for the face value of his interest. It is contended that the firm was insolvent at the time of the retirement; that Hough's interest in the business was worthless; that the notes given him were in law fraudulent as against other creditors; and that the insertion of Hough's name as a creditor for the amount of these notes, in the schedules, indicates an intent to divert the assets of the firm and avoid the assignment. The schedules may, of course, be referred to to show the intent with which the assignment was executed. If a fictitious claim is inserted in the schedules by the assignors, it may indicate an intent to misappropriate the assets. *Talcott v. Hess*, 31 Hun, 282. In this case, however, the claim is not fictitious. A bargain was made between Hough and P. & A. in good faith, which bound P. & A. If void at all, it would only be so as against creditors. The claim might be a deferred claim, but was none the less a claim. There was no attempt at concealment of the facts. The schedules state that the notes were given for moneys due Hough 'on the dissolution of Hough, Phraner & Arthur.' Upon these facts it does not necessarily follow that the mere insertion of Hough's name in the schedules as a creditor would avoid the assignment. *Howe v. Lawrence*, 9 Cush. 553; *Smith v. Howard*, 20 How. Pr. 121; *Dimon v. Hazard*, 32 N. Y. 65. It seems clear, however, that the entire force of this objection to the assignment rests upon the insolvency of the firm at the time of Hough's retirement. This is not proven. The actual condition of the firm at this time is not shown. It is

true that Phraner, the only one of the partners who is called as a witness, testifies that he cannot recollect any serious losses between April 14, 1886, the day of Hough's retirement, and May 29, 1886, the day of the failure. The cause of the failure was embarrassment and delay in payments by firm debtors. An expert accountant testifies that, so far as the books show, the surplus of January 1, 1886, should belong to the firm on May 29th, less the notes given Hough and the drawings of P. & A. The assignment itself does not contain the usual recital of insolvency. The schedules are in evidence, and show that at the time of the failure the liabilities amounted to \$22,608.32. Of these, \$2,591.57 were contingent. These have all been met by the parties primarily liable, and should be deducted to ascertain the firm's actual condition. The actual liabilities are therefore \$20,016.71. As against these the assets appear nominally worth \$24,777.51, and actually worth \$17,222.74. At the time of the failure, therefore, the books show an apparent surplus of \$4,777, although the Hough notes are included in the liabilities. The schedules set forth, item by item, the nominal and actual value of the firm accounts and merchandise in the usual form. The total actual value of the good accounts is, however, afterwards reduced \$750, by a deduction of ten per cent. to meet cost of collection, and the total actual value of the merchandise is similarly reduced about \$3,100, by a deduction of twenty-five per cent. for depreciation and cost of sale, so that in the recapitulation given above \$3,850 seems to have been deducted as the estimated expense of conducting the assigned estate after the failure. The total actual value of the assets, at the time of the assignment, therefore, was apparently over \$21,000, or \$1,000 above the liabilities, including the Hough notes, while the nominal surplus was nearly \$5,000. These facts do not justify the conclusion that the firm was insolvent six weeks previous, on April 14th, or that a transaction which, so far as the evidence shows, was free from actual fraud, was fraudulent in law.

"Counsel contends, however, that if the firm was solvent at that time, there has been a mysterious disappearance of assets. The surplus of January 1, 1886, deducting Hough's share, was about \$8,000. The apparent nominal surplus on May 29th was about \$4,800; actual, about \$1,000. The difference, \$3,800, between the face and actual value, is made up of \$3,100, depreciation on fixtures and sundries, due to wear and tear, and \$650, lost on open accounts. Irrespective of these items, the firm has actually lost only \$3,200 in the five months, and this includes the amounts drawn by the partners. No exhaustive examination of the firm's business has been presented, and these facts do not support a finding that there has been any withdrawal of assets so connected with the assignment as to render the latter invalid. If the firm was solvent on May 29th, that fact alone does not invalidate the assignment. *Ogden v. Peters*, 21 N. Y. 23; *In re Thompson*, 30 Hun, 200. The evidence shows embarrassment, and a sufficient basis for a finding of an honest purpose in making the instrument, which must be presumed until it is disproven.

"All the points urged by defendants' counsel have been carefully examined. The transactions of the partners, with their wives and relatives, easily give rise to suspicion, but the facts proved are insufficient to base a finding of fraudulent intent in the making of the assignment. It is urged that, as persons conversant with the matters in dispute are not called as witnesses, it should be presumed that their testimony would be adverse to the plaintiff. Phraner was examined at length, and his testimony is unimpeached. The defendants have not proved, by any preponderance of evidence, the fraud alleged, and it was unnecessary for the plaintiff to lengthen the case by a production of further testimony. *Bleecker v. Johnston*, 69 N. Y. 309. The plaintiff is entitled to judgment in both cases."

Argued before LARREMORE, C. J., and DALY and VAN HOESEN, JJ.

Blumenstiel & Hirsch, for appellants. *Charles H. Griffin*, for respondents.

VAN HOESSEN, J. I am in favor of affirming the judgment. There is no clear and unmistakable fraud on the part of the assignors. The charge of fraud rests upon inferences, suspicions, and computations. As those do not make a strong case, we are asked to draw an unfavorable conclusion from the fact that the wives of the assignors were not called as witnesses. We see no reason to suspect that the assignors have suppressed testimony that was needed to explain their acts, and remove a well-grounded presumption of fraud. The testimony of Mr. Phraner, one of the assignors, was satisfactory to the referee, and I see no reason why it ought not to have been so. I am in favor of affirming the judgment upon the report of the referee. All concur.

WEBB *et al.* v. OSBORNE.

SIMMONTON v. SAME.

(*Common Pleas of New York City and County, General Term. December 2, 1889.*)

1. SUPPLEMENTARY PROCEEDINGS—EXTENSION OF RECEIVERSHIP—FILING ORDER.

Under Code Civil Proc. N. Y. § 2468, providing that the title to the judgment debtor's property shall vest in the receiver, in supplementary proceedings, from the time of filing in the county clerk's office of an original order of appointment, or an order extending the receivership, the title to the judgment debtor's land vests in the receiver on his filing for record in the county clerk's office the order extending the receivership, though the original order of appointment was not so filed.

2. SAME—RECEIVER OF LAND—RIGHTS OF DEBTOR.

Since the rule that a creditor should sell the judgment debtor's land on execution, and not seek to collect his judgment by means of supplementary proceedings, exists to save the judgment debtor's right of redemption, he cannot complain, where he has formally consented to an order extending the receivership to the land in question.

Appeal from special term.

Supplementary proceedings in actions by James Webb and another against Thomas Osborne, and by William J. Simminton against the same defendant, in which proceedings Ezekiel Fixman had been appointed receiver of Osborne's property. From an order vacating a previous order that the tenants of property formerly belonging to Osborne attorn to the receiver he appeals. The appellant is a receiver, in supplementary proceedings, of the above-named Thomas Osborne. He was originally appointed by order of this court made in the action first above entitled, and dated March 4, 1886. This order was filed with the clerk of this court the same day. On March 11, 1886, the appellant, as receiver, gave a receiver's bond, as required by law, which was duly approved by a judge of this court, and filed in the office of the clerk of this court. Said order of March 4, 1886, was not filed in the office of the clerk of the city and county of New York until May 6, 1887. On August 19, 1886, an order was duly made in supplementary proceedings founded upon the action second above entitled, extending the receivership of Mr. Fixman to said second action. Said order of August 19, 1886, was granted upon the written consent of the attorneys for the defendant and judgment debtor, who appeared upon the application, and upon the same day was duly filed in the office of the clerk of this court, and upon the 3d day of March, 1887, was duly filed in the office of the clerk of the city and county of New York. At the time of the granting of the original order in the first action appointing Mr. Fixman receiver, and at the time of the granting and filing in the office of the said county clerk of the order of August 19, 1886, in the second action, extending such receivership, the above-named Thomas Osborne was the owner of a piece of real estate known as the "Osborne Apartment House." Between the date of the filing and recording in the county clerk's office of said order extending the receivership, and the date

of the filing and recording in said office of said original order appointing the receiver, to-wit, on or about April 20, 1887, said Thomas Osborne conveyed said real estate by deed to one John H. Taylor. On the 24th day of October, 1888, an order of this court was made and entered, entitled in both of said actions, directing "that each and every one of the tenants occupying apartments in the premises mentioned and described in the said petition, and known as the 'Osborne Apartment House,' * * * attorn to the said Ezekiel Fixman, as such receiver, and paid to him their rents for the apartments occupied by them, respectively, as and when the same become due and payable." Subsequently, and on or about the 22d day of November, 1888, by order duly made and entered in this action, and dated that day, the order last referred to was vacated; and from such last-named order, vacating said order of October 24, 1888, this appeal is taken.

Argued before LARREMORE, C. J., and VAN HONSEN, J.

A. H. Stoiber and Nathaniel C. Moak, for appellant. *William H. Hewson*, for respondent.

LARREMORE, C. J. I have stated above all the facts which seem to me to have any material bearing upon the present controversy. The respondent claims that, because the original order appointing the receiver was not filed in the county clerk's office until after the execution and delivery of the deed from the judgment debtor to John H. Taylor, the receivership of Mr. Fixman never applied to the real estate in question. But the order extending such receivership was duly filed in said county clerk's office before the making of said deed, and, under the circumstances of this case, I think such filing was sufficient for all purposes of vesting the receiver with the legal title to the Osborne apartment house. Section 2466 of the Code provides that, when a receiver has already been appointed, the judge, instead of appointing another receiver, must make an order extending the receivership. There is no doubt but that Mr. Fixman was legally appointed in the first suit. The original order appointing him was duly made, and, together with his bond, filed in the office of the clerk of this court. In my judgment, this constitutes a valid appointment, within the meaning of section 2466, regardless of the fact whether or not the receiver completely qualified in the first suit by filing such original order in the county clerk's office. The section then proceeds: "Such an order gives to the judgment creditor the same rights as if a receiver was then appointed upon his application." The following section directs that an order appointing the receiver or extending the receivership shall be filed in the county clerk's office. As far as the form of this language indicates anything, the intention would seem to be that an order of original appointment and one extending a receivership were of co-ordinate authority, and that the filing of either of such orders would accomplish the result of a legal qualification on the receiver's part. This theory of construction is strengthened by the similar language of section 2468, which provides that the title of the judgment debtor's property shall vest in the receiver from the time of the filing of an original order of appointment, or an order extending the receivership. There is no express language requiring the original order to be filed with the county clerk before the order extending the receivership shall become valid. On the contrary, the purpose appears, by clear implication, from all the sections referred to, to make the filing of such order of extension in all essential respects an equivalent to the filing of the original order, and not a mere concomitant thereof. My conclusion is that, under section 2468, the real property of the judgment debtor became vested in the receiver on the 3d day of March, 1887, when the order extending the receivership was filed in the county clerk's office, and that the subsequent deed by the judgment debtor conveyed nothing. It follows that the order directing the tenants to attorn and pay rent to the receiver was properly granted, under rule 78.

The point has been made on behalf of the appellant that the granting of such order was error, because, when a judgment debtor is seised of real estate, the proper course for the creditor to pursue is to issue execution against and sell the same, and not to seek to collect his judgment out of the rents through a receiver. The cases of *Bank v. Martin*, 2 N. Y. Supp. 315, and *Bunn v. Daly*, 24 Hun, 526, are cited in support of this contention. But in both of these cases the application before the court was to appoint a receiver, and not to extend aid to a receiver already appointed. The grounds for the principle laid down in such authorities are stated in *Bank v. Martin*, *supra*, as follows: "If the plaintiff should be permitted to procure the appointment of a receiver, and thus vest the title of the real estate of the judgment debtor in such receiver, it could be sold, and the judgment debtor deprived of the right of redemption which is given to him in case of a sale by execution. It was the duty, therefore, of the plaintiff to have caused the house and lot to be sold on execution, thus exhausting its remedy by execution before resorting to these proceedings." It thus appears that the reason for the rule that plaintiff shall exhaust his remedy by execution before proceeding against the property by means of a receiver is that, if the other course were adopted, a judgment debtor's right to a redemption might be taken away. Such rule, therefore, exists for the judgment debtor's benefit, and to protect his strictly legal rights. It can have no relevancy or force in the case at bar, because here it expressly appears that the order extending the receivership was formally consented to on the judgment debtor's part. The order appealed from should be reversed, with costs.

OEHME v. COOK *et al.*

(*Common Pleas of New York City and County, General Term. December 2, 1899.*)

MASTER AND SERVANT—DEFECTIVE APPLIANCES—EVIDENCE.

In an action by a servant for personal injuries caused by an alleged defect in the master's machinery the complaint will be dismissed in the absence of evidence to show how long the defect has existed.

Appeal from trial term.

Action by William Oehme against Valentine Cook and another for personal injuries sustained by plaintiff from the alleged negligence of defendants while employed in their iron foundry. A crane in the foundry consists of a vertical beam, about 16 or 18 feet high, that reaches nearly to the ceiling, and revolves on a pivot. From the top of this beam, two horizontal pieces of timber, about 20 feet long, parallel, on the same level, extending in the same direction from the vertical beam, and reaching out the same distance from it, project. A carriage, the wheels of which rest on the two horizontal timbers, moves back and forth upon them. A traveling bar is run directly above the space between the horizontal timbers. The one end of the traveling bar is fastened to the carriage, and, as the carriage is moved back and forth, the traveling bar, to keep its horizontal position, moves on a cog-wheel between the horizontal timbers nearest the vertical beam. On the inner side of either of the horizontal timbers a bar of iron was screwed, on which the end of the traveling bar would drop, in case it was forced outward beyond a certain point. This bar, which the witness called the "preserver," plaintiff attempted to prove, was absent at the time of the accident. From a judgment entered on a nonsuit, plaintiff appeals.

Argued before LARREMORE, C. J., and VAN HOESEN, J.

August P. Wagener and Lexow & Leo, (Leopold Leo, of counsel,) for appellant. Edward M. Burghard and Lewis Sanders, for respondents.

VAN HOESEN, J. The evidence showed that the traveling bar fell from the crane and struck the plaintiff, but that it would not have fallen if a piece

called the "preserver" had been in its place on the crane. When the preserver was taken away, no one of the witnesses could testify, but it was replaced after the accident happened to the plaintiff. The learned judge dismissed the complaint because it did not appear how long the preserver had been off the machine, and said that it was indispensable that there should be some evidence that the defendants were negligent in failing to replace it in a reasonable time after its removal. In the absence of any evidence as to how long the preserver had been lacking, the judge said that the jury could not draw the conclusion that the defendants had been negligent, because, for aught that appeared, it might have been broken and have fallen off at the very moment of the accident. I think that the learned judge was correct in his ruling, and that the judgment should be affirmed. *Bailey v. Railroad Co.*, 3 N. Y. Supp. 585. Judgment affirmed, with costs.

KNAPP v. BARCLAY.

(Common Pleas of New York City and County, General Term. December 2, 1889.)

APPEAL—REVIEW—WEIGHT OF EVIDENCE.

Where the evidence is conflicting, judgment will not be disturbed on appeal.

Appeal from district court.

Action to recover money paid to the agent of defendant to obtain a lease from the latter. Judgment for plaintiff, and defendant appeals.

Argued before LARREMORE, C. J., and VAN HOESEN, J.

James H. Laird, for appellant. *Matthew Daly*, for respondent.

PER CURIAM. We can discover nothing in the evidence to warrant the observation of the justice of the district court that Stehle deceived Darer, and fraudulently induced him to pay the money in controversy to Barclay. If the justice believed Darer's own story, he had no reason to impute the slightest fraud to any one. Darer swore that he paid the money to Barclay's agent in reliance upon the promise of the latter that it should be returned in case Mr. Barclay did not give him a lease of the farm. Mr. Barclay did not give Darer a lease, and, consequently, if Darer's story be true, he is entitled to recover the money, not because he was defrauded, but because the contract provided that it should be returned to him, under the circumstances that now exist. Although the testimony of Darer is amply sufficient to support the judgment, it seems that it was not accepted as true by the justice, who appears to have discredited the statement that the money was to be returned in case a lease were not given to Darer, and to have assumed without proof that Darer paid the money because Stehle persuaded him that it was the best way to insure the getting of a lease, and that Stehle was guilty of fraud in using such persuasions. We have doubts as to whether the decision of the court below was a wise one, but we shall not interfere with it. It seems strange to us that no inquiry was made of Paine, the agent of Mr. Barclay, as to whether he agreed at the time the money was paid to return it to Darer in the event of Mr. Barclay's refusal to give him a lease. Paine was a witness, and the very turning point of the case was whether or not such an agreement was made, and yet Paine did not really contradict Darer's statement as to the agreement. We must therefore affirm the judgment.

RIGGS v. CHAPIN *et al.*, (three cases.)

(City Court of New York, General Term. December 2, 1889.)

1. PLEADING—PLEADING AND PROOF—VARIANCE.

Where the complaint avers that defendant M. contracted to build a house for defendant C., and plaintiff subcontracted with M. to do the work, plaintiff cannot prove a contract between himself and C.

2. SAME—AMENDMENT—DISCRETION OF COURT.

It is in the discretion of the court to grant leave to amend a complaint on trial.

3. MECHANICS' LIENS—RIGHTS OF SUBCONTRACTORS.

Under Laws N. Y. 1885, c. 342, § 1, giving a lien to persons doing work on, or furnishing material for, a building, with the consent of the owner, but providing that the owner shall not be liable, by reason of the liens filed, to pay more than the amount agreed on in the contract, and remaining unpaid at the time of filing the lien, a subcontractor need not show the consent of the owner directly to himself; but, in the absence of an agreement by the owner making himself personally liable for the claim of the subcontractor, the latter has a claim against the property no further than the amount unpaid on the contract at the time of filing his lien.

4. JUDGMENT—CORRECTION—DISMISSAL.

Where an action is dismissed on technical grounds, a recital in the judgment that the dismissal was on the merits will be stricken out.

Appeal from special term.

Action by John Riggs against James M. Chapin, Frederick R. Meres, and others to foreclose a mechanic's lien filed by plaintiff against property owned by defendant Chapin. The complaint alleges that Chapin made a contract with defendant Meres whereby the latter was to build the stairs in said house, and furnish lumber and material therefor, to be paid for in installments, as the work progressed; and that Meres made a subcontract with plaintiff to do said work, and certain extra framing, for \$200, to be paid in two installments. The complaint alleged that Chapin, the owner, "well knew" the facts stated; and that there was due from him to the contractor more than sufficient to satisfy plaintiff's lien. On the trial, plaintiff undertook to prove a contract between himself and Chapin, whereby the latter agreed to pay plaintiff for the work done. The trial judge ruled that the proof offered was not receivable under the pleadings, and that plaintiff was bound to prove the facts as alleged, to-wit, that Meres performed his contract with Chapin; that the latter owed Meres more than the amount of plaintiff's lien, and dismissed the complaint. From the judgment entered on this dismissal, plaintiff appeals.

Argued before MCADAM, C. J., and HOLME, J.

W. P. Prentice, for appellant. A. D. Kenyon, for respondent Chapin. Tuttle, Goodell & Brooks, for respondent Meres.

MCADAM, C. J. It is a settled rule that the *allegata* and *probata* must agree. The latter must support the former. In other words, the plaintiff must prove his case as he has alleged it. *Cumtsey v. Lewis*, 15 N. Y. St. Rep. 364. The object of the pleadings is to arrive at a specific issue upon a given and material fact. If there be proofs to facts not put in contestation by the pleadings, or allegations of facts not established by proofs, in each case they must be rejected. *The Sarah Ann*, 2 Sum. 206. Every fact which a party must prove to establish his cause of action or defense must be stated in the pleading, (*Gurnee v. Beach*, 40 Hun, 108;) and facts which are not alleged cannot be proved, (*McKyring v. Bull*, 16 N. Y. 297.) The rule touching the statement of facts constituting the cause of action is the same in all cases, legal or equitable; and the rules by which the sufficiency of the pleadings are to be determined are prescribed by the Code. *People v. Ryder*, 12 N. Y. 438; Pom. Rem. § 527. *Kelsey v. Western*, 2 N. Y. 501, was an equity case, and the court (at page 506) held: "It is well settled that no proofs can be offered of facts not put in issue by the pleadings, nor can relief be granted for matters not charged, although they may be apparent from other parts of the pleadings and evidence, and therefore particular care must be taken to put in issue in the bill whatever is intended to be proved by the complainant in the cause; otherwise, he will not be permitted to give it in evidence, for the court pronounces the decree *secundum allegata et probata*. The reason of which is that the adverse party may be apprised against what suggestion he is to prepare his defense." The rule of pleading is practically the same whether the action be in its nature of legal or equitable cognizance, except

that in an equity case the facts may be more numerous, more complicated, more involved; and the pleader may state all the facts, in a legal and concise form, which constitute the cause of action and entitle him to relief. The rule touching the statement of facts constituting the cause of action is the same in all cases, and the rules by which the sufficiency of the pleadings are to be determined are prescribed by the Code. *People v. Ryder, supra*. One of the material requirements of a complaint to foreclose a mechanic's lien is an allegation of the contract under which the labor or material were furnished, or facts which amount to a contract. The plaintiff, in his complaint, undertook to comply with this requirement by specifically alleging—*First*, a contract between the plaintiff, as subcontractor, and Meres, the contractor; and, *next*, a contract between the latter and Chapin, the owner; and the lien is sought to be enforced on the theory that the owner owed the contractor an amount exceeding that claimed by the subcontractor. These allegations were denied, and the issues so raised came on for trial. Instead of proving the facts as alleged, the contract between Meres, the contractor, and Chapin, the owner, was not offered in evidence. Indeed, the plaintiff undertook to ignore it, by attempting to prove a contract between the plaintiff and Chapin, the owner, by which the latter was to pay the plaintiff for his work and material. The trial judge refused to receive the evidence offered; there being nothing in the complaint warranting its reception. This ruling was proper; and, the plaintiff having failed to sustain the allegations of his pleading in manner and form as alleged, the dismissal of his complaint was not error. A party cannot be called into court to defend upon a cause of action particularly specified, and be required upon the trial to answer another, entirely different, for which he is unprepared. Pleadings are to be so drawn as to evolve some question, either of fact or law, disputed between the parties, and mutually proposed and accepted by them as the subject for decision; and the question so produced is called the "issue." Tyler, Steph. Pl. 147. The pleadings herein clearly defined the issue the court below was called upon to determine, yet no proof was offered in its support.

The plaintiff moved to amend his complaint by alleging an agreement on the part of the owner to pay for the work done. The amendment proposed was not of form, but of substance, as it changed the entire nature of the action and proofs. Its purpose was to drop Meres, the contractor, as the debtor, and to substitute in his place Chapin, the owner, as the one primarily liable to him, as an original promisor. Such an amendment might have been permitted on terms or conditions that would not have operated to the prejudice of the defendants, or taken them by surprise. But the trial judge was under no obligation to allow an amendment, even in an equity case. An application for leave to amend a pleading is addressed purely to the discretion of the trial judge, and his denial of it is not reviewable on appeal. *Rosenwald v. Hammerstein*, 12 Daly, 377. It is needless to discuss what we might have done at trial term under similar circumstances. The question we are to determine is whether the judge below erred,—in other words, whether he acted contrary to his duty,—and the record does not warrant us in deciding that he acted in violation of law. Pleadings are at times amended on appeal, but only to uphold a judgment; never to reverse one.

This leads us to the construction of the statute conferring the right of lien in favor of mechanics and others doing work or furnishing materials towards the erection or alteration of buildings in this city. The term "with the consent of the owner," contained in section 1, c. 342, Act 1885, must be construed with reference to its obvious intent and meaning. It was not intended to make the owner pay twice,—first to the contractor, and next to the employes of the latter. If, however, a stranger employs a contractor "with the consent of the owner," expressed or implied, the property of the owner will be liable for the claim of the person employed; for the reason that the land, having re-

ceived the benefit of the labor or material, with the expressed or implied assent of the owner, should be charged to the extent of the benefit conferred thereon. Thus, in *Nellis v. Bellinger*, 6 Hun, 560, a son employed a mechanic to erect a dwelling-house upon land which belonged to his father, for his own use and benefit. It was shown that the father consented to the erection of the house, and, while he did not contract for the work, or direct it, or in any way become responsible for it, personally, it was held that the mechanic had a lien upon the land for services rendered in the construction of the house. In *Husted v. Mathes*, 77 N. Y. 388, the title to the land was in Mrs. Storms, and the improvements thereon were made by her husband, she simply knowing of them, and consenting thereto; and the right of lien was enforced. These decisions proceed upon the theory that "the legislature clearly intended to enforce the equitable principle that one who knowingly takes the benefit of the property or labor of another, in the form of improvements made upon his land, ought to have the land subjected to a lien for the value thereof." Not to charge the land, in such a case, would enable the owner of the fee to appropriate the labor and materials of others to his own benefit, without compensation. This would be manifestly unjust and inequitable. But where an owner employs a contractor, and pays him all he contracted to pay, not in advance, but as the work progressed, not collusively, but in good faith, he cannot be again compelled to pay, simply because the contractor subsequently fails to pay those he employed. The contractor has the right to employ assistants "without the consent of the owner." The nature of the work would imply that he must. These employees are selected by, and are under the exclusive control of, the contractor, who makes his own contracts with them, and superintends their performance. Mechanics are not obliged to accept employment under him, neither are material-men bound to credit him; and, if they do, they must look to his personal credit, or see to it that their notices of lien are filed in time to stop the payments coming from the owner to the contractor according to the terms of the contract, or their effort to acquire a lien on the property may prove abortive. A person who leases property and employs mechanics to do work upon it, to suit his pleasure or convenience, cannot charge the estate of the owner for the work. *Knapp v. Brown*, 45 N. Y. 207; *Muldoon v. Pitt*, 54 N. Y. 269; *Jones v. Manning*, 6 N. Y. Supp. 338. In other words, in order to affect the estate of the owner, he must in some manner consent, either expressly or impliedly, to the charge; for neither he nor his property can be charged contrary to his agreement, and against his will. In *Otis v. Dodd*, 90 N. Y. 336, owners of certain lands leased the same for a term of years; the lessees covenanting to erect certain buildings and structures thereon, which, at the expiration of the lease, should become the property of the owners. The plaintiff, under a contract with the lessee, erected the buildings and structures specified, and filed the notice required to effect a lien; and it was held that he thereby acquired a valid lien, as against the owners, for the balance due. In that case the erections became part of the freehold as soon as they were made. They were to belong to the owners of the fee. The owners paid nothing for the erections, which, by the terms of the lease, were made by their express consent. They superintended the erections, and gave directions concerning them. The property thus benefited and improved was, under the circumstances, equitably charged with the lien. This seems just; and the principle decided in that case cannot be extended to an owner who contracts for the erection of a building, and in good faith pays for it according to the terms of the contract of employment. Whenever an owner contracts with another to build a house on his land, he consents to the erection; but such consent does not necessarily obligate him to pay subcontractors, not in privity with him, the amount of their demands. The owner's liability proceeds from his consent, as expressed in and evidenced by his contracts. He is to pay according to their terms, not otherwise. True, the pay-

ments falling due to the contractor may be impounded by the filing of a lien by a mechanic or material-man, and may, by operation of provisions of the statute, be applied to discharging such liens; but no personal responsibility is placed upon the owner, further than that created by his contract. He may by subsequent acts create personal obligations to subcontractors, but not in the absence of an agreement with them, expressed or implied, whereby the owner makes the charge personal to himself. The case of *Richardson v. Reid*, 3 N. Y. Supp. 224, is of this character. There the contractor negotiated with the plaintiff for a furnace and range, when the owner stopped the negotiation, saying there was money in his hands belonging to the contractor; that he desired a larger and more expensive furnace put in his house; and that if the plaintiff would put the furnace in, he (the owner) would pay the bill therefor. The owner in that case became an original promisor, and was properly held personally liable for the price of the furnace; and a lien filed against his property was held to be valid. The complaint in the case cited, although more comprehensive than the one used here, was inartistically drawn; but the court said. It "seems to be sufficient to sustain the judgment." If the evidence offered had been objected to and ruled out, as not being in accordance with the pleading, or the objection had been made that the complaint itself was insufficient to charge the owner personally, and the objection had been sustained, and the complaint, in consequence, dismissed, the court might have held, as we do here, that the ruling and decision were not error. The questions presented here were not discussed there, and could hardly have been presented in that case, in view of the result at which the trial court arrived. The complaint in the present case was drawn in accordance with our understanding of the statute. It presented a case in which a lien would attach against the property of the owner to the extent of the amount due from the latter to Meres, the contractor. The difficulty is that these facts were not proved; and, for the failure to establish them, the complaint was properly dismissed. The trial judge found that the owner had no contract with Meres; but this finding was not made upon proof, but upon the absence of it. The counsel for Chapin claims that the contract was not made with Meres, but with another person, not a party to the action; but this is of no consequence, because, as the plaintiff failed to prove his cause of action within its entire scope and meaning, the owner was not called upon to make his defense; and we cannot anticipate what he might have pleaded if the plaintiff had changed the allegations of his pleading, or what he would have proved if he had been put upon his defense.

The dismissal was upon technical grounds, not on the merits, and does not bar the plaintiff from maintaining a new action against his employer, whoever he may be. Code, § 1209. The declaration in the judgment that the dismissal was "upon the merits" was either erroneously or inadvertently inserted therein, and must be stricken out. With this modification, the judgment must be affirmed, but without costs.

FIRST NAT. BANK v. COX *et al.*

(Superior Court of New York City, General Term. April 15, 1889.)

NEGOTIABLE INSTRUMENTS—BONA FIDE HOLDER—EVIDENCE.

In an action by a bank on a note, it was in evidence that the manager of the business of one of the indorsers was in possession of the note shortly after its maturity, but the cashier of the bank testified that it had been sent for collection to another person, who delivered it to the bank's attorney. The attorney testified that the indorser was present when the note was delivered to him for collection, and that, no instructions being given as to its ownership, suit was brought in the name of the indorser, but, upon the attorney's learning that the note belonged to the bank, he so informed defendant's attorney and no answer was served; and subsequently

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this action was brought. *Held*, that there was no evidence that the note was ever in the hands of the indorser as owner after its maturity, or that the rights of the bank were other than those of a purchaser before maturity.

Appeal from jury term.

Action by the First National Bank of Gloucester against John Cox and others. Defendants appeal from a judgment on a verdict directed for the plaintiff.

Argued before SEDGWICK, C. J., and TRUAX and DUGRO, JJ.

Jesse Johnston, for appellants. *Harriman & Fessenden*, for respondent.

SEDGWICK, C. J. The action was on a promissory note against the defendants, as makers. On the trial the defendants did not contest that at first the plaintiff had paid value for the note, or that it was in the plaintiff's hands when it fell due. The answer had averred "that if the plaintiff is the owner and holder of said note the same was purchased after it became due and payable." If this referred to the purchase by the plaintiff at the time it first went into the plaintiff's ownership, there was no evidence to sustain this answer. On the trial the defendants assumed that the answer referred to a second purchase or delivery of the note to the plaintiff from the payee, one Stinson, who, it was claimed, had in some way paid or satisfied the bank's claim against him as indorser, and afterwards, after maturity, retransferred the note to the bank. If these facts had existed, the defendants claimed that the bank acquired only the right of Stinson, the indorser, against the makers, which would permit the defendants to make an offset against the indorser, and in the answer an offset was pleaded, which, if valid, would extinguish any claim upon the note. The answer also alleged that "Stinson, the payee in said note mentioned, is now the lawful owner and holder of said note." The defendants, to maintain these defenses, gave testimony for the purpose of showing that after maturity the payee, Stinson, was in possession of the note; they arguing that this possession made a presumption, that it had been delivered to him, by the bank, in a transaction that made him the owner of the note. They did not in reality give testimony that Stinson was in actual possession. The witness who spoke on this point said that one Eaton was in actual possession. As to Eaton's possession being the possession of Stinson, nothing more was shown than that at the time Eaton was the general manager of Stinson's business. This did not tend to show that the note was held in the course of that employment of agency, when the other undoubted facts of the case are considered. The defendants called a witness, one of the attorneys for the plaintiff in this action. He testified that the note in action was given to him by Mr. Booth. Both Booth and Stinson were his clients. Stinson had placed in his hands the papers that concerned the claim that Stinson made in respect of the contract, which is the subject-matter of the offset in the present answer. Booth had such relations to Stinson that he was present at consultations in respect of the contract. In the course of these, Booth placed in the hands of the witness the note, with directions to bring suit upon it, with no instructions as to the ownership of the note. An action was begun in the name of Stinson. Before answer, the witness learned that the bank was the owner, and he so told the defendant's attorney, and no answer was served. Thereupon this action was brought.

The cashier of the bank was called as a witness for plaintiff. On his cross-examination he testified that the bank sent the note from its place of business, in Massachusetts, to Booth, in New York, with instructions to collect the note, and, if necessary, to have suit brought upon it. His testimony on the point of Booth's having custody of the note was so corroborated by the evidence of plaintiff's attorney, called as a witness by defendants, that his credibility was not a question for the jury. One of the defendants testified that Eaton did have possession of the note at a time not definitely fixed, and that Eaton

demand payment of the note. The other testimony satisfactorily showed that, if Eaton had the note before Booth gave it to the attorney, Eaton must have been acting for Booth or for the bank; or, if he had it after the attorney held it from Booth, he must still have held it for the bank in reality, even if we suppose that for a time Stinson was thought, by a mistake, to be the holder. Such a mistake would not give Stinson or Eaton a right to act in the attempt to collect for any but the bank. I am of opinion that there was no evidence that the note was ever in Stinson's possession after maturity, as owner, or that plaintiff's rights were other than those of a purchaser before maturity. The judgment should be affirmed, with costs. All concur.

STEVENS v. REYNOLDS.

(*Supreme Court, General Term, First Department. November 7, 1889.*)
MECHANICS' LIENS—ASSIGNMENT OF DEBT.

The New York mechanics' lien law (Act 1885, c. 342) provides that if the owner or person in interest shall, for the purpose of avoiding the provisions of the act, or in advance of the terms of any contract, pay by collusion any money, etc., he shall be liable for the amount which would have been unpaid to the contractor, assignee, etc., had no such payment been made. A material-man filed a lien for lumber furnished the contractor. Afterwards the contractor gave to another material-man, who had also furnished lumber, an order on the owner for a sum in excess of that due him for the lumber. The order read: "It being for lumber materials used in construction of same; the amount to be paid of the last payment of \$1,900." *Held*, that the material-man presenting the order could only recover thereon the amount due for lumber actually furnished by him for the building.

Case submitted on agreed statement.

This was an action by Chancey Stevens against Bridget M. Reynolds, to enforce a mechanic's lien. Upon the trial of the issues the parties affected by the appeal agreed upon the following state of facts:

"STATEMENT OF FACTS.

"*First.* The defendant Bridget M. Reynolds was, September 1, 1886, and still is, the owner in fee of the premises described in the complaint known as 'No. 115½ Waverly Place,' in the city of New York. *Second.* The defendant Hugh M. Reynolds was and is the husband of said Bridget M. Reynolds, and was her duly-authorized agent to make contracts affecting said property. *Third.* The defendant Anderson, on or about September 21, 1886, made a contract with the defendant Hugh M. Reynolds, as agent of said Bridget M. Reynolds, to do certain carpenter work on the building erected on said premises, and to furnish certain materials therefor. The contract called for the completion of the work on or before October 20th, 1886, and the payments to be as follows:

When all the trimmings should be done, except the basement,	-	\$1,000
When all the doors and sash should be hung, vestibule set up,	-	
and hardware on,	-	1,000
Thirty-five days after the completion of all the work,	-	1,900

Making a total of	-	-	-	-	-	\$3,900
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Fourth. That said Anderson entered on the performance of said contract, and received payments on account amounting to \$1,950; that he failed to complete the work by October 20th, 1886, and continued, with Reynold's consent, to work on the building until about the 22d day of December, 1886, at or about which time the work was completed; that certain portions of the work called for by the contract were omitted by Anderson and completed by Reynolds; that the trial court has allowed \$404.52 therefor; that certain other portions of the work were either waived by the owner or offset by other work furnished; that the amount adjudged to be due said Anderson on said contract, after making said deductions, is \$1,545.48. *Fifth.* That the plaintiff,

between September 13 and December 4, 1886, furnished for and delivered to defendant Anderson lumber to the value of \$1,097.93, which lumber was used in the construction of said building; that no part of said claim has been paid. *Sixth.* That on the 15th day of February, 1887, and after the said lumber had been fully furnished, and within ninety days after the final furnishing thereof, the plaintiff duly filed in the office of the clerk of the city and county of New York a notice of lien, duly verified, against the said premises, for the value of said lumber materials, as above set forth, under and in pursuance of the provisions of chapter 342 of the Laws of New York, passed May 27, 1885. *Seventh.* That between October 7 and November 5, 1886, the defendants Ogden & Bigelow furnished to the defendant Anderson lumber of the value of \$909.94, a portion of which, to the value of about \$400, was used in said building. No part of said \$909.94 has been paid. *Eighth.* That on or about November 15, 1886, defendant Anderson executed and delivered to the defendants Ogden & Bigelow, who were copartners in business, under the firm name of Ogden & Co., an instrument in writing as follows: 'NEW YORK, Nov. 15th, 1886. *H. M. Reynolds, Esq.*: Please pay to the order of E. H. Ogden & Co. nine hundred and nine 94-100 dollars, and charge to account of my contract with you for the carpenter work at 115½ Waverly Place, it being for lumber materials used in construction of same; the amount to be paid of the last payment of nineteen hundred dollars. ALEXANDER ANDERSON.' This paper writing was given and accepted as payment for the lumber furnished as aforesaid. That said writing was presented to said Hugh M. Reynolds, in the presence and at the request of said Anderson, on the 15th day of November, 1886, and due notice thereof was given to said Reynolds, but no acceptance in writing was given."

Argued before VAN BRUNT, P. J., and BRADY and DANIELS, JJ.

Charles H. Machin, for plaintiff. *Charles A. Decker*, for defendant.

BRADY, J. The learned justice held in the court below that the order given to Ogden & Co., for \$909.94 was an equitable assignment *pro tanto* of the amount of the last payment due by Reynolds to Anderson, the contractor, and that there was nothing in the mechanic's lien act of 1885 (chapter 342) which in any way affected their right to be paid the amount mentioned in the assignment; and this is really the only question which requires consideration, for the reason that the conclusion of the learned justice that the order given to Ogden & Co. was an equitable assignment *pro tanto* is clearly established by the case of *Brill v. Tuttle*, 81 N. Y. 457, inasmuch as the sum mentioned in it was made payable out of a particular fund, which was clearly a distinguishing characteristic of the order referred to. There is nothing in the case of *Gunther v. Darmstadt*, (Daily Reg. March 20, 1888,) which conflicts with this view. There it was held that the paper in question was a mere draft, and that the circumstances attending the drawing and delivery did not indicate an intention to assign any part of the fund. The act of 1885 (chapter 342) declares that if the owner or person in interest shall for the purpose of avoiding the provisions of the act, or in advance of the terms of any contract, pay by collusion any money or any other valuable thing on such contract, he shall be liable for the amount that would have been unpaid to the contractor, subcontractor, or assignee, had the owner or other person in interest made no such payment, or given no such mortgage, or effected no lien or incumbrance at the time of filing the notice of lien prescribed in the fourth section of the act. The appellant's contention seems to rest upon the misunderstanding of the provisions just referred to, and illustrated by his dependence upon decisions relating to the mechanic's lien law of 1862, for Kings county, (chapter 478,) and the case of *Post v. Campbell*, 83 N. Y. 279, in which the court of appeals construed that act, and held that payments in advance of the terms of the contract, although without fraud or collusion, could not be held against

a lienor. It is conceded by the appellant's counsel that in that act the word "collusion" did not appear in the precise connection that it does in the act of 1885. An examination of the different sections will show that by the act of 1862 two classes of payment were provided against: *First*, a payment by collusion, for the purpose of evading the provisions of the act; and, *second*, in advance of the terms of any contract which is entirely different from the language employed by the legislature in the act of 1885, which applies the word "collusion" to both classes of payment referred to in the act of 1862, the language being, "shall, for the purpose of avoiding the provisions of this act, or in advance of the terms of any contract, pay by collusion any money," etc. The reasoning, therefore, of Justice RAPALLO in the case mentioned does not apply. Indeed, the learned judge said: "But, when provision is made against payment in advance, I find none which requires that such payment in advance be made by collusion, or fraudulently." It should be observed that *Post v. Campbell* was decided in 1881,—several years, therefore, before the passage of the act of 1885. In *Munger v. Curtis*, 42 Hun, 466, in discussing section 2 of the act of 1885, Justice PRATT said that section applies only to cases where the money is paid, or the incumbrance put on, by the owner, for the purpose of defrauding the contractor or subcontractor.

There being no evidence in the case establishing collusion as to the entire sum covered by the assignment, it was proper that the assignees should recover of that amount a sum equal to the value of the lumber furnished by them towards the construction of the building, and nothing more. It is true that the learned justice in the court below proceeded upon the doctrine affecting equitable assignments, declaring the assignee to be entitled to the whole sum embraced in the assignment; but this view cannot be sustained, in view of the provisions of the act of 1885, and which were in existence prior to the assignment, and, indeed, prior to the contract between the owner and the builder herein. The fund which was provided for by the contract in payment of materials to be furnished and services to be rendered was by the act appropriated upon certain conditions, being applied to the payment of claims for services rendered and materials furnished to the building; and, although payments in advance by collusion were prohibited, nevertheless the spirit of the act, breathing in every section, is that the sum to be paid shall be secured to the laborers and material-men. It was not in the power, therefore, of the contractor to pay in advance, by assignment or otherwise, out of that fund a sum in excess of the amount due for materials furnished for the work done upon the building, except subject to the operation of the lien law, the provisions of which were equally binding upon him and his assignee. There does not seem to be any room for doubt that it was the intention of the legislature to secure the amount of the contract for the payment of material-men and laborers, giving to them a lien upon it, on their compliance with the necessary requirements. For these reasons, it is thought that the assignee should be limited to the amount of the material actually furnished for the building to which the lien relates, and the judgment should be so modified as to secure that result. Ordered accordingly, without costs to either party. All concur.

PEOPLE v. HARRIS.

(Supreme Court, General Term, Fourth Department. November, 1889.)

1. INDICTMENT AND INFORMATION—SUFFICIENCY.

An indictment under Laws N. Y. 1884, c. 202, § 8, making it a misdemeanor to sell, supply, or bring to be manufactured, to any butter or cheese factory, any milk diluted with water, charged that on the 3d and 4th days of the same month defendant did, at the place named, bring to a certain cheese factory, for the purpose of being manufactured into butter and cheese, a large quantity of milk diluted with water; that the milk so diluted was sold to G. and R.; that defendant delivered water in his milk aforesaid for the purpose and with the intent of defrauding

said G. and R. *Held*, that the indictment sufficiently charged a crime, within the requirements of Code Crim. Proc. N. Y. §§ 275, 276, providing that the indictment must contain a plain and concise statement of the act constituting the crime.

2. SAME—DUPLICITY.

Nor was more than one offense charged, within the requirements of sections 278-280, that the indictment must charge but one crime, in one form, except it may be charged in separate counts to have been committed in a different manner or by different means; that where the acts constitute different crimes they may be charged in separate counts; and that the precise time of commission need not be stated, but the crime may be alleged to have been committed at any time before the finding of the indictment, except where time is a material ingredient of the crime.

3. COURTS—JURISDICTION—SPECIAL SESSIONS.

Laws N. Y. 1884, c. 202, § 11, provides that "courts of special sessions shall have jurisdiction of all cases arising under this act, and their jurisdiction is hereby extended so as to enable them to enforce the penalties imposed by any or all of the sections hereof." *Held*, that courts of special sessions are not given exclusive jurisdiction of cases arising under the act.

4. REPEALING ACT—LEGISLATIVE INTENT.

As Laws N. Y. 1885, c. 188, contains a clause repealing several statutes, without mentioning Laws 1884, c. 202, and as the legislature declared the act of 1885 to be supplemental to and in aid of the act of 1884, it is clear that the legislative intent was that the act of 1885 should not repeal that of 1884.

Appeal from court of oyer and terminer, Otsego county.

The defendant, Albert Harris, was indicted for the crime of watering milk. His demurrer to the indictment having been overruled, he moved to quash. This motion being denied, defendant pleaded not guilty, and went to trial. On return of a verdict of guilty, a motion in arrest of judgment was also denied, and defendant appeals.

Argued before HARDIN, P. J., and MARTIN and MERWIN, JJ.

E. M. Harris, for appellant. *Chas. T. Brewer*, for respondent.

MARTIN, J. The defendant was indicted for the crime of watering milk, in violation of section 3, c. 202, Laws 1884, which provides: "No person or persons shall sell, supply, or bring to be manufactured, to any butter or cheese manufactory, any milk diluted with water. * * * Whoever violates the provisions of this section shall be guilty of a misdemeanor, and shall be punished for each offense by a fine of not less than twenty-five or more than two hundred dollars, or not less than one or more than six months' imprisonment, or both such fine and imprisonment." The indictment also charged that on the 3d and 4th days of August, 1884, at the town of New Lisbon, the defendant did bring and carry to a certain cheese manufactory in Garrettsville, in said town, for the purpose of being manufactured into butter and cheese, a large quantity of milk diluted with water; that the milk so diluted was sold to a firm consisting of Henry Gilbert and C. P. Root; that the defendant delivered water in his milk as aforesaid for the purpose and intent of cheating and defrauding said Gilbert and Root, the purchasers thereof, against the peace of the people of this state, and contrary to the provisions of chapter 202 of the Laws of 1884, and more particularly of section 3 of the said statute. To this indictment the defendant demurred on the grounds: "(1) The indictment does not conform substantially to the requirements of sections 275 and 276 of the Code of Criminal Procedure, in that said indictment does not contain a plain and concise statement of an act constituting the crime charged, nor does it state the name of the crime charged, nor of any crime or misdemeanor. (2) More than one crime is charged in the indictment. (3) That the facts stated do not constitute a crime. (4) The court has no jurisdiction over the subject of the indictment." The defendant's demurrer was overruled, and an interlocutory judgment was entered overruling such demurrer. The defendant then pleaded not guilty. The indictment was subsequently brought to trial at a court of oyer and terminer, held in and for the county of Otsego, and the defendant was convicted and sentenced to pay a fine of \$100, and to

stand committed to the Otsego county jail until the fine was paid, not exceeding one day for each one dollar of the fine. On the trial the defendant moved to quash the indictment, and that the proceedings be dismissed and the defendant discharged, on the ground that the court of oyer and terminer or the court of sessions had not jurisdiction of the offense alleged in the indictment; also that the act under which the indictment was found was repealed by chapter 183 of the Laws of 1885; and that the grand jury presenting the indictment had no jurisdiction to present it. This motion was also denied.

At the close of the evidence the defendant moved for his discharge, and that the jury be directed to render a verdict of acquittal upon the grounds: (1) That the people had failed to prove the defendant guilty of the crime charged in the indictment. (2) That there was not sufficient proof of the delivery by the defendant of any milk diluted with water to the cheese manufactory mentioned in the indictment, nor that the defendant ever sold, supplied, or brought to be manufactured, to any butter or cheese manufactory, any milk diluted with water. (3) That there was not sufficient proof to authorize a conviction that the milk claimed to have been diluted with water had been sold to a firm consisting of Henry Gilbert and C. P. Root, as charged in the indictment or otherwise, or that defendant did bring or carry such milk to the cheese manufactory mentioned in the indictment for the purpose of being manufactured into butter or cheese, or for any other purpose. (4) That the grand jury by which the indictment was presented had no jurisdiction to inquire into or to present the same, and that this court has no jurisdiction to try the same, or the offense alleged in the indictment. (5) That the act chapter 202 of the Laws of 1884, and particularly section 3 of said act, under which this indictment purports to be found, is repealed by chapter 183 of the Laws of 1885, and no trial or conviction can be had under such repealed statute. (6) That the object of the act, the conditions, elements, and the penalties for the offense, have been so changed and increased since the offense is alleged to have been committed and the indictment presented that no prosecution or conviction can be had therefor under the indictment or under the act of 1884. (7) That no prosecution or conviction under chapter 202 of the Laws of 1884 can be had except in the manner, in the court, and by the authorities specifically mentioned therein; that it does not appear that the district attorney of Otsego county has or ever had any authority to prosecute the defendant for the offense in question from the state dairy commissioner, who, under the direction of the governor, is alone charged with the duty of prosecuting all offenses under said act. This motion was denied.

On the coming in of the verdict, and when the defendant was called for judgment, the defendant, by his counsel, moved that no judgment be rendered on the verdict of guilty against the defendant, and that judgment be arrested on the grounds and because: (1) That the court had and has not jurisdiction over the subject of the indictment. (2) That the facts stated in the indictment do not constitute a crime. (3) That there is not evidence sufficient to warrant a verdict of guilty against the defendant; that there is a failure of proof on the part of the people as to essential elements of the crime charged. (4) And upon each and all of the grounds stated upon motion to direct acquittal of defendant and for his discharge made at the close of the evidence. This motion was also denied. The defendant now contends that the court erred in overruling his demurrer, and insists that no crime was charged in the indictment; that more than one offense was charged therein; that the facts stated in the indictment do not constitute a crime; and that the courts had no jurisdiction over the subject of the indictment.

An examination of the indictment in this case, and of the statute under which it was found, discloses quite clearly, we think, that the indictment sufficiently charged a crime under the statute. The statute makes it a misdemeanor to sell, supply, or bring to be manufactured, to any butter or

cheese manufactory, any milk diluted with water. The indictment charged that the defendant brought to a certain cheese factory named and described therein milk diluted with water, and that he sold the same to the individuals named in the indictment, contrary to the provisions of said statute. We think the indictment fulfills the requirements of sections 275 and 276 of the Code of Criminal Procedure, and sufficiently charged a crime under the statute.

It is, however, said that more than one offense is charged in the indictment, and hence is in contravention of sections 278 and 279 of the Code of Criminal Procedure, and consequently invalid. We think otherwise. The indictment alleges but a single transaction. It is true that it alleges that it took place on the 3d and 4th days of August, 1884, but there is but one sale or bringing to the cheese manufactory alleged, and but one quantity of milk diluted with water alleged to have been delivered. Moreover, section 280 of the Code of Criminal Procedure provides that "the precise time at which the crime was committed need not be stated in the indictment, but it may be alleged to have been committed at any time before the finding thereof, except where the time is a material ingredient in the crime." We think that but one offense was charged in this indictment, and that it was not obnoxious to the provisions of sections 278 and 279 of the Code of Criminal Procedure.

We are also of the opinion that the court had jurisdiction over the subject-matter of the indictment. This court had occasion to examine a similar question in the case of *People v. Austin*, 3 N. Y. Supp. 578. In that case the question was whether courts of special sessions were given exclusive jurisdiction of the offenses mentioned in chapter 183 of the Laws of 1885. Section 14 of that act provides: "Courts of special sessions shall have jurisdiction of all cases arising under this act, and their jurisdiction is hereby extended so as to enable them to enforce the penalties imposed by any or all sections thereof." It was held that that section did not confer exclusive jurisdiction upon courts of special sessions of the cases enumerated in the statute, and that the defendant had the right to give bail and thus secure a trial after indictment. In the case at bar the statute relied upon as conferring exclusive jurisdiction upon courts of special sessions is practically the same as the statute under consideration in the *Austin Case*. Indeed, they are precisely alike, except that the word "hereof" is used in the statute of 1884, while in the statute of 1885 the word "thereof" is used instead. We can see no distinction between the two statutes, nor between the questions involved in the two cases, and therefore conclude, as we did in the *Austin Case*, that the court of sessions or court of oyer and terminer had jurisdiction of the subject-matter of the indictment in this case.

The defendant also contends that chapter 202 of the Laws of 1884 was repealed by chapter 183 of the Laws of 1885. An examination of the title of chapter 183 of the Laws of 1885 shows that the legislature declared the act of 1885 to be supplementary to and in aid of chapter 202 of the Laws of 1884; thus evincing clearly, we think, an intention on the part of the legislature not to repeal the act of 1884. Moreover, the act of 1885 contains a repealing act by which several statutes were repealed, but the act of 1884 is not mentioned therein. There is no claim of any express repeal of this statute. The defendant's claim is that it was repealed by implication. We think not. The act itself not only fails to show any facts which would justify us in holding that it was repealed by implication, but it shows quite clearly that it was the intent of the legislature that it should not be repealed. We have examined the other exceptions taken by the defendant, but have found none that would justify a reversal of the judgment appealed from. Code Crim. Proc. § 764. Judgment affirmed, and the clerk directed to enter judgment and remit a certified copy thereof, with the return and decision of this court, to the court of oyer and terminer of Otsego county, pursuant to sections 547 and 548 of the Code of Criminal Procedure. All concur.

ROBERTS et al. v. VIETOR et al.*(Supreme Court, General Term, Fourth Department. November, 1889.)***1. ASSIGNMENT FOR BENEFIT OF CREDITORS—PREFERENCES—DESCRIPTION OF CLAIM.**

An assignment for benefit of creditors contained a preference as follows: "L. Cohn, agent or individually. * * * Money loaned, promissory note made by assignors, indorsed by A. J. McIntosh, payable to L. Cohn, agent or individually, unable to say which; dated March 2, 1886, due in four mos., \$2,500; interest from March 2, 1886." The loan had in fact been procured from Cohn as agent. *Held*, that the assignment was not void for uncertainty because it did not give the name of the principal; it appearing that the assignors acted honestly, and described the claim as best they could.

2. SAME—FRAUDULENT PREFERENCES.

It is not a fraudulent preference, rendering an assignment void, for the assignors to prefer a note given by them in payment of another note against a firm of which they had been members, and for which they were liable.¹

3. SAME—MISTAKE IN AMOUNT OF PREFERRED CLAIM.

Where there is a finding that some of the items of a preferred debt had already been paid, and that there was a mistake as to some of the others, but that the total debt was in fact greater than stated in the assignment, and that the assignors intended to prefer the debt actually due, and in misdescribing it, which was the result of an honest mistake, there was no intent to hinder, delay, or defraud creditors, the assignment will not be held void as preferring a fictitious indebtedness.

4. SAME—FINANCIAL CONDITION—REPRESENTATIONS.

The fact that the assignors had stated at various times to mercantile agencies and several of their creditors that they had a surplus of \$40,000 above their debts and liabilities, and that no losses sufficient to wipe out the surplus had occurred, does not warrant a conclusion that part of the property had been disposed of fraudulently, where there is a finding that the assignment was made in good faith.

5. SAME—ENTRY OF JUDGMENTS.

The entry in favor of several preferred creditors of judgments which are found to have been obtained in good faith, and for sums actually due, except in one case in which an honest mistake was made, will not invalidate the assignment.

6. SAME—FAILURE TO KEEP BOOKS.

The fact that the assignors kept no ledger and no general cash-book a portion of the time, while engaged in business, is not sufficient evidence of a fraudulent intent to justify a holding that the assignment is fraudulent and void.

Appeal from judgment on report of referee.

Action by Ellis H. Roberts & Co. against George F. Vietor and others. From a judgment sustaining a general assignment for the benefit of creditors, made by defendants Buckley & Co. to defendant Bulger, the defendants George F. Vietor and others appeal.

Argued before HARDIN, P. J., and MARTIN and MERWIN, JJ.

James Dunne, for appellants. *Matterson & Harvey*, for respondents Spencer et al. *Risley, Quin & Perry*, for respondent Bulger.

MARTIN, J. The primary object of this action was to set aside a general assignment for the benefit of creditors made by the defendants Buckley and Shirley to the defendant Bulger. On the trial the appellants sought to impeach the assignment as fraudulent and void, on the grounds (1) that on its face it preferred a debt of L. Cohn, agent or individually, thus failing to show the creditor intended to be preferred; (2) that Cohn was not a creditor of Buckley & Co.; (3) that the debt of Chloe Spencer, which was preferred, was the individual debt of Shirley; (4) that the debt of Adelia J. Sparks, which was preferred, was the debt of Buckley, Myers & Co., and assumed by Buckley & Co. without consideration; (5) that the debt of Daniel G. Major, which was preferred, had been partly paid, was fictitious in part, and a part was for money loaned to the defendant Buckley individually; (6) that Buckley & Co.

¹ Concerning the validity of assignments for benefit of creditors, as affected by preferences contained therein, see *Grubbs v. King*, (Ind.) 20 N. E. Rep. 142, and note; *Cohen v. Moorhouse*, 8 N. Y. Supp. 818, and note; *Talbot's Assignee v. Ewalt*, (Ky.) 7 S. W. Rep. 681, and note.

had fraudulently disposed of their property; (7) that Buckley & Co. had fraudulently and collusively allowed the defendants Major, Spencer, Sparks, and Wheeler to obtain judgments for the sums preferred in the assignment, and which were not owing to them; (8) that Buckley & Co. had failed to keep proper books of account. As the appeal-book does not contain the evidence given before the referee, except that relating to the validity of the preferences of the debts of Mrs. Spencer and Daniel G. Major, we are not called upon to review the facts in this case, except so far as they relate to the preference of those debts. All other are legal questions, and founded on some alleged error of law. *Billings v. Russell*, 101 N. Y. 228, 4 N. E. Rep. 531. Before proceeding to examine the legal questions involved, it will be necessary to examine the facts relating to the debts of Spencer and Major, as our determination of those questions may have an important bearing upon the questions of law to be subsequently considered.

Proceeding in the order of examination suggested, we are at first presented with the question whether the debt of Chloe Spencer was an individual debt of Shirley, one of the members of the firm of Buckley & Co., or whether it was the debt of the firm. The referee has found that on the 13th day of February, 1884, Mrs. Spencer loaned to the firm \$3,000, for which the firm gave her its note; that the note has not been paid, and was preferred in the assignment. We have carefully examined the evidence relating to this claim, and are of the opinion that it fairly sustains the finding of the referee that this was a firm debt, and that his finding upon that question should not be disturbed.

This brings us to the examination of the claim of the defendant Major. The statement of his debt in the schedule, which was a part of the assignment, was substantially as follows: "Daniel G. Major, Washington, D. C. Money loaned, in accounts and notes, which assignors are unable to describe, amount about \$12,000; date of interest: \$1,000, January 12, 1883; \$1,500, August 8, 1883; \$500, October 4, 1883; \$1,000, February 4, 1884; \$3,000, February 10, 1884; \$5,000, May 23, 1884,—as near as assignors are able to state." The referee has found that there was actually due from Buckley & Co. to Major on the day the assignment was made the sum of \$12,656.38; that the assignors, while they did not pretend to describe the debt of Major in the assignment accurately, did intend to prefer the debt actually due, and supposed they were doing so; and that in so describing said debt there was no intent to hinder, delay, or defraud their creditors on the part of the assignors. The evidence and findings of the referee are also to the effect that a \$1,500 note held by Major against Buckley & Co. had been paid; that at the time of such assignment Buckley & Co. did not owe him \$1,000 obtained January 12, 1883, nor \$5,000 obtained May 23, 1884; that \$1,000 of the money advanced by Major was to pay rent on the store occupied by Buckley & Co., the lease of which had been assigned to Major; that Major never occupied the store, nor received the rent for the same, but the rent was paid by Buckley & Co. to the landlord; that some of the items advanced by Major were advanced by sending his checks or drafts payable to Buckley, or to Buckley's wife, and were not charged upon the firm books of Buckley & Co. Upon the questions which arose as to the \$1,500 debt that was paid, the statement in the assignment as to the interest on \$1,000 from January 12, 1883, and \$5,000 from May 23, 1884, as to the \$1,000 advanced to pay rent, and as to the money advanced which was sent by check or draft to Buckley or his wife, considerable evidence was given. The evidence tended to show that all the money sent or advanced by Major was in fact loaned to Buckley & Co. The reasons for sending such checks or drafts to Buckley or his wife were given. The evidence also tended to show that the fact that the \$1,500 had been paid was forgotten by the parties, and that mentioning that sum, as well as the sums of \$1,000 and \$5,000 in the assignment, was a mistake, and arose from the fact that the assignors were

unable to determine the precise sum due, and that this condition of affairs arose out of the relation of the parties, and the manner in which the business between them had been transacted. We think the evidence was sufficient to justify the referee in finding that the assignors intended to prefer the debt actually due Major; that they were guilty of no fraudulent intent in doing so; that the debt preferred was a debt of Buckley & Co.; and that no part of the debt preferred was fictitious. We think the findings of fact by the referee were sufficiently sustained by the evidence, and should be upheld.

This brings us to the consideration of the legal questions in the case. The referee found that the assignment was made and accepted in good faith, and with no intent to hinder, delay, or defraud the creditors of the assignors; and held that the assignment was valid, and the preferences to the amount due the creditors preferred were also valid. The appellants now ask this court to reverse the findings and decision of the referee on the grounds above stated. In view of the importance of this case, it is perhaps due to the parties that we briefly examine each of the grounds relied upon, separately.

First, then, was the assignment void because in the preference of what is known as the "Cohn Debt" the assignment failed to identify the creditor whose debt was intended to be preferred? The statement contained in the assignment as to this debt was as follows: "L. Cohn, agent or individually, New York. Money loaned, promissory note made by assignors, indorsed by A. J. McIntosh, payable to L. Cohn, agent or individually, unable to say which; dated March 2, 1886, due in four mos., \$2,500; interest from March 2, 1886." It appeared by the evidence, and was found by the referee, "that the note so preferred had its origin in a loan by one Mrs. Feuchtwanger to Buckley & Co., and the note really belonged to her, and not to L. Cohn." The appellants contend that preferring this debt, without specifying it as a debt owing Mrs. Feuchtwanger, rendered the assignment void "on its face." We do not think so. That the debt intended to be preferred was accurately and fully described is not and cannot be denied. No debt but that described could have been intended, and no other could have been substituted in its place. That the loan was in fact obtained from or through Cohn is not disputed, nor is there any pretense that the debt evidenced by the note described has ever been paid. There is nothing in this case to show that the assignors did not honestly describe the debt in question as best they could, or that they did not suppose that the note was held by Cohn, either in his own right or as agent, nor is there any evidence from which it can be held that if a mistake was made in describing the debtor it was not an honest one. In *Maack v. Maack*, 2 N. Y. Supp. 506, it was held that a provision in an assignment that the assignee should "pay in full all debts due or to become due for goods sold to the party of the first part in said grocery and feed business, the particular items of which the party of the first part is now unable to mention," was not void for uncertainty. See, also, *Bank v. Talcott*, 22 Barb. 550; *Richardson v. Thurber*, 104 N. Y. 606, 11 N. E. Rep. 133. We do not think the description of the debt was so uncertain as to render the assignment void as a matter of law.

These considerations also dispose of the *second* ground upon which the appellants seek to reverse the judgment in this case.

Third. The next and third ground insisted upon by the appellants is that the debt of Mrs. Spencer was an individual debt of Shirley, and its preference rendered the assignment fraudulent and void. As we have already seen, the referee has found that the debt was a firm debt of Buckley & Co. This finding we think should be sustained, and thus the foundation for this objection does not in fact exist.

Fourth. We do not think that the appellants' claim that the debt of Adelia J. Sparks was fraudulently preferred can be sustained. The foundation of this debt was money loaned to the firm of Buckley, Myers & Co. prior to August 10, 1878, and for which she held the note of that firm. Myers, one of

the members of that firm, subsequently died, leaving Buckley and Shirley as the sole surviving partners thereof. After Myers' death she continued to hold that note until January 8, 1884, when she surrendered it up to Buckley & Co., which firm consisted of Buckley and Shirley, and received therefor the note of Buckley & Co. for the amount of such first note and interest. This last note was preferred in the assignment of Buckley & Co. in 1884, and also by the assignment under consideration. No part of this note or debt has ever been paid. The consideration for the note given by Buckley & Co. was the surrender of the note made by Buckley, Myers & Co. Both Buckley and Shirley were liable on the note given by Buckley, Myers & Co., and were liable for the debt due Adelia J. Sparks from the time of its inception. Under such circumstances we do not think that the note given her by Buckley & Co. was invalid, nor that preferring that debt rendered the assignment void as to the creditors of Buckley & Co. *Stanton v. Westover*, 101 N. Y. 265, 4 N. E. Rep. 529; *Saunders v. Reilly*, 105 N. Y. 12, 12 N. E. Rep. 170; *Wheel Co. v. Fielding*, 101 N. Y. 504, 5 N. E. Rep. 431; *Crook v. Rindskopf*, 105 N. Y. 476, 12 N. E. Rep. 174; *Williams v. Whedon*, 109 N. Y. 333, 16 N. E. Rep. 365.

Fifth. Nor do we think that the appellants' claim that the preference of the Major debt rendered the assignment void should be sustained. As we have already seen, the appellants' claim that this debt was partly fictitious and partly an individual debt of Buckley is not sustained by the facts as found, and the claim that a portion of the debt had been paid has been explained by the evidence, which shows, at most, an honest mistake of the parties in supposing that this portion of the debt still remained unpaid. "While an excessive preference, without explanation, would invalidate an assignment, the ear of the court is not shut to facts which may establish honest mistake." *Brown v. Halsted*, 17 Abb. N. C. 197, 204; *Kavanagh v. Beckwith*, 44 Barb. 192, 197.

Sixth. The claim of the appellants that Buckley & Co. had fraudulently disposed of their property is founded solely on the findings of the referee "that at various times between March 29, 1884, down to and on the 2d day of March, 1886, Buckley and Shirley stated and represented to several of their creditors and mercantile agencies that they had a surplus of at least forty thousand dollars over and above their debts and liabilities," and "that no business losses have been shown to have occurred to Buckley & Co. sufficient to wipe out such surplus between the dates of such statements and representations and the date of the last assignment." With no proof, except that contained in such findings, that Buckley & Co. had disposed of any of their property fraudulently, and without any finding by the referee that any such fraudulent disposition of their property had in fact been made, but with a finding that the assignment was made in good faith, we do not think that this court can hold as a matter of law that there had been any fraudulent disposition of their property by Buckley & Co.

Seventh. The referee has found that the judgments entered in favor of the defendants Major, Spencer, Sparks, and Wheeler were entered in good faith, and without any intent to hinder, delay, or defraud the creditors of Buckley & Co., and that the amounts for which such judgments were rendered were due to the several judgment creditors named, except that the judgment obtained by Major was for \$13,521.10, when it should have been for the sum of \$12,656.38, but that "the error in stating the amount of and describing the claim in the complaint was innocently made, and with the belief that the allegations of the complaint setting forth the debt were true, and the offer of judgment was made and accepted in the same belief." Assuming these facts, as we think we should, it is very difficult to perceive how the obtaining of such judgments would in any way invalidate the assignment. While we think it may be readily supposed that the purpose of obtaining those judg-

ments was to insure the collection of the debts of these several creditors, even in the event that the assignment should fail, still, if we assume that such was their purpose, how does that affect the validity of the judgments, if they were obtained in good faith and the assignment was made in good faith? We think not at all. Nor do we think that the manner in which these judgments were obtained rendered the assignment or the judgments fraudulent. *Gutman v. McNulty*, 22 Wkly. Dig. 241; *Beards v. Wheeler*, 76 N. Y. 213; *Trier v. Hermann*, 44 Hun, 489.

Eighth. Nor can we discover in the fact that Buckley & Co. kept no ledger and kept no general cash-book a portion of the time, while engaged in business, sufficient evidence of fraudulent intent to justify us in holding that the assignment was fraudulent and void.

We have thus examined separately and somewhat in detail the various grounds relied upon by the appellants for the reversal of the judgment in this action, but have found none which we regard as sufficient to justify us in so doing; and, when we consider all these grounds together, we are still of the opinion that they are not sufficient to justify a reversal of the judgment appealed from. This case has been fairly and carefully tried, before an intelligent and upright officer, who has bestowed great care and industry in the examination and determination of this case. He has had the witnesses before him, become thoroughly familiar with the facts, and their relation to each other, and his determination of the facts in this case should be regarded as final. As to the legal questions involved, so far as they relate to the construction of this assignment, the same rules should be applied as are applicable to the interpretation of other contracts. They are to be fairly and reasonably construed, with a view to carrying out the intent of the parties making them. Where, therefore, an interpretation may be given to the assignment consistent with innocence and the general rules of law, it should be given in preference to one which would impute a fraudulent intent to the assignors, or defeat the general purpose and intent of the conveyance. *Crook v. Rindskopf*, 105 N. Y. 477, 485, 12 N. E. Rep. 174. Applying this rule to the questions involved, we think it quite manifest that the judgment should be affirmed. Judgment affirmed, with costs.

HARDIN, P. J., and MERWIN, J., concurred.

ROGERS v. WENDELL.

(*Supreme Court, General Term, Fourth Department. November, 1889.*)

RECEIVERS—PERSONAL LIABILITY—EMPLOYMENT OF AGENT.

Where a receiver of a corporation employed plaintiff to take charge of the company's property and pay such sums as were necessary for its protection, and there was no express agreement that plaintiff should exonerate the receiver and look alone to the trust-estate for his compensation, the receiver is individually liable for plaintiff's services and disbursements.

Appeal from special term, Jefferson county.

Action by John Rogers against Harry M. Wendell, as executor of the estate of Nathan D. Wendell, deceased, to recover for disbursements incurred and services performed while in the employment of Nathan D. Wendell, as receiver of the Carthage Company, a corporation. From a judgment in defendant's favor, plaintiff appeals.

Argued before HARDIN, P. J., and MARTIN, J.

F. T. Evans and *W. F. Porter*, for appellant. *Louis W. Pratt*, for respondent.

MARTIN, J. On the 8th day of November, 1884, Nathan D. Wendell, the defendant's testator, was appointed temporary receiver of the property of the

Carthage Company, in an action to dissolve such corporation. On the 4th day of December, 1884, he became permanent receiver thereof. On November 17, 1884, he employed the plaintiff to take charge of the property of the company at Carthage, and to pay certain disbursements necessary for its protection. The plaintiff entered upon and continued in such employ until January 5, 1886, when Wendell died. During the continuance of such employment the plaintiff furnished materials, looked after the property generally, made reports to Mr. Wendell weekly, and drew drafts upon him for various sums disbursed by plaintiff, which were paid. The plaintiff was not paid for his services, which were of the value of \$409, nor was he paid \$38 disbursed by him under and in pursuance of such contract. This action was to recover for such services and unpaid disbursements. On the trial the court held that Wendell did not assume any personal liability for the services rendered or disbursements made by the plaintiff, and that plaintiff was not entitled to recover. I cannot assent to this conclusion. In *Schmittler v. Simon*, 101 N. Y. 557, 5 N. E. Rep. 452, it is said: "Neither executors nor administrators have power to bind the estate represented by them through an executory contract, having for its object the creation of a new liability, not founded upon the contract or obligation of the testator or intestate. They take the personal property as owners, and have no principal behind them for whom they can contract. The title vests in them for the purposes of administration, and they must account, as owners, to the persons ultimately entitled to distribution. In actions upon contracts made by them, however they may describe themselves therein, they are personally liable." In *Willis v. Sharp*, 113 N. Y. 591, 21 N. E. Rep. 705, the court says: "It is the settled doctrine of the courts of common law that a debt contracted by an executor after the death of his testator, although contracted by him as executor, binds him individually, and does not bind the estate which he represents, notwithstanding it may have been contracted for the benefit of the estate. *Austin v. Munro*, 47 N. Y. 360. It has been held in numerous cases that an executor, carrying on a trade under the authority of the will, binds himself individually by his contracts in the trade. He is not bound to carry on the trade and incur this hazard, although authorized or directed to do so; but, if he does carry it on, the contracts of the business are his individual contracts." It is true that in the last case it was held that under the provisions of the testator's will the estate was also bound in equity for the debt in question, yet it was not held that the executor was not individually liable, but in effect held that in addition to the personal responsibility of the executor the creditor had a claim in equity against the estate. In *Davis v. Stover*, 16 Abb. Pr. (N. S.) 227, it is stated that as a general rule an agent employed by a receiver in the execution of a trust must look to the person employing him individually for his pay, and an executory contract of this character does not bind the estate. But it was held in that case that where there was an express agreement that the compensation was to be made out of the estate the services might constitute an equitable set-off against a claim the estate held against the agent. In *Noyes v. Blakeman*, 6 N. Y. 580, it is said: "It is undoubtedly true, as a general rule, that where a trustee employs agents in the execution of his trust they are to look to him individually, and have no lien upon the trust fund for their compensation." In *Mygatt v. Wilcox*, 45 N. Y. 309, it is said: "A party who employs an attorney is personally liable to him for his services, although acting as a trustee or in a representative capacity in the business in which he employs him. *Bowman v. Tallman*, 2 Rob. (N. Y.) 385." In *People v. Insurdnce Co.*, 30 Hun, 142, it was held that a receiver was liable for rent of premises occupied by him. In *Kedian v. Hoyt*, 33 Hun, 145, it was held that a trustee was personally liable for work done and for materials furnished to the trust-estate. In *Ryan v. Rand*, 20 Abb. N. C. 314, which was an action against a receiver individually for services, it was said: "The trial judge erred in holding that the defendant was

not individually liable for the services rendered upon his accounting as receiver. The rule is that a person employed by a trustee, receiver, general assignee, executor, or administrator, in matters pertaining to the execution of the trust, must look to the person employing him, individually, for his compensation, as the contract does not bind the estate he represents. The title to the trust property vests in these different officials, and they must account for it to the persons ultimately entitled to distribution. They are individually liable, because they have no responsible principal behind them, for whom they may contract, and against whom the creditor may enforce his demand." *Patton v. Baking Powder Co.*, 114 N. Y. 4, 20 N. E. Rep. 621.

On the argument it was practically assumed that Wendell's liability as receiver was similar to the liability of an executor or administrator, and several of the cases cited to sustain this judgment relate to the liabilities of the latter. Conceding the correctness of this assumption, the *Schmittler* and *Willis Cases*, *supra*, must be regarded as controlling authorities in this case. But, independent of those cases, the other authorities cited are to the effect that the receiver was individually liable to the plaintiff. I think it should be so held, both upon principle and authority. Wendell employed the plaintiff, and he performed the services and made the disbursements for which he seeks to recover. The plaintiff had no knowledge of the directions which the court gave Wendell as receiver, nor of the powers that were vested in him by its orders. The receiver had no principal against whom the plaintiff could maintain an action. Nor could he maintain an action against Wendell's successor, as there was no contract or privity between them. *Navigation Co. v. Railroad Co.*, 41 N. J. Eq. 187, 3 Atl. Rep. 134. If the plaintiff cannot recover against the estate of Wendell, he has no right of action, and his claim cannot be enforced. A receiver cannot of his own motion contract debts chargeable upon the fund in litigation. While a court may allow expenses incurred by a receiver for the preservation of the property, it is nevertheless the order of the court, and not the act of the receiver, which creates the charge, and upon which its validity depends. *Vilas v. Page*, 106 N. Y. 451, 18 N. E. Rep. 743. It is no answer to the plaintiff's claim to say that if it is just and proper the court will allow it, and order it paid. It may have been perfectly proper so far as the plaintiff was concerned and still improper as against the estate. The receiver may have been guilty of some act which would render the allowance of this claim against the estate improper. In such event the plaintiff's claim would be disallowed, and he compelled to lose his demand, although his action was in all things proper. The plaintiff's rights under his contract should be dependent upon no such uncertain remedy for their enforcement. He made his contract with the receiver, presumptively, upon his individual responsibility, and the receiver should be required to perform it.

But it is said that the receiver ought not to be held personally liable upon a contract made for the benefit of the estate he represents. Why not? If his action was of doubtful propriety, or if the estate was of doubtful sufficiency, why should not the receiver be liable, if, acting under such circumstances, he obtains the services and property of another? If the estate was insufficient, he knew it better than any other person, and should not have incurred the liability. Under such circumstances the law would not require it of him, and common honesty would forbid his making such a contract at the expense of another. If held to be individually liable, no improper harm can fall upon the receiver, or his estate. If the action of the receiver in making this contract and incurring this expense was proper and authorized, the demand, when paid, can properly be charged in his accounts, and will be allowed by the court. If the receiver acted improperly, or without authority, in employing the plaintiff and directing him to make such disbursements, then his estate should bear the burden of his unauthorized act, and it should not be cast upon the plaintiff. This is not a case where there was an agreement by the plain-

tiff to exonerate the receiver from individual liability, nor where there was an agreement to make the debt a charge upon the trust-estate. Nor does the evidence tend to show even that the plaintiff performed such services, and made such disbursements, upon the faith and credit of the estate. Therefore the cases of *New v. Nicoll*, 73 N. Y. 127; *Foland v. Dayton*, 40 Hun, 563; *Martin v. Platt*, 51 Hun, 435, 4 N. Y. Supp. 359, have no application. Although it may be that Wendell could have exempted himself from individual liability by an express agreement to that effect, still an express agreement was necessary, and it was not sufficient that the plaintiff, in doing the work and making the expenditure, did it upon the faith and credit of the estate. *New v. Nicoll*, *supra*. I think the trial court erred in holding that Wendell was not individually liable to the plaintiff, and in dismissing the complaint, and that for such error the judgment should be reversed.

For concurring opinion of *HARDIN, P. J.*, see 8 N. Y. Supp. 515.

WESTON et al. v. REICH.

(*Supreme Court, General Term, Second Department. December 10, 1899.*)

WITNESS—COMPETENCY—TRANSACTIONS WITH DECEDENTS.

Under Code Civil Proc. N. Y. § 829, providing that a party shall not be examined as a witness in his own behalf concerning a personal transaction or communication between the witness and a deceased person, except where the testimony of the deceased person is given in evidence concerning the same transaction or communication, a cross-examination of the defendant concerning the meaning of statements contained in a letter written by him to one of the plaintiffs, who has since died, does not render defendant competent to testify to a conversation between him and the plaintiff preceding the writing of the letter, and which caused it to be written.

Appeal from judgment on report of referee.

Action by Abijah J. Weston and another against Lorenz Reich for lumber sold and delivered. Code Civil Proc. N. Y. § 829, provides: "A party * * * shall not be examined as a witness in his own behalf * * * concerning a personal transaction between him" and a person since deceased, "except where * * * the testimony of the * * * deceased is given in evidence concerning the same transaction or communication." From a judgment in plaintiff's favor, entered on the referee's report, defendant appeals. For former litigation between the same parties, see 1 N. Y. Supp. 412.

Argued before *BARNARD, P. J.*, and *DYKMAN* and *PRATT, JJ.*
Abram Kling, for appellant. *F. P. Bellamy*, for respondents.

DYKMAN, J. This is an appeal by the defendant from a judgment in favor of the plaintiff upon the report of a referee appointed to hear and determine the action. The action was for lumber sold and delivered, and the defense set up was an agreement to take wine in payment for the lumber. The referee has found all the facts in favor of the plaintiff, and refused to find the facts desired by the defendant; and we find his report well sustained by the evidence and the circumstances surrounding the transaction.

James Weston, one of the original plaintiffs, died after the commencement of the action; and during the trial the counsel for the plaintiff offered in evidence a letter written by the defendant to James Weston in his life-time. The letter was received without objection. Upon his cross-examination the defendant was asked what he meant by certain statements in that letter, and then his counsel asked him this question: "*Question.* Did you have any talk with Mr. Weston preceding the letter, or with Bulmer subsequently, which caused you to write that letter?" The question was objected to as incompetent, and a violation of section 829 of the Code. The objection was sustained, and the counsel for the defendant excepted. The counsel for the defendant claims that ruling was erroneous, and requires a reversal of the judgment, but we cannot concur in that view. The counsel for the plaintiff had made no inquiry of the defendant respecting any transaction or communication be-

tween him and the deceased plaintiff, and no such testimony was called for by the question of the plaintiffs' counsel. He simply asked the defendant the meaning of certain expressions and statements in the letter, and thus called only for the operation of his own mind. We find no error in the record, and the judgment should be affirmed, with costs.

BARTHOLOMEW v. POUGHKEEPSIE & H. FERRY CO.

(*Supreme Court, General Term, Second Department. December 10, 1889.*)

1. NEGLIGENCE—DANGEROUS PREMISES—EVIDENCE.

A verdict of \$5,000 for injuries sustained by reason of a ferry company's negligence is supported by the evidence and the law, where it is shown that plaintiff, a child of 10 years, in passing with her mother and aunt from the waiting-room of the ferry to the boat over the regular passage-way for passengers, stepped into a hole in the bridge, and was seriously injured; that the iron plate which usually covered the hole had become unfastened, and pushed to one side, a week before the accident, to the knowledge of the company's agents.

2. SAME—INSTRUCTIONS.

It was not error to charge the jury that "the fact that a thousand or ten thousand persons went every day on the ferry and did not get injured would not excuse the company for not providing for the case when this obviously dangerous place was to result in an accident."

Appeal from circuit court, Dutchess county.

Action by Alice Bartholomew, an infant, by Esther Henzie, her guardian *ad litem*, against the Poughkeepsie & Highland Ferry Company, for injuries caused by defendant's negligence. Defendant operates a ferry. Plaintiff, a child of 10 years, entered the waiting-room of the ferry with her mother and aunt, for the purpose of taking passage on defendant's boat. In passing from the waiting-room to the boat over the regular passage-way for passengers, plaintiff stepped through a hole in the bridge, and sustained the injuries complained of. The hole had been covered with an iron plate up to within a few days of the accident, when the plate became unfastened, and was pushed to one side, leaving part of the hole exposed. There was evidence that a great deal of traffic was going over; that the same plank were on the bridge at the time of the accident that were there when the ferry was built, which was 10 years before; that the hole was large enough to admit the foot and leg of a child 10 years of age; that it was not repaired for three weeks after the accident; that defendant's agents knew of the dangerous condition of the hole. The physician who attended the child some time after the accident testified that he found the child suffering from an inflammation of the knee-joint, and that the child's condition was about the same as when he first saw her, six months before the trial. The child could not use her leg, and suffered great pain from it. The court, in its charge to the jury, instructed them that "the fact that a thousand or ten thousand persons went every day on the ferry and did not get injured would not excuse the company for not providing for the case when this obviously dangerous place was to result in an accident." The jury found a verdict in favor of plaintiff for \$5,000, and judgment was entered accordingly. Defendant appeals.

Thompson & Lown, for appellant. *Allison Butts*, for respondent.

DYKMAN, J. This is an action against a ferry company for the recovery of the damages resulting to the plaintiff from an injury sustained by her while walking from the ferry-house to the boat upon which she was to embark for passage across the Hudson river, at Poughkeepsie. The injury was caused by an opening in the plank or bridge over which the plaintiff passed, into which she stepped. Her leg went through the opening, and her knee-joint was injured in a very serious manner. The trial of the cause resulted in a verdict for the plaintiff, which is fully sustained by the evidence and the law
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applicable to the case. There was but one exception to the charge, and that presents no error. There is no merit in the appeal, and the judgment and order denying the motion for a new trial should be affirmed.

QUINLAN v. STRATTON *et al.*

(*Supreme Court, General Term, Second Department. December 10, 1889.*)

NEW TRIAL—SUFFICIENCY OF AFFIDAVITS.

A new trial will not be granted on motion, based only on affidavits which assign as grounds that the decision was not made within the prescribed time, and that defendants have a good defense on the merits, which was summarily disposed of without having been fully and fairly presented to the court.

Appeal from special term, Queens county.

Action by John J. Quinlan against Emily A. Stratton and Samuel W. Judson to foreclose a mortgage. Judgment was rendered for plaintiff, from which an appeal was taken, but defendants, before they had settled their proposed case, moved for a new trial. No newly-discovered evidence was alleged, nor was the motion based on exceptions taken, or on the minutes of the court, or on any ground other than the "affidavits, the complaint and answers, and such other papers as it may be necessary to refer to in the action for a new trial." The grounds assigned in the affidavits of the defense are that the decision was not made within the prescribed time, and that defendants have a good defense on the merits, which was summarily disposed of without having been fully and fairly presented to the court. From an order denying the motion defendants appealed. The notice of appeal did not designate the order appealed from other than "an order made at a special term of this court, held in the county of Kings, dated the 26th day of January, 1889, and filed in the office of the clerk of the county of Queens by the plaintiff on the 7th day of February, 1889."

Argued before BARNARD, P. J., and DYKMAN and PRATT, JJ.

Samuel W. Judson, for appellants. Frank N. O'Brien, (A. H. Dailey, of counsel,) for respondent.

DYKMAN, J. This is an action for the foreclosure of a mortgage, and upon the trial the plaintiff had judgment. The defendants appealed from the judgment, and made and served a proposed case. Before the case was settled, the defendants moved, upon affidavits which are now printed among the papers submitted to us, for a new trial, without disclosing any grounds for the motion. The motion was denied, and the defendants have appealed from the order of denial. The affidavits make no case for a new trial, and the practice was irregular. The order should be affirmed, with \$10 costs and disbursements.

GUION v. WILLIAMS *et al.*

(*Supreme Court, General Term, Second Department. December 10, 1889.*)

TRUSTS—EVIDENCE.

There was evidence that plaintiff's husband, since deceased, had the management of her money, and had invested part of it in stock certificates; that the certificates had been originally made out in his name, as trustee for plaintiff, and her name afterwards erased, leaving one of the certificates in her husband's name individually, and the other in his name as trustee, the rules of the companies being such that certificates of stock could not be issued in trust without inconvenience; that the dividends had been deposited to plaintiff's credit; that after her husband's death the certificates were found in his vault, in an envelope, with other certificates belonging to plaintiff; that on the envelope was indorsed plaintiff's name, in her husband's handwriting, and a further indorsement, signed by him, setting forth the contents of the envelope, including the certificates in question, and directing his executor to transfer them to plaintiff. Held, that the evidence established that the certificates were held in trust for plaintiff, by her husband.

Appeal from special term, Kings county.

Action by Martha A. Guion against David T. Williams and Isaac M. Hunt, executors of Benjamin L. Guion, deceased, to compel defendants to transfer to plaintiff two certificates of stock belonging to her, but held by defendants' testator in his own name. Plaintiff was the widow of defendants' testator, and they had lived together for 52 years before his death. There was evidence that plaintiff had a large amount of money, which was in the care and under the management of her husband. After his death there were found in his box in the safe-deposit vaults four certificates of stock, in an envelope marked, in his own handwriting, "M. A. Guion," and on the envelope was the following indorsement, signed by him: "50 shares American Express, 50 shares Wells, Fargo, 50 shares Adams, 50 shares Rock Island, standing in my name, which my executors will transfer to M. A. Guion." The Adams, and Wells, Fargo, Express certificates were issued to "B. L. Guion, in trust for Martha A. Guion." The American Express certificate was issued to Benjamin L. Guion, trustee, New York. The Chicago & Rock Island stock stood in the name of B. L. Guion, individually. There was evidence that a large part of plaintiff's money was used by her husband to pay for this American Express Company stock; that the certificates of the American Express and of the Rock Island had both been originally made out in the name of "B. L. Guion, in trust for M. A. Guion," but the words "for M. A. Guion," had been erased from the American Express certificate, and the words "in trust for M. A. Guion" from the Rock Island certificate; that the words "in trust for M. A. Guion" had been originally written at the instance of B. L. Guion, but had been erased, because the rules of the companies were such as to make it inconvenient to have stock issued in trust for a specific person; that the dividends on this stock were paid to plaintiff's husband, and by him deposited to the credit of plaintiff. There was judgment for plaintiff. Defendants appeal.

Argued before BARNARD, P. J., and DYKMAN and PRATT, JJ.

Smith, Woodward & Buckley, for appellants. *Charles N. Judson*, for respondent.

DYKMAN, J. This is an action in equity, to procure a judgment declaring certain stock to be the property of the plaintiff. The testimony was taken before a referee appointed for that purpose, with power to take the same and report it to the court, with his opinion. Besides taking the testimony and reporting the same to the court, with his opinion, the referee undertook to make findings of fact and law, and to decide the case against the plaintiff. That was beyond the scope of his authority, and his findings have neither place nor influence in the case. When the case was presented to the judge at special term he found no difficulty in deciding the case in favor of the plaintiff, and did so by appropriate findings of fact and conclusions of law. Judgment has been entered upon such findings; and the defendants appeal therefrom, and from the order granting an additional allowance to the plaintiff. There is no merit in either appeal. The testimony was abundant to establish the claim of the plaintiff, and left no excuse for the defense of the action. As we fully concur in the opinion rendered by the judge at the special term, it is neither profitable nor necessary to make a lengthy examination or statement of the case here. The judgment and order appealed from should be affirmed, with costs.

UNITED STATES ILLUMINATING CO. v. GRANT, Mayor, et al. BRUSH ELECTRIC ILLUMINATING CO. v. SAME. MOUNT MORRIS ELECTRIC LIGHT CO. v. SAME.

(*Supreme Court, General Term, First Department. December 13, 1889.*)

1. PUBLIC NUISANCE—UNINSULATED ELECTRIC WIRES—PERMITS TO REPAIR.

Plaintiffs, the conduct of whose business requires the use of wires as conductors of electric currents, which are dangerous to human life unless perfectly insulated, are not excused for failure to keep such wires in a perfect and safe condition by the refusal of the board of electrical control to grant permits to repair the same, where they have taken no steps to compel the granting of such permits.

2. SAME—ABATEMENT—COMMISSIONER OF PUBLIC WORKS.

Such uninsulated wires constitute a public nuisance, which the commissioner of public works, both as a private citizen and as a public official charged by the duties of his office with the removal of obstructions from the streets, may abate.

3. SAME—NOTICE TO CREATOR.

It being the duty of plaintiffs to maintain a proper inspection of such of their apparatus as may become dangerous, and to remedy all defects immediately, they are not entitled to notice of such defects, nor to be heard as to their existence, nor to any delay, in order that they may remedy the same, before the city authorities proceed to abate such a nuisance.

4. SAME.

Where a public nuisance exists, a court of equity will not limit its abatement to any particular officer of the municipality, unless exclusive power to act in the matter is plainly conferred on one department.

5. CONSTITUTIONAL LAW—POLICE POWER—ELECTRICAL CONDUCTORS.

The authority conferred upon the board of electrical control in the city of New York by Laws 1887, c. 716, § 4, to grant or refuse permits for the continuance of electrical conductors above ground, where no subways have been provided therefor, is a valid exercise of the police power, to the extent of regulating the continuance of such conductors as have become dangerous by reason of defective insulation.

6. INJUNCTION—BOARD OF ELECTRICAL CONTROL.

The granting of permits to replace old wires with new ones of larger size and conductivity, such replacement being matter of construction, is left within the discretion of the board by such act, and an injunction will not lie against the refusal to grant such permits.

Appeal from special term, New York county.

Defendants, the board of electrical control of the city of New York and the commissioner of public works, appeal from an order granting an injunction.

William H. Clark, (John M. Bowers and David J. Dean, of counsel,) for appellants. Carter, Hughes & Crevath, Bearts, Choate & Beaman, and Foster, Hotelling & Klenke, (Joseph H. Choate and Charles E. Hughes, of counsel,) for respondents.

VAN BRUNT, P. J. The circumstances relating to the organization of the United States Illuminating Company and the Brush Electric Illuminating Company are so similar that it is not necessary, in the statement of facts, to refer distinctly to those two plaintiffs. The Mount Morris Electric Light Company stands in a different position in some respects, which will be hereafter noticed. The two plaintiffs first above mentioned seem to have been organized, pursuant to the laws of this state, for the purpose of generating and distributing through New York city electric currents, for light and power. They were authorized to erect and maintain wires, poles, and other fixtures incidental to their business, over and upon the streets of the city, upon obtaining the consent of the municipal authorities. This consent was given by resolution of the common council; and pursuant to this authority a large amount of money has been invested in the business for the prosecution of which these companies were organized, and poles have been erected and wires strung by virtue of their charters, and with the permission and under the protection of the municipal authorities. In 1884 the first act of the legislature was passed, looking to a suppression of the evil, which had been recognized, of allowing telephonic and electrical companies to occupy those parts

of the streets which are above ground for their poles and wires. By this act it was provided that all telegraphic, telephonic, and electric-light wires and cables used in any incorporated city of this state having a population of 500,000 or over should thereafter be placed under the surface of the streets and avenues of said cities, and that this should take place on or before the 1st day of November, 1885. And it was further provided that in case the owners of the property should fail to comply with the provisions of the act the local governments of the said cities were directed to remove without delay all telegraphic, electric-light, and other wires, cables, and poles, wherever found above ground, within the corporate limits of said cities. Compliance with this act having been recognized as an impossibility, in 1885 another act was passed, entitled "An act providing for placing electrical conductors under ground in cities of this state, and for commissioners of electrical subways." Laws 1885, c. 499. By this act, within 20 days after the passage thereof, in cities having a population exceeding 1,000,000, according to the last census, the mayor, comptroller, and commissioner of public works of such cities were authorized and directed to appoint three disinterested persons, residents of the respective cities for which they shall be appointed, to be a board of commissioners of electrical subways. This board was charged with the responsibility of enforcing the provisions of the act hereinbefore mentioned, and the act of 1884 was amended so as to conform in all respects to the provisions of the act of 1885. By the act of 1885, it was made the duty of the subway commissioners to cause to be removed from the surface and put, maintained, and operated under ground, wherever practical, all electric wires or cables used in the business of any electrical company. Provision was also made for such companies constructing conduits under ground, after approval of their plans by the board of subways. It was further provided that said subway board should carefully investigate any and all methods proposed by any such company. It further provided that if no suitable plan was proposed or in use within 60 days after the passage of the act it should be the duty of the board to cause to be devised and made ready for use such a general plan as would meet the requirements of said acts, and that the board should have full authority to compel all companies operating electric wires to use the subways so prepared. In the suburbs, or along the streets, avenues, or other highways, in sparsely inhabited or unoccupied portions of any such city, the public interests not requiring the electrical conductors to be placed under ground, and wherever, in any other locality in any such city, it was deemed by said board to be for any cause impracticable to construct and successfully operate under ground the electrical conductors required by any such company, it should be the duty of said board to examine and grant the application of any such company for permission to deviate from an under-ground system; but the board should not grant any such permission, unless satisfied, upon such investigation, that such a permission should, for one or the other reasons thereinbefore stated, be granted, and that it would not interfere with the successful working of under-ground conductors elsewhere in said city. It was provided that such permit should be held and construed to authorize the construction and maintenance of the lines of conductors therein provided for as and where prescribed by the board. It was also made the duty of the board, in granting such permits, to bear in mind the purpose and policy of the act, which was to convert the overhead systems in use in said cities to under-ground systems as soon as possible, without impairing the efficiency of their service. The act further provided that the work of constructing every line of conductors authorized by any such permit should be subject to the rules and regulations, not inconsistent therewith, prescribed, or to be prescribed, by the local authorities having control of the streets, avenues, or other highways in such city; and that every such permit should specify the location of the structures to be erected and used for sustaining the electrical conductors, and should

give the general dimensions thereof. The act further provided, by section 5, that whenever said commissioners, in carrying out the provisions of the act, should permit any aerial electrical wires or cables to be erected, it should be the duty of the board to designate in such permit the route and location thereof, and to prescribe and regulate the height at which such wires or cables should be placed, and that all such wires and cables should be so erected and maintained as not to incommode the other public uses of such streets, avenues, or highways. In 1886 an act was passed, amending the act of 1885 in particulars which it is not necessary to mention here.

In 1887, another act was passed, entitled "An act in relation to electrical conductors in the city of New York," (Laws 1887, c. 716,) by which, after its passage, the board of commissioners of electrical subways in and for the city of New York heretofore appointed, together with the mayor of said city for the time being, were constituted a board of electrical control in and for the city of New York, and upon this board were conferred all the powers and duties imposed by the act of 1885 upon the commissioners appointed thereunder, and all the powers and duties theretofore by any law conferred or imposed upon the local authorities of said cities, or any of them, in respect to or affecting the placing, erecting, construction, suspension, maintenance, use, regulation, or control of any electrical conductors or conduits or subways for electrical conductors in said cities; and it was provided that such powers should thereafter be exclusively exercised or performed by said board of electrical control. By the third section, it was provided that whenever, in the opinion of the board, in any street or locality of any city, a sufficient construction of conduits or subways under ground should be made ready, under the provisions of the act, it should notify the owners of the electrical conductors above ground in such street or locality to make such electrical connections in said street, or through other streets, localities, or parts of the city, with such under-ground conduits or subways, and to remove poles, wires, etc., above ground, and their supporting fixtures or other devices, within 90 days after notice to such effect should be given. This provision was made a police regulation in and for the city of New York; and, in case it was not complied with, it was made the duty of the commissioner of public works to cause the same to be removed forthwith by the bureau of incumbrances, upon the written order of the mayor of said city to that effect. The fourth section is as follows: "Sec. 4. It shall be unlawful, after the passage of this act, for any corporation or individual to take up the pavements of the streets of said city, or to excavate in any of said streets, for the purpose of laying under ground any electrical conductors, unless a permit, in writing, therefor shall have been first obtained from the said board, or its predecessors; and, except with such permission, no electrical conductors, poles, or other figures or devices therefor, nor any wires, shall hereafter be continued, constructed, erected, or maintained or strung above ground in any part of said city. The said board of electrical control may establish, and from time to time may alter, add to, or amend all proper and necessary rules, regulations, and provisions for the manner of use and management of the electrical conductors, and of the conduits or subways therefor, constructed or contemplated under the provisions of this act, or of any act herein mentioned."

Pursuant to the authority thus conferred, certain subways in this city have been constructed; but sufficient for the operating of the under-ground wires of the two plaintiff companies above mentioned have not been constructed or provided for their use, and they have not been permitted to construct the same upon plans of their own. Under the authority conferred by the acts above mentioned, the plaintiff, the Mount Morris Electric Light Company, has constructed its plant, pursuant to the rules and regulations, and under the supervision, of the board of electrical control. Various accidents having occurred, the attention of the board and the city authorities was called to the

condition of the electric wires which were being used by those companies; and, it being found that many of these wires were dangerous, because of their want of proper insulation, the board of electrical control, on the 9th of October, 1889, passed the following resolution: "Resolved, that notice be given to all companies operating and furnishing electric lights on overhead wires in the city of New York to discontinue the use of such overhead wires until such time as said wires shall be certified by the expert of this board to be in proper and safe condition." The companies plaintiff were a day or two thereafter notified to shut off the electric currents from their wires, and on the 12th of October the mayor issued a direction to the commissioner of public works in the following language: "SIR: You are hereby directed to remove all the electric-light wires in the city of New York which are at this date improperly insulated, and which are now in position, in violation of the rules and regulations of the board of electrical control. The wires to be removed under this order to be designated by the expert of the board." Subsequent to the receipt of this order the commissioner of public works proceeded to take down wires claimed to be imperfectly insulated, and therefore dangerous to human life. It is claimed upon the part of the plaintiffs that the said commissioner, in the carrying out of this work, not only removed wires where there was a break in the insulation, but also a number of blocks of wires all of which were of good quality, proper insulation, and in perfect condition; and that he threatened on the following morning to take down the remaining connecting wires, although in a state of perfect insulation. The plaintiffs, claiming that the condition of their wires was due solely to the arbitrary and unjust refusal of the board of electrical control to permit the plaintiffs to repair the same, without which permit such repairs could not be made, and that their rights of property were in jeopardy, and that the public authorities had no power to interfere with the conduct of their business in the manner in which it was proposed to do, obtained and served the temporary injunction granted herein. Upon argument, this injunction was made permanent, to the extent that the board of electrical control were restrained and enjoined "from removing, or causing to be removed, any of the poles or overhead wires or fixtures of the plaintiffs in this city, except in the parts of said city where suitable under-ground subways or conduits for the suitable reception of the overhead wires of plaintiffs have been provided and made ready for the occupancy of plaintiffs, and notice thereof given to plaintiffs as required by statute; and, except where such under-ground subways or conduits have been provided as aforesaid, from preventing repairs of any of the poles or overhead wires and fixtures of the plaintiffs, or the replacing of such poles or wires or fixtures as may be defective by proper poles or wires; and from ordering plaintiff to discontinue the use of its overhead wires, or any of them, except wires defectively insulated, and then only until such wires have been properly insulated, or replaced by wires properly insulated." And the defendant the commissioner of public works was enjoined and restrained from removing, or causing to be removed, any of these poles, wires, or fixtures, except where suitable subways had been provided, and notice thereof given, without first giving the plaintiffs written notice, specifying in detail the particular wires, or parts of wires, defectively insulated, or for other cause needing repairs or replacement, or the particular poles or fixtures needing repairs or replacement, and giving to plaintiffs reasonable time to repair and replace the same; and only upon the default of the plaintiffs to make such repairs or replacement after such reasonable time had elapsed after the giving of such notice. From such order this appeal is taken.

It seems to us that but two questions are presented by this appeal, and they are—*First*, even if the board of electrical control in those cases where subways have not been provided, have refused permission to these plaintiffs to make such repairs as were necessary to keep their plant in a perfect and safe

condition, will such refusal excuse the plaintiffs for their failure so to do? and, *secondly*, has the commissioner of public works the power to abate a public nuisance existing in the streets of the city of New York, dangerous to the lives of its citizens, without first going to the creator of the nuisance, and informing him of the discovery of its existence by the authorities, and requesting him to abate the same, and thereafter waiting, before proceeding to protect the lives of the citizens, for some indefinite length of time, called a "reasonable time," in order to see whether the creator of the nuisance will abate the same or not? That the latter is a proposition presented by this appeal seems to have been conceded by the learned counsel for the plaintiffs upon the argument, and also by the learned judge in the court below. It was admitted upon the argument that in the conduct of the business in which these plaintiffs are engaged the wires employed for the conducting of the currents used by them for the purpose of lighting, and the furnishing of power, unless perfectly insulated, are dangerous to human life; and, without this admission, occurrences have taken place which demonstrate the proposition. The plaintiffs, therefore, are conducting a business by means of an apparatus and a force which, unless properly controlled, subjects every passer-by in the streets of New York to the danger of death. They are therefore bound, in the prosecution of that business, to use the highest degree of diligence; and, if it is impossible for them to conduct their business without subjecting the passers-by upon the streets of the city to danger, although without negligence on their part, then it is doubtful whether the legislature, even, could, without closing the street as a public highway, and making provisions for compensation to all parties damaged thereby, confer authority for the conduct of such a business upon the public streets of this city, because it would be giving up the streets to a purpose for which they had never been dedicated.

The proposition, then, which is presented, is, in view of the rule of law requiring the plaintiffs, because of the dangerous character of the business which they are conducting, to use the highest degree of diligence, when the plaintiffs have failed to comply with this obligation, and when human life is threatened because of this failure, have not the public authorities—or, for that matter, any citizen—the right to at once remove such danger, as a common nuisance? We think there can be but one answer to this proposition; and that under such circumstances the law allows this summary method of doing justice, because injuries of this kind require an immediate remedy, and cannot wait for the slow progress of the ordinary forms of judicial procedure. In other words, human life is more sacred than the forms of legal procedure. When it is apparent, as in the case at bar, that the condition of the wires of the plaintiff is such that they are dangerous to human life, and that any passer-by, without negligence on his part, is liable to be struck dead in the street, can it be said for a moment that the public authorities have no power to abate this nuisance, and protect the lives of its citizens? Indeed, it is one of their highest duties; and, if they allowed such a condition of affairs to continue, they might make the city itself liable for the damages sustained by reason of their negligence in not removing the common nuisance.

But it is said upon the part of the plaintiffs that "our large investment of capital is thus left to the mercy of the public authorities, and we are at least entitled to some notice of the defects complained of, that we may remove the same." This proposition involves a claim upon the part of these corporations that the public authorities shall perform a duty which the law devolves upon themselves, namely, the proper inspection of their own apparatus, which is liable to become dangerous at any time, and the immediate remedying of the difficulty. It is not a part of the duty of the public authorities to inspect the apparatus of private corporations, and warn them when such apparatus becomes dangerous to human life.

There is one fact which seems to be established beyond question upon the

papers before this court, and that is that at the time of the commencement of these actions the wires of these plaintiffs had become excessively dangerous, by reason of defective insulation. Attention was called to this condition of affairs by the happening of accidents by which human life was sacrificed, and the great strife seems to have been, between the electrical companies and the board of electrical control, as to upon whom the blame for this shameful condition of affairs was to be imposed. The companies claim that the board refused arbitrarily to allow repairs to be made, which were requested by them, and that the rules and regulations of the board regulating these repairs were unreasonable, and that they were in consequence unable to keep their wires in that condition which their plain duty required should be done. But, even if this state of affairs existed, it was no excuse to the plaintiffs. They had ample remedies at their hand for the purpose of compelling the board of electrical control to give them permits for the making of repairs, if such permits were unjustly refused. The courts were open to them; and it is a familiar principle that where a permit upon the part of any of the city's officers is improperly refused, a *mandamus* may issue to compel the performance of that public duty. But these plaintiffs, when their wires got into such a condition, concededly, as made them public nuisances, endangering human life, made not the slightest effort to compel the board of electrical control, if they unjustly refused, to grant them permits to repair; and it is a very significant circumstance, when we take into consideration the dispute that arose between the board of electrical control and the plaintiffs. If these electrical companies had been actuated by the slightest desire to put their apparatus in a condition such as would not endanger human life, they could easily have found a way to remove the obstruction which they claim was placed in their path by the board of electrical control. It would seem that they were only too willing to attempt to shelter themselves behind the assumed unreasonableness of some of the regulations of the board, and allow their apparatus to get into such a condition that it was dangerous to human life, and become a public nuisance.

In the determination of the question as to whether the commissioner of public works should have been enjoined in the removal of those wires which were not properly insulated, it is not necessary for us to consider or discuss this dispute. The mere fact that the board of electrical control refused permits to which the plaintiffs were entitled, forms no excuse for their allowing these wires to get in this condition, and remain so for the periods of time established by the papers before us. There is no question but that if the operation of their system had depended upon the procuring of these permits to which they were entitled the plaintiffs would have found ready means to call the board of electrical control to reason. But, by sheltering themselves under this, as they now claim, unauthorized action of the board, they undoubtedly thought themselves excused from the expenditures of money necessary to render their apparatus safe for operation. As has already been said, this formed no excuse for a longer time than would have been necessary to make an application to the courts to enforce their rights against the board of electrical control. It should be observed that the complaint alleges that whatever disputes had arisen between the board of electrical control and the companies in respect to the making of repairs had been settled prior to the commencement of this action, and that the board had construed its rules so as to allow the plaintiffs to take down old wires where this was deemed necessary, and replace them by new wires, protected by new insulation; and it further appears by the other papers that this occurred in August, 1889. The complaint further alleges that it was still uncertain whether said board would allow the new wires which are erected in place of the old ones taken down to be of larger size and greater conductivity than the wires which they replace. This, being new construction, was clearly a matter within the discretion of

the board; and hence every question as to permits simply to repair had been resolved long before the commencement of this action.

It further appears from the papers in this case that at the time of the commencement of these suits the wires of these companies were in a terrible condition, in respect to imperfect insulation, and that they were a menace upon all sides to the safety of the passer-by upon the public streets. The commissioner of public works, under these circumstances, in view of his duty to remove obstructions from the streets, whether dangerous to the citizens or otherwise, had the duty devolved upon him to abate the nuisance at the earliest possible moment. It is true that in taking such action he undoubtedly did so at his peril; and, in an action brought against him for the violation of the property rights of any one of these companies, he would be bound to show such a condition of affairs as rendered the existence of the wires so removed a public nuisance. It is claimed upon the part of the plaintiffs that the commissioner of public works asserted the right to remove a whole line of wire because of a single defect. This, however, does not seem to be clearly established. He undoubtedly had no right to remove more than was necessary to abate the nuisance. But this right existed in the commissioner of public works, in common with any other citizen who desired to use the streets of the city. It is undoubtedly true that no power other than that connected with his office was conferred upon the commissioner by the resolution of the board of electrical control, or the direction upon the part of the mayor. The contingency had not arisen which authorized the board of electrical control, as a body, to put the commissioner of public works in motion; nor was the mayor authorized to confer any authority upon the commissioner in respect to this matter which he did not enjoy by virtue of his office. Therefore, in the consideration of this question it has not been deemed necessary to discuss the action of the board of electrical control or of the mayor.

It has also been assumed that these plaintiffs have a right to continue and maintain overhead wires until the subways should be ready, provided such wires are maintained in such a manner as not to be dangerous to human life; and that they have a right, when such wires become out of repair, to repair the same, subject to the reasonable regulations of the board of electrical control; and that it is the duty of the said board, if necessary, to give the plaintiff permission to do so. The learned judge in the court below seems to have conceded these propositions, and said: "The plaintiff owes a duty to the public to keep its wires safe; and, if the board would not take the necessary action to enable it to remove dangerous wires and put up safe ones, it should have applied to the courts for relief. Under these circumstances, I think it was not only a proper and necessary regulation for the board to require the plaintiff to discontinue the use of such overhead wires as were not properly insulated, but that it was the plain duty of the board to make such regulation. Whoever may be responsible for the failure to supply subways, and whether the plaintiff is wholly or only partially responsible for the fact that its unsafe wires were not repaired, when it became apparent that human life was endangered by reason of the imperfect insulation of some of its wires it was the right and duty of the board to direct the immediate discontinuance of the use of such wires. Nor do I think it was necessary to the validity of such action that the plaintiff should have had notice, and an opportunity to be heard and to remedy the defects, before the resolution was adopted. A wire carrying a heavy current of electricity, and not properly insulated, is dangerous to life, and is a public nuisance; and I think the board had the right to direct the immediate discontinuance of such wires, without notice to the plaintiff. I am inclined to think, however, that the resolution which was adopted went too far, in providing that such discontinuance should continue until the expert of the board should certify that such wires were in a proper and safe condition. The plaintiff has no control over

such expert; and it is possible that, for reasons satisfactory to himself, he might never give such a certificate, even if the wires were made perfectly safe." It would thus appear that his judgment was founded upon the assumption that the commissioner of public works derived his authority to act from the board of electrical control and the mayor; and that the action of the commissioner should not be controlled by the opinion of the expert of the board of electrical control; and that the board had no power to compel the discontinuance of the wires until the expert should certify that such wires were in a safe and proper condition; and that the decision of the expert as to the want of safety of the wires would not necessarily justify the action of the commissioner. In these latter propositions, we think the learned judge was clearly right. But the commissioner of public works had a right to act, both as a private citizen and by virtue of his office, and to remove these obstructions, which had become dangerous, without notice to the plaintiffs; and therefore the injunction which was granted was entirely too broad, in restraining all action upon the part of the commissioner of public works until the companies should have an opportunity to remedy the defects pointed out by him.

Considerable has been said upon the argument, and is also contained in the brief of the counsel of one of the parties plaintiff, that the power to remove nuisances which had become dangerous to life is vested in another department of the city government. It may be true that the board of health, under the peculiar phraseology of the act conferring powers upon them, would have a right to remove these wires, because dangerous to human life. But their power was not exclusive. The department of public works had a right also, and it was its duty, to keep the streets of the city of New York in a passable condition, and to remove all obstructions which interfered with their use, and therefore had ample authority to abate this nuisance. If this was not so, will a court of equity intervene, by injunction, to restrain the abatement of a nuisance by the public authorities simply because the proper department is not acting? We think not. The nuisance existing, the court will not limit its abatement to any particular officer of the municipality, unless the exclusive power is plainly conferred upon one department. Even then, the right of an officer of the municipality to act as a private citizen, in a perfectly clear case, would not be affected.

The counsel for the respondents, while apparently conceding the right of the commissioner of public works to remove an imperfectly insulated wire, urges that the right of removal must in the first place depend upon a determination by the commissioner of the condition of the fixture, and this he has no right arbitrarily to determine without notice, and without affording the plaintiffs an opportunity to be heard; and, if the pole or wire is defective or unsafe, it should not be removed, or the nuisance abated, without granting to the plaintiff an opportunity to remedy the alleged defect. That the commissioner should not act arbitrarily, and without a determination as to the condition and existence of the nuisance, is undoubtedly correct; but where a party erects and maintains knowingly a public nuisance in the streets of New York, necessarily dangerous to human life, we know of no rule of law which requires the public authorities, or the public, to abandon the streets until the party maintaining the nuisance shall have an opportunity to be heard as to its existence, and, after such hearing, an opportunity to remove the same. In his proposition the learned counsel seems to us to overlook the important fact that it is because of the gross negligence of the plaintiff that these wires were allowed to become a public nuisance, as they are conceded to have been at the time of the commencement of this action. The plaintiffs have been guilty of a willful violation of a manifest duty in allowing these wires to become dangerous. They are without excuse; and when they claim that the destruction of these instruments of death, maintained by them in violation of every duty and obligation which they owe to the public, is an invasion of their rights of

property, such claim seems to proceed upon the assumption that nothing has a right to exist except themselves. It is idle to say that a party knowingly maintaining a nuisance which may at any time deal death to innocent passers-by can for an instant be entitled to the protection of the law in its maintenance. If these plaintiffs had been without fault, a different question might have been presented. But it is evident that they were guilty of the highest degree of negligence. The commissioner had authority, both as a private citizen and as a public official charged by the duties of his office with the removal of obstructions from the streets of the city, to abate the nuisance complained of.

Some of the affidavits contained in the record appear to claim that the commissioner of public works, although not acting wantonly in his attempts to abate the existing nuisance, yet either had removed or threatened to remove, before the hearing of the motion in the court below, certain wires which were not in a defective condition. We have not deemed it necessary to advert to those claims, because the complaint, as filed, contains no averments under which proof of such facts would be admissible; and, as the relief granted must depend upon the allegations of the complaint, no such question is presented for consideration. It follows, therefore, that the order appealed from should be reversed, with \$10 costs and disbursements.

BARRETT, J. While concurring in the conclusion arrived at by the presiding justice, and also in what he has so forcibly said, there are one or two additional considerations which it may, perhaps, not be unprofitable to place upon record. We start with the constitutionality of the act of 1885, deliberately settled by the court of appeals. *Squire's Case*, 107 N. Y. 593, 14 N. E. Rep. 820. A careful comparison of that act with the act of 1887 shows no such divergence in the latter enactment as to render its constitutionality doubtful. This has been affirmed in several cases, (*Illuminating Co. v. Hess*, 3 N. Y. Supp. 777; and see *Telegraph Co. v. Mayor*, 38 Fed. Rep. 552; and *Electric Light Co. v. Grant*, MS. opinion, INGRAHAM, J.;) and it cannot be doubted that if the act of 1887 had been before the court of appeals it would have received the same treatment as the act of 1885; for the principles enunciated by RUGER, C. J., in the *Squire Case*, *supra*, are directly applicable to the provisions of the later enactment. It is true that a literal and strained construction of section 4 of the act of 1887 might subject some of its provisions to constitutional objection. The plaintiffs have undoubtedly acquired property rights and franchises of which they cannot be deprived without just compensation. They are duly incorporated, under legislative sanction. They have obtained the consent of the local authorities to their corporate use of the streets, and they have obtained this pursuant to legislative direction. Upon the faith of this authorization from the law-making power, they have expended large sums of money, and otherwise acted upon the legislative license. From this condition of things, two propositions flow: *First*, the license having been acted upon, and something done by the licensee in consideration thereof, it has become invested with the qualities of a contract; *second*, such of the companies' operations as may reasonably be said to have been contemplated by the legislature cannot be deemed a nuisance. So far as the public is concerned, the legislative power, within its constitutional limits, is substantially omnipotent. A proper construction of this fourth section, therefore, calls for the clear recognition of the cardinal considerations—*First*, that there can be no implication of a legislative intention to deprive the plaintiffs of their vested rights; *second*, and, on the other hand, that there can be no implication of any such intention to authorize an inherent nuisance,—not merely something which, but for legislative sanction, would constitute an illegal structure in the highway, but something essentially *malum in se*. Thus viewed, there is little difficulty in giving this section a reasonable and

harmonious interpretation, just to the companies and not inimical to the public welfare. The companies are not organized under these later acts, which, indeed, have no relation to such corporate organization, but under an act passed at a time when the present methods of applying the electric principle were not in vogue, and were probably not even dreamed of. Laws 1848, c. 37. The acknowledged nuisance of non-insulated wires, seemingly unavoidable at times in these modern systems, was not then contemplated, much less authorized; nor was any particular method of applying the electric principle referred to in either of the amendatory acts. Laws 1879, c. 512; Laws 1882, c. 73. We have been referred to no statute expressly authorizing the present methods of electric application for street-illuminating purposes. On the contrary, the acts passed in and since 1884 indicate a legislative awakening to the fact that advantage was being taken of harmless general laws to incorporate for dangerous uses; and every one of these acts (1884, 1885, 1886, and 1887) speaks loudly of a growing disposition on the part of the legislature to check the evil of such dangerous uses. The purpose of the act of 1887 was largely to reaffirm the previous determination, that all these dangerous appliances should be placed under ground, and, finally, to complete its execution. Until the subways were ready for their occupation, the companies were permitted to proceed with the business for which they were organized, by means of the existing over-ground fixtures and apparatus. To maintain, until the completion of the subways, such existing fixtures, apparatus, and wires as were really safe and as were covered by due previous authorization, these companies were not bound to procure a fresh permit from the new board of electrical control. But they could not supplement such fixtures, apparatus, or wires, nor otherwise add to their existing systems, without such a permit. Nor could they continue even their existing systems, at any point where, owing to non-insulation or defective apparatus, their wires had or might become dangerous to the community; at least, until the apparatus had been rendered perfectly safe for the conduct of this intense electric agent. To that extent, and for the purpose in general of securing the public safety pending the construction of the subways, the legislature conferred upon this board the power of granting or refusing permits. This power must, of course, be exercised reasonably; but, subject to this rule of reason, and especially in view of the general purpose referred to, it is necessarily continuous, and it involves the authority from time to time to revoke such permits, when public safety imperatively demands some modification of the deadly force or more perfect insulation or other safeguards. It is clear to my mind that in these particulars there is in this act of 1887 a valid exercise of the police power, and a valid delegation of such power to the board, and such is the true construction of the meaning and intent of the fourth section of that act.

If, then, the plaintiffs' entire systems are necessarily and unavoidably dangerous to human life, as matter of fact, they can be restrained or abated by appropriate proceedings; for, so far as their mode of using electricity is thus dangerous to human life, it is without legislative authority, express or implied, and the systems, under such use, become nuisances. But the entire structure cannot be summarily destroyed, if the particular nuisance can be otherwise restrained or abated. Where the offense consists in the wrongful use of what is harmless in itself, the remedy is to stop such use, not to tear down or remove the structure. *Moody v. Board*, 46 Barb. 665, 666, citing *Barclay v. Com.*, 25 Pa. St. 503. If the entire system becomes, as a conclusive and openly apparent fact, so flagrantly and imminently dangerous to human life as to come within the principles governing conflagrations and pestilence, the corporate authorities can doubtless summarily abate it. If, however, the systems are not necessarily and unavoidably dangerous to human life; if they can be kept in a safe condition by active vigilance and proper repairs,—they are permitted to continue until the subways are ready for their

reception. In that case, however, while the entire system may not be a nuisance, each part of it which is suffered to become dangerous is a nuisance, and, as one of the learned counsel for the plaintiffs justly and candidly conceded upon the argument, "a nuisance of the highest kind."

At this point we come to the practical question raised upon the motion below. Here let me say that my difference is not with Mr. Justice ANDREWS' opinion in the main, but with his order. That opinion is a careful, exhaustive, and generally accurate statement of the facts and the law. Indeed, I cannot see that we reach this point by different roads. The learned judge concludes that non-insulated wires are nuisances, and that they should be promptly abated. But he thinks that before abatement by the public authorities the companies should have notice, and a reasonable opportunity to repair; and that an injunction, upon the facts before him, should issue to restrain a summary abatement of the nuisance or nuisances until the person attempting such abatement has given the companies this notice, and such reasonable opportunity to repair. It is here that our roads diverge. I cannot think that such an injunction was authorized by the case presented by the complaints. Moreover, the equities of the bills were fully denied. Nor is there sufficient proof in the affidavits to justify the apprehension that these public officers are acting in a wanton or oppressive spirit, nor to warrant the belief that the abatement of non-insulated wires is to be used as a pretext for the unnecessary destruction of any part of the plaintiffs' system which is not really dangerous to the community. The case is consequently within the principles laid down in *Hart v. Mayor*, 9 Wend. 571; *Meeker v. Van Rensselaer*, 15 Wend. 397; *Cronin v. People*, 82 N. Y. 320, and similar cases. It is freely conceded that this power of abating nuisances must be reasonably exercised, and, as is said by Judge Dillon in his work on *Municipal Corporations*, (volume 1, § 95,) "although the power be given to be exercised in any manner the corporate authorities may deem expedient, it is not an unlimited power, and such means only are intended as are reasonably necessary for the public good. Wanton or unnecessary injury to private property and private rights are not thereby authorized." Citing *Babcock v. City of Buffalo*, 56 N. Y. 268. There is another principle which should be conceded with equal freedom; and that is that the corporate authorities cannot by their mere declaration make that a nuisance which in fact is not. Where, however, the thing sought to be abated is "intrinsically and inevitably a nuisance," there, as is said by Judge Dillon, (volume 1, § 379,) the authority to preserve the health and safety of the inhabitants and their property is a sufficient foundation for ordinances suppressing and prohibiting it. "Much," he adds, "must necessarily be left to the discretion of the municipal authorities; and their acts will not be judicially interfered with, unless they are manifestly unreasonable and oppressive, or unwarrantably invade private rights, or clearly transcend the powers granted to them." The cases cited abundantly establish the proposition that Mr. Gilroy had a right summarily to abate the common nuisance of any non-insulated wire found to exist in the plaintiffs' systems. He had this right both individually and officially, and he was not dependent for his justification upon either the resolution of the board or the order of the mayor. In *Meeker v. Van Rensselaer*, *supra*, the defendant was an alderman. He was sued for pulling down five dwelling-houses, which were proved to be nuisances. He also proved that the board of health had directed the nuisances to be abated. The supreme court held that his justification on the latter head failed, because the minutes of the board had not been produced; but the court said that in its judgment the proof was immaterial, "because the defendant did not need any authority from the board of health. As a citizen of the Fifth ward who desired to preserve the public health, and especially as an alderman, he was fully justified in every act done by him." According to the ruling now under review, a court of equity might have enjoined that citizen and alderman until

he had given the owners of the five houses notice, and a reasonable opportunity to abate; and, indeed, such an injunction would have been more reasonable in a case where the mere touch of the houses did not necessarily involve immediate death. So in *Hart v. Mayor, supra*, it was held that the municipality, as a corporate body, had the right to abate a nuisance detrimental to the trade of the city; and the court of errors affirmed an order of the chancellor dissolving an injunction which restrained the corporation from summarily abating such nuisance. Mr. Justice SUTHERLAND said that the right did not depend upon the validity of the ordinance, considered as a legislative act, any more than it does here upon the resolution of the board or the order of the mayor; but that the real question was "whether the corporation had power, upon any principle whatever, to do the act which the ordinance authorized to be done. The injunction restrained the corporation and their officers from intermeddling with or removing the complainant's float. If that float is a public nuisance which the corporation had a right to abate, that right cannot be affected or impaired by their having undertaken, in the form of an ordinance, to prescribe to their agents or officers the manner in which they should proceed to cause it to be removed. I have already expressed the opinion that this float, considered as an unauthorized obstruction either of the river or the basin, was a public nuisance; and the books lay down the rule, in very broad terms, that any person may abate a common nuisance." In the same case, Senator Edmonds said that he entertained no doubt that the respondents, as a corporate body, had a right to abate the nuisance. "Any person," he said, "may abate a common nuisance." The objection was then made that the plaintiffs, by the corporate action, would be deprived of their property without due process of law or trial by jury. To this Mr. Justice SUTHERLAND answered that the provision of the constitution was inapplicable, because there was a right summarily to remove the obstruction. "Formal legal proceedings," he observed, "and trial by jury are not appropriate to, and have never been used in, such cases." To the same effect, Senator Edmonds, (see his remarks at pages 609 and 610.) If these doctrines were maintained in a case where commercial interests alone were in question, and where the obstruction was claimed to be but partial and limited, surely, *a fortiori*, they apply where human life and the free enjoyment of the highway without fear or apprehension are involved.

To require a preliminary notice under such circumstances would be to paralyze the legal agencies provided to secure the safety of the inhabitants of the city, and to set a premium upon corporate negligence; that, too, in a case where the highest corporate diligence is demanded. Nothing whatever should be permitted to stand between the officer of the municipality and the actually non-insulated wire, nor should he be hindered or delayed for one moment in his laudable purpose of protecting his fellow-citizens by its neutralization. If in destroying its deadly force the officer exceeds his duty, the remedy at law is ample. So, also, is the remedy in equity, if he shall attempt unnecessarily to destroy the entire system, or so large a part of it as substantially to bring about that result, or otherwise to work irreparable injury, in the sense which we have pointed out. But, so long as he acts fairly and moderately, without wantonness or oppression, he has nothing to fear. At all events, the last thing that should be set in motion to paralyze his honest efforts for the protection of human life is the power of a court of equity, exercised on mere motion *pendente lite*. In my judgment, this part of the order should be reversed, and the injunction, as to Gilroy, wholly dissolved. That part of the order which enjoins the board of electrical control from preventing repairs was clearly unauthorized. It is in the nature of a final, mandatory judgment, and is in effect a peremptory *mandamus*, granted before trial in an equity suit. The facts upon which it was granted showed that the only substantial dispute was as to the right to replace old wires by new ones,

larger in size, and of greater conductivity. The general right to repair had been conceded long before the commencement of these suits. Upon these facts, the utmost that the plaintiffs would have been entitled to, even in a proper proceeding, was an alternative *mandamus*; and, in view of the discretion vested in the board with regard to fresh constructions, and the probability that such discretion covered larger wires, of greater conductivity, even an absolute denial of an application for a *mandamus* would have been justified. Both upon the facts, then, and the law regulating such procedure, this part of the injunction should fall with that which has been the main subject of consideration.

VAN BRUNT, P. J. I concur in the additional suggestions contained in this opinion.

BRADY, J. I concur with my brethren that the order appealed from should be reversed. I regret that my duties in the oyer and terminer have been so prolonged that I am unable to state fully my views of the questions presented for consideration on this appeal; and I must content myself with a very brief opinion, in order not to delay the decision herein. Whatever rights the plaintiffs have acquired by legislative grant are subject to the dominant law of public safety; and it must be assumed that such rights were secured and invoked with knowledge of this controlling principle. The legislature has no power to violate it, and consequently none to authorize an enterprise to be conducted in the public streets by the use of a death-dealing factor, unless the conditions imposed, surrounding and controlling it, are such as to secure the public safety, not for a time, but for all time during its use. And whenever this safety ceases to exist, business immediately becomes a nuisance, more or less, and may be abated as such by any citizen who chooses to exercise the power; he assuming only the responsibility of proving it to be as asserted. Indeed, the object of the subway for which the legislature called and provided by various acts is undoubtedly, in part, at least, based upon the dangerous character of the plaintiffs' business, and the legislative duty of securing the public safety. The creation of a business, extra hazardous, in the public streets, or of organizations to use elements therein dangerous to life from their very nature, can only be legal, if at all, when they are so burdened as to secure the public safety preliminarily to such use, and its continuance, by the untiring and, indeed, unflinching vigilance of the person or corporation. If this cannot be done, then a nuisance is created and exists, and not a lawful enterprise. There should, in other words, be no intervals of this safety when life may be sacrificed by the condition of some instrument or agency used in the business. This may seem to be a severe, even harsh, rule; but the duty to secure the public safety, the lives of citizens, renders its enforcement imperative.

KENT v. SIBLEY et al.

(Common Pleas of New York City and County, General Term. December 2, 1889.)

APPEAL—REARGUMENT—LEAVE TO GO TO COURT OF APPEALS.

A motion for reargument, and for leave to go to the court of appeals, on grounds not involved in any issue determined by the judgment, will be denied.

On motion for reargument, and for leave to go to court of appeals. For former report see 5 N. Y. Supp. 447.

Action by Jennie E. Kent against Richard C. Sibley and others to recover on an undertaking to stay proceedings on appeal. On trial plaintiff demurred to defendants' second defense, and the demurrer was sustained. The general term of the city court affirmed the judgment, and on appeal to this court, the judgment was again affirmed.

Argued before LARREMORE, C. J., and DALY, J.

Le Barbier & Brewster, for appellants. *Pelton & Poucher*, for respondent.

PER CURIAM. The case of *Embrey v. Jemison*, 9 Sup. Ct. Rep. 776, has no bearing upon the question presented by the appeal. That case merely decides that a gambling contract is not enforceable by process of law. This case is one in which an action is brought upon an undertaking to stay proceedings upon appeal. There was no illegality in the undertaking, or in the consideration for the undertaking. Even if the defendant had been induced by fraud to enter into the lease, he does not pretend that he was induced by fraud to execute the undertaking; and it would not be a defense to an action on the undertaking to prove that fraud had been employed to get him to sign the lease. Fraud in the lease would be a defense to the lease, but not to an action on the undertaking. Had the motion been made on the ground that there was no evidence in the case that \$500 had become due as rent at the time the appeal was finally disposed of, a different conclusion might have been reached. But the defendant has not complained that the evidence was insufficient to sustain the verdict. His contention is that the case of *Embrey v. Jemison*, authorizes a plea of fraud in procuring the execution of a lease when the action is for the non-performance of the condition of a bond given upon an appeal. The motion for a reargument, as well as the motion for leave to go to the court of appeals, is denied.

ATKINSON v. TRUESDELL.

(Superior Court of New York City, General Term. November 22, 1889.)

COSTS—ALLOWANCE—NEW TRIAL.

The criterion to determine whether a party is entitled to costs under Code Civil Proc. N. Y. § 3251, providing that the successful party on a motion for a new trial on a "case" shall have costs in the same sum as on appeal, is whether the motion is made on a "case," and where neither the order to show cause on which a motion for a new trial was made, nor any of the papers used on the motion, are presented to the court on appeal from an order resettleing costs, a recital therein that the motion made, and which was decided, was for a new trial on a "case," is conclusive.

Appeal from special term.

Motion by plaintiff, Joseph Atkinson, to resettle costs of motion for a new trial, made by defendant, Titus B. Truesdell. From an order granting plaintiff's motion, defendant appeals. For former litigation between same parties, see 6 N. Y. Supp. 509.

Argued before TRUAX and INGRAHAM, JJ.

Edward P. Wilder, for appellant. *Samuel W. Weiss*, for respondent.

INGRAHAM, J. The order appealed from resettles an order granted at special term denying defendant's motion for a new trial on the case, etc., by striking v.7N.Y.s.no.16—51

out from said order the words "\$10," leaving in lieu thereof a blank space, wherein the clerk may, after taxation, insert the amount of statutory costs allowed on a motion for a new trial on the case by the Code; and the only papers presented to the court on this appeal is the order of March 29, 1889, which recites that a motion was made by defendants for a new trial upon the case herein made and settled, on the ground that the trial court permitted an erroneous rule of damages to be applied by the jury on the trial of the case; and that the verdict is against evidence, and the weight of evidence, and excessive; and that the verdict be set aside, and a new trial granted, upon alleged newly-discovered evidence; and orders that the said motion be denied, with \$10 costs, to be paid by the plaintiff to defendant; the notice of application to resettle that order; affidavits submitted to the court upon such motion for resettlement; and the order appealed from—resettling the order denying the motion; and the bill of costs as taxed by the clerk. Neither the order to show cause upon which the said motion for a new trial was made, nor any of the papers used on such motion, are presented to the court on this appeal; nor does it appear upon what ground the motion for a new trial was made, except by the recitals of the order, or upon what ground it was disposed of by the court. It is clear, therefore, that there is nothing before this court to show that the order appealed from was erroneous. By section 3251 of the Code it is provided that the costs awarded to a party to an action must be at the following rates: To either party, upon a motion for a new trial upon a case, or an application for judgment upon a special verdict, the same sum as upon an appeal. The criterion to determine whether a party is entitled to costs under this subdivision is whether the motion for a new trial is made upon a case, and the order of the court in this action recites that the motion made, and which was decided, was for a new trial upon a case. The respondent was therefore entitled to the costs allowed by the chief judge upon the record as it appears before us. The affidavit used on behalf of the defendant says that the motion for a new trial was not made at the term at which the case was tried, or before the time in which the defendant could take an appeal from the judgment had expired, and therefore, under section 1002 of the Code, could not be made upon a case. But the motion was made by the defendant upon a case, and was decided by the court, and it is upon the motion as made that the costs are allowed. The case of *Forstman v. Schulting*, 38 Hun, 485, does not apply, as it does not appear that the motion discussed in that case was made upon a case, but it appears from the opinion of the presiding justice to have been made upon the ground of what the court there calls "newly-discovered law." On the record before us the respondent was entitled to the costs allowed by the resettlement of the order, and the order appealed from should be affirmed, with costs and disbursements.

PEOPLE *ex rel.* KING *et al.* v. BARNES.

(*Supreme Court, General Term, Second Department.* December 10, 1889.)

CONTEMPT—WHAT CONSTITUTES.

An order was entered restraining certain officers and members, including appellant, from disposing of the property of their corporation, and was served on the president in the presence of appellant, who had notice of the order and its contents. Afterwards, appellant delivered a deed of conveyance of the property described in the order. *Held*, that appellant was guilty of contempt, and was properly fined \$250 and committed to jail for six months.

Appeal from special term, Richmond county.

There was an action by Thomas M. King and others against Reon Barnes and others, and the New York Transit & Terminal Company, to require the transfer to plaintiffs of certain shares of stock in defendant corporation, and other relief. On April 10, 1888, the court of appeals, affirming the various judgments of the general term, held that plaintiffs were entitled to the relief

prayed for. 16 N. E. Rep. 832. On October 9, 1888, an order was entered whereby it was ordered that defendants in said action, including said Reon Barnes, be restrained and enjoined from making any disposition of the property of the New York Transit & Terminal Company, and from incumbering the same in any manner, or entering into any contract or agreement for the sale of property in the name and for the account of said corporation. A copy of the order was served on the president of the corporation, said Barnes being present at the time, and having notice of the order and its contents. Afterwards, on the same day, Barnes delivered a deed of conveyance of the property mentioned in the order. An order was entered adjudging Barnes guilty of contempt of court, and imposing on him a fine of \$250, and committing him to jail for six months. From this order, defendant Barnes appeals. For former reports, see 2 N. Y. Supp. 121; 4 N. Y. Supp. 247.

Argued before BARNARD, P. J., and DYKMAN and PRATT, JJ.

Hornblower & Byrne, for appellant. *Tracy, MacFarland, Boardman & Platt*, for relators.

DYKMAN, J. This is an appeal from an order dated July 20, 1889, which adjudges the appellant Reon Barnes to be in contempt for a violation of a previous order of the court. The notice of appeal also specified several other orders which he desired to review; but they are all connected with the same proceeding, and require no separate examination. The guilt of the appellant Barnes is fully established in the record before us, and he has well merited the punishment imposed upon him. The persistence of this appellant in his defense and disobedience of the mandates of the courts seems to be unprecedented in the annals of litigation. This court and the court of appeals have both justified the imposition of a severe punishment upon him for a contempt; and now he is before us again, in an effort to escape from punishment for an act of contumacy of equal enormity with the other. If the majesty of the law is to be maintained, and the authority of the courts is to be vindicated, this man must not escape from severe punishment. The order from which the appeal is taken should be affirmed, with \$10 costs and disbursements; and all the orders specified in the notice of appeal should also be confirmed and affirmed.

BAKER v. SECOR.

(*Supreme Court, General Term, Second Department. December 10, 1889.*)

1. FALSE IMPRISONMENT—JOINT TORT-FEASORS—ASSIGNMENT OF JUDGMENT.

An execution creditor, by unlawfully directing the issuance of an execution against the body of his judgment debtor, becomes a joint tort-feasor with his attorney who unlawfully procures its issuance; and an assignment by plaintiff, the original judgment debtor, to the execution creditor, of a judgment for false imprisonment against the attorney in consideration of the discharge of the original judgment, discharges the attorney.

2. JUDGMENT—ASSIGNMENT—CONSIDERATION.

An assignment of his judgment by a judgment creditor to his attorney for reasons of convenience, and for his own benefit, cannot prevail against a subsequent settlement by him with his judgment debtor.

3. SAME—DELIVERY.

Where it is not denied that the claim evidenced by a judgment has been transferred, it is immaterial whether there has been a delivery of the assignment of the judgment to the assignee, or to a third person for his benefit, or whether the assignment rests in parol only.

Appeal from circuit court, Queens county.

Action by Jarvis S. Baker against William H. Secor for false imprisonment in causing plaintiff's arrest on a body execution issued on a judgment obtained in an action by Charles G. S. Baker, the son of plaintiff, against plaintiff, in which action the defendant was the attorney for the son. For the facts, see 4 N. Y. Supp. 303. There was a verdict of \$4,500 for plaintiff,

and from a judgment thereon, and an order denying his motion for a new trial, defendant appeals.

Argued before BARNARD, P. J., and DYKMAN and PRATT, JJ.

William H. Secor, pro se, and J. H. Drake, for appellant. Benjamin W. Downing, for respondent.

PRATT, J. On January 20, 1887, while the facts were fresh in his mind, the plaintiff testified that he paid a judgment which his son then held against him by assigning to that son the judgment in this action. That testimony was corroborated by a written document put in evidence, signed by the plaintiff, dated January 25, 1887, in which he stipulates concerning the disposition to be made by the son of the money expected to be realized from the judgment thus assigned. And on January 25, 1887, the son makes a written agreement also concerning the disposition to be made by him of such money. Upon the present trial, plaintiff and his son were both examined as witnesses, and seem to have lost all memory of these transactions; but there is no denial that the judgment held by the son against the plaintiff was paid, and the only denial attempted of the assignment by the plaintiff to the son is the statement by the father that he has never "delivered" an assignment of the judgment to his son. That is no denial of the fact that the judgment was legally assigned. Whether the assignment was "delivered" to the son, or to some third party for his benefit, or whether it rested in parol only, was irrelevant. The essential fact that the plaintiff had transferred his claim for damages to his son, one of the tort-feasors, for whose benefit it is now prosecuted, was not denied. That brought the case within the rule laid down upon the former appeal, and the complaint should have been dismissed.

It appears that in June, or July, 1886, the son executed to his attorney an assignment of the judgment he held against his father, which he afterwards assumed with his father to discharge. Such assignment to the attorney does not affect the question here. The evidence shows that it was made for reasons of convenience, to be used for the benefit of the son. It could not prevail against the settlement of the judgment made by the beneficial owner.

It was urged upon us that the verdict was excessive. It was clearly so; but, as the questions above discussed go to the whole recovery, an extended discussion of that point is not required. Judgment reversed.

BACON v. NANNY *et al.*

(*Supreme Court, General Term, Second Department. December 10, 1889.*)

MUNICIPAL CORPORATIONS—SEWERS—CONSTRUCTION OF STATUTE.

Under Laws N. Y. 1870, c. 291, tit. 3, § 3, subd. 25, authorizing trustees of villages "to construct sewers, culverts, and drains," as amended by Laws 1889, c. 186, authorizing them to "construct culverts and drains," and "to cause all necessary sewers to be built," the expense thereof to be assessed on the village at large, so far as the sewers crossed streets or ran along village property, and the remainder on the lots fronting on the sewers, which should not be constructed except on the petition of a majority of the property owners, village trustees can construct sewers only on the conditions precedent prescribed by the latter statute.

Appeal from special term, Orange county.

Injunction by Henry Bacon against Harrison W. Nanny and others, president and trustees of the village of Goshen. Defendants appeal from an order continuing until final judgment a preliminary injunction restraining defendants from incurring any liability or issuing any bonds on the credit of the village in carrying out a certain plan for providing sewers for said village.

Harrison W. Nanny, for appellants. Joseph Merritt, for respondent.

CULLEN, J. The question for decision in this case is whether the village of Goshen, a village incorporated under the General Statutes, had the power to

construct a general system of sewers at the expense of the village at large, and issue bonds for the expense to be incurred. Under the general act, (chapter 291, Laws 1870,) by subdivision 25, § 3, tit. 3, the trustees of villages were empowered "to construct sewers, culverts, and drains." No special provision was made as to assessing the expense on adjacent property. This is the only grant of power to construct sewers to be found in that statute. This section was from time to time amended. Chapter 78, Laws 1874; chapter 242, Laws 1875; chapter 281, Laws 1878. These amendments directed the cost of sewers to be assessed on the adjacent property. In 1885 (chapter 236) this subdivision was again amended so as to read substantially in the same form in which it was originally enacted. In 1887 (chapter 513) the section was again amended by adding to it subdivision 29. That subdivision authorized the president and trustees "to provide a proper and sufficient drainage and sewerage for the village, and to that end" to acquire by purchase or condemnation land or streams necessary for that purpose. No provision is made for the expense of such lands or streams. As the law stood in 1885, we think it clear that the trustees were empowered to construct sewers at the expense of the village. Such sewers were a general charge, for the reason that there was no provision to the contrary. The amendment of 1887 did not create a new system of general sewers, as distinguished from local sewers, for there was no system of local sewers at the time of the enactment of that amendment. It relates solely to the acquisition of lands or water-courses for the sewers, and grants power in that respect which had not theretofore been possessed by the trustees. In 1889 (chapter 186) subdivision 25 was again amended. The general authority is given to "construct culverts and drains," (sewers being omitted,) and "to cause all necessary sewers to be built," the expense thereof to be assessed on the village at large so far as the sewers crossed streets or ran along village property, and the remainder on the lots fronting on the sewers. It is claimed that this amendment relates only to what are termed "local sewers," and that subdivisions 25 and 27 contemplate different systems of sewers. There is nothing in the history of this legislation to justify the claim. As already seen, when subdivision 29 was enacted all sewers were a general charge, and hence, until the act of 1889, there could not be two systems, and the enactment of that amendment cannot affect the construction of the law of 1887. The last-named law does not authorize the construction of sewers in terms. That power was already granted by subdivision 25. In the clause of the statute granting the general power, sewers have been stricken out by the act of 1889, leaving the authority to construct culverts and drains unaffected, while sewers are not to be constructed under the provisions of the act except upon the petition of the majority of the property owners, and the expense thereof to be charged as before mentioned. We think this the only authority now existing under the general statute for incorporated villages to construct sewers, and that it can be exercised only upon compliance with the conditions precedent prescribed by the state. The right to construct drains at the general expense still remains, and, if it be necessary for the public health that a general system of sewerage should be built, that can be accomplished by proceeding under the general act for the construction of sewers in villages. Chapter 375, Laws 1889. The order appealed from should be affirmed, with \$10 costs.

STERGER v. VAN SICLEN.

(*Supreme Court, General Term, Second Department. December 10, 1889.*)

NEGLIGENCE—DEFECTIVE PREMISES—DUTY TO REPAIR.

A landlord is not liable for personal injuries sustained by a person visiting his tenant, where it appears that the tenant had assumed the duty of repairing the defect which caused the accident, and that the landlord had paid her for it.

Appeal from circuit court, Kings county.

Action for personal injuries by Wilhelmine Sterger against J. Wyckoff Van Sicken. While visiting a tenant of defendant, as plaintiff was descending a stairway, one of the stairs broke through under her feet, and she sustained serious injuries. It appeared that a month before the accident occurred the defendant remitted a portion of the rent as payment to the tenant for repairing the defect in the stairway which caused the injury. At the close of the evidence the court ordered plaintiff's complaint dismissed, and from a judgment entered in accordance therewith she appeals.

Argued before BARNARD, P. J., and DYKMAN and PRATT, JJ.

Roswell H. Carpenter, (A. H. Dailey, of counsel,) for appellant. A. Simis, Jr., for respondent.

PRATT, J. It sufficiently appears that in May previous to the accident defendant engaged the tenant to repair the defect in the stairs, and remitted two dollars from the rent of that month, to compensate the tenant for doing that work. The defect was a trifling one, and the two dollars would seem to be ample. It seems clear that, as between the tenant and those claiming under him, no action would thereafter lie against the landlord for injuries occasioned by that defect. The duty to repair seems to have been assumed by the tenant. The plaintiff was a visitor to the family of the tenant, and was injured while upon such visit. Upon this state of facts we are of opinion that the authorities in this state do not sustain the plaintiff's claim for damages. It follows that the complaint was properly dismissed, and the judgment must be affirmed. All concur.

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PEOPLE *ex rel.* SINNOTT v. BOARD OF TRUSTEES OF THE NEW YORK & BROOKLYN BRIDGE.

(Supreme Court, General Term, Second Department. December 10, 1899.)

1. POLICEMEN—REMOVAL—NEW YORK & BROOKLYN BRIDGE.

Under Laws N. Y. 1887, c. 192, providing that policemen of the New York & Brooklyn Bridge are removable only after written charges preferred, and a public examination thereon, in such manner as the rules and regulations of the trustees may prescribe, but no removal can be had after such hearing, unless by a majority vote of all of said trustees, a rule that the hearing shall be had before the president of the board, who, in case he recommends the dismissal of the person charged with the offense, shall report the evidence to the board, is valid.

2. SAME—SUFFICIENCY OF EVIDENCE.

Relator was charged with absence without leave, which was admitted, and with falsely reporting sick. The report of the police physician, that he had visited relator's residence, and found him out, and could not learn of his sickness, was read without objection; and no denial or explanation of the facts was made. *Held*, that relator could not complain that the facts were not proven by competent evidence.

3. OFFICE AND OFFICER—TITLE—COLLATERAL ATTACK.

The title of a trustee *de facto* cannot be attacked collaterally.

Certiorari to review the proceedings of the board of trustees of the New York & Brooklyn Bridge, discharging relator from the police force.

Rollin E. Beers, for relator. Bergen & Dykman, for respondents.

CULLEN, J. The relator, a policeman on the New York & Brooklyn Bridge, was charged with absence without leave, and falsely reporting sick. Notice of the charges was served upon him, and a hearing was had before the president of the board of trustees. After such hearing, he was removed by the trustees. Under chapter 192, Laws 1887, policemen are removable only after written charges preferred, and a public examination thereon, in such manner as the rules and regulations of the said trustees may prescribe; but no removal can be made after such hearing, unless by a majority vote of all of said trustees. Rules enacted by the trustees under this statute direct that the hearing shall be had before the president of the board, who, in case he recom-

mends the dismissal of the person charged with the offense, shall report the evidence to the board. This regulation that the hearing should be had before the president instead of the board was valid. A similar rule of the board of police in New York, directing the testimony to be taken before a single commissioner, has been upheld by the general term of the first department. *People v. Board of Police*, 20 Hun, 402; *People v. Commissioners*, 23 Hun, 351. In the latter case, it is said by Judge DAVIS: "If it was necessary that a majority of the board should always be present on taking testimony on charges of this kind, it would be difficult, if not impossible, to perform the numerous and various functions and duties devolved by law upon that board." This argument is far stronger in the case of a board composed of 20 members, meeting but monthly.

The proceedings before the president were most crude in form, and irregular. They should not serve as a precedent for other trials. But we are satisfied, not only that substantial justice was done, but that the relator had a fair opportunity to defend his rights. The evidence of the captain of the police established the absence of the relator from duty. This he did not deny, but asserted he was sick. There was read the report of the physician of the police, that he had visited the residence of the relator, and found the latter out, and could not learn of his illness. This report was certainly not competent evidence. Proceedings of the character of the one under review are judicial, and the accused must be confronted with the witnesses, and have an opportunity to cross-examine. *People v. Nichols*, 79 N. Y. 582. But to the admission of the report the relator made no objection; nor did he make any denial of the facts asserted in the report, or offer any explanation. Had he objected, the witness could have been produced. The absence of the relator from his residence at the time he reported himself as sick and was absent from duty required explanation; and, in the absence of explanation, he could not insist on having his statement that he was sick credited. Having made no objection to evidence, nor denied the facts, he cannot complain that the facts alleged were not proven by competent evidence.

The further objection is raised that the removal was not made by a majority vote of all the trustees, in that Mr. Brinkerhoff was not comptroller of the city of Brooklyn, and therefore not a trustee. It appears from the return that Brinkerhoff was acting as comptroller and as trustee. He was therefore a trustee *de facto*, and his title cannot be assailed collaterally. There is also another answer. If Brinkerhoff was not comptroller, then the office of comptroller was wholly vacant. In such case, there were but 19 members of the board, and the vote of 10 of such trustees was a majority vote. The proceedings of the board of trustees should be affirmed, with costs.

WHEELER v. EMMELUTH.

(Supreme Court, General Term, Second Department. December 10, 1889.)

JUDGMENT—CANCELLATION—MOTION TO SET ASIDE ORDER.

An order canceling a judgment, without notice to the owner, is irregular; but where the parties in interest are afterwards heard on a motion to vacate the order, and it appears that if vacated it would have to be again entered, and it does not appear that any one has been prejudiced by it, the order should stand.

Appeal from special term, Westchester county.

The plaintiff, Thomas Wheeler, recovered a judgment against the defendant, William Emmeluth, in 1876, and others against him in 1877. In 1885 the defendant, as an insolvent debtor, received from the county court of Westchester county an order discharging him from his debts. Subsequently executions issued to satisfy the judgments, and on motion of defendant's attorney an order was made and entered at the special term, June 8, 1889, canceling the judgments; whereupon plaintiff moved to vacate and set aside the

order. July 20, 1889, an order was made denying the motion, from which order plaintiff appeals.

Argued before BARNARD, P. J., and DYKMAN and PRATT, JJ.

Michael J. Scanlon, for appellant. *Gabriel Levy*, for respondent.

PRATT, J. It was undoubtedly irregular to enter an order without notice to the owner of the judgments, but the owner had an opportunity to be heard upon the merits when he made his motion to vacate the order, and no fact was proved or reason suggested to show that the order, as entered, was not right. So far as appears, precisely such an order would have to be again entered in case it was set aside for the irregularity complained of. The plaintiff should have shown upon his motion to vacate the order that he had been prejudiced by the entry of the order without notice. Under all the circumstances, we think the order should stand. Order affirmed, but without costs. All concur

JACKSON *et al.* v. KINSEY *et al.*

(*Supreme Court, General Term, Second Department. December 10, 1889.*)

CLOUD ON TITLE—ACTION TO REMOVE—LIMITATION.

Where, by mutual mistake, a deed contains a covenant against the erection of buildings of a certain character on the land conveyed, within 40 feet of the front, it creates a cloud on the title, the right to remove which is a continuing one, not barred by the statute of limitations.

Appeal from special term, Kings county.

Action by Theodore F. Jackson and others, as executors and trustees under the will of Loftus Wood, deceased, against Peter Kinsey, as sole surviving executor under the will of Abraham Stockholm, deceased, and others, to remove cloud on title. Defendants appeal from a judgment for plaintiffs.

Argued before BARNARD, P. J., and DYKMAN and PRATT, JJ.

Henry A. Monfort, for appellants. *Jackson & Burr*, for respondents.

PRATT, J. In August, 1869, the testators of the respective parties contracted, in writing, for a purchase and sale of land to be conveyed by a warranty deed, with the usual nuisance clause. In September, 1869, in fulfillment of that contract, defendants' testator, through his attorney, prepared and delivered to plaintiffs' testator a deed of the premises in question. Through a mutual mistake, the conveyance given, in addition to the usual nuisance clause, contained in the printed part a covenant against the erection on said land, within 40 feet of the front, of any buildings except of brick or stone with slate or metal roofs. Such a covenant was not called for by the contract, was not contemplated by either of the parties, and neither of them ever knew that it was contained in the deed. At the time of the sale the lands were used for farming purposes, though they were within the limits of the city of Brooklyn. At the head of the printed blank form used in preparing the deed, and in the place usually used by the printer to describe the character of the form, were the words "Cov vs. Nuisance." At the time the deed was delivered no mention was made of the fact that the deed contained the covenant complained of, nor was that fact known to plaintiffs' testator, or his attorney, who did not carefully examine the printed portion of the deed. Upon receipt of the deed plaintiffs' testator entered into possession of the premises, and continued in possession up to the time of his death, never having discovered that the deed contained the covenant referred to. Since his death the premises have been in possession of the plaintiffs, who did not discover that covenant in the deed until the year 1887, when it was called to their attention, on their attempting to sell, by the intended purchaser, who refused to accept the title on that account. Thereupon plaintiffs tendered to defendant Kinsey a release

of the premises from said restriction, and, later on, an agreement correcting the deed, and requested him to execute the same, offering to pay him \$250 for his trouble, but he refused to execute them unless he was paid \$1,500. Some two or three years thereafter this action was brought. All the above facts were alleged in the complaint, with the exception of the fact that the printed blank used contained at its head the words "Cov vs. Nuisance." The answer denied that there was any mistake, and alleged that the deed was in conformity with the understanding and agreement of the parties, and also set up the 10-years statute of limitations. The judgment appealed from directed that the restriction complained of be stricken out of the deed, and enjoined the defendants from making any claim upon the premises thereunder. It is well settled that plaintiffs are not restricted to the prayer for relief contained in their complaint, but may have judgment for such relief as the facts alleged and proved shall justify. In this case facts were alleged in the original complaint and proved on the trial that showed a cloud on plaintiffs' title which they were entitled to have removed. *Carpenter v. Carpenter*, 40 Hun, 263. Such a right is a continuing one, and is not barred by the statute of limitations so long as it exists. "The cause of action is not the creation of the cloud, but its existence; its effect upon the title of the owner, and his right to have it removed." *Schoener v. Lissauer*, 107 N. Y. 111, 13 N. E. Rep. 741. The order should be affirmed, with \$10 costs, and the judgment affirmed, with costs and disbursements. All concur.

CONGER v. WEYANT *et ux.*

SAME v. TREADWAY.

(*Supreme Court, General Term, Second Department. December 10, 1899.*)

1. CEMETERIES—RIGHT OF BURIAL—CONVEYANCE.

No formal deed is necessary to confer the exclusive right to the use of a lot in a cemetery for burial purposes. Oral permission is sufficient.

2. SAME—SALE OF LOT—EVIDENCE.

Where defendant's family used a lot for burial purposes, without objection, for over 20 years, grave-stones being erected, marked with the initials of the family, the manager of the cemetery association recognizing their right, and a memorandum of the sale of the lot to defendant being shown in the manager's handwriting, a sale to defendant of the right to use such lot was sufficiently shown.

3. SAME—PRESCRIPTIVE RIGHT TO LOT.

More than 20 years' possession under a claim of title will defeat ejectment for a lot in a cemetery.

Appeal from circuit court, Rockland county.

Ejectment by Clarence R. Conger against Wolsey T. Weyant and Sallie V. Weyant, his wife, and against John Treadway. From an order entered on a verdict in favor of defendants, and an order denying his motion for a new trial on the minutes, plaintiff appeals. For former reports, see 3 N. Y. Supp. 152, 153.

Argued before BARNARD, P. J., and DYKMAN and PRATT, JJ.

Seaman & Conger, (Irving Brown, of counsel,) for plaintiff. *George W. Weyant*, for defendants.

PRATT, J. The facts are the same as when these causes were formerly before the court, and the opinions then filed (see 3 N. Y. Supp. 152, 153) cover the case, and render further discussion superfluous. In addition to the reasons then given, it may be said that more than 20 years' possession under a claim of title is shown, which would of itself defeat the actions. None of the rulings upon the trial now objected to had any effect upon the determination, and if any of them were erroneous no harm resulted. Judgment affirmed, with costs.

WILSON v. DARRAGH et al.*(Supreme Court, General Term, Second Department. December 10, 1889.)***INFANCY—RATIFICATION OF CONTRACTS—MORTGAGES.**

A mortgage given by an infant is ratified where, after attaining majority, the mortgagor procures releases of portions of the mortgaged premises, and takes no steps in disaffirmance of the mortgage until foreclosure is begun, more than two years after her becoming of age.¹

Appeal from special term, Queens county.

Action by Peter M. Wilson against Annie Finnerd Darragh and others to foreclose a mortgage. On the trial the following facts were found: On June 22, 1881, the defendants Annie Finnerd Darragh (then Annie Finnerd) and Edward A. Darragh executed and delivered their joint and several bond, wherein they bound themselves to pay Remington Vernam \$3,500. On the same day, to secure the payment of the money mentioned in the bond, the defendant Annie Finnerd Darragh (then Annie Finnerd) executed the mortgage in question on premises which had previously been conveyed, without consideration, by Darragh to Annie Finnerd. At the time of making the bond and mortgage, Annie Finnerd was an infant, 19 years old, and became of age May 10, 1883. In order to induce plaintiff to purchase the bond and mortgage, both Edward A. Darragh and Annie Finnerd Darragh (then Annie Finnerd) on July 16, 1881, made affidavits that the bond and mortgage were good and valid, and that no effects or equities existed against the same, and that no part of the principal or interest had been paid thereon; and, relying on the truth of these representations, plaintiff purchased the bond and mortgage from Remington Vernam, paying full value therefor. On July 10, 1883, in order to complete a sale of a portion of the premises, the defendant Annie Finnerd Darragh procured a release of the portion sold from the lien of the mortgage; and again, on December 10, 1883, to complete a sale of another portion of the premises, the defendant Annie Finnerd Darragh procured a release of such other portion from the lien of the mortgage. As a conclusion of law, the trial court held that the bond and mortgage had been ratified by Annie Finnerd Darragh after arriving at majority. From a judgment of foreclosure and sale, defendants appeal.

Argued before BARNARD, P. J., and DYKMAN and PRATT, JJ.

Daniel Brown, (James W. Covert, of counsel,) for appellants. *Hunt & McVicar*, for respondent.

PRATT, J. The evidence fully sustains the findings of fact, and upon those findings the conclusions of law are correct. There was an utter failure to make out usury upon this loan, and thus the only defense we need to consider is that of infancy. Whether there was a ratification or not may well be inferred from all the circumstances of the case. It is probable, although not specifically proved, that Annie Darragh held this property in trust, to do with it whatever Edward Darragh requested. She received it from him, and paid no consideration therefor, and seems to have mortgaged and conveyed it upon his request. These circumstances throw light upon her conduct in regard to the property. We think no other conclusion could have been reached, except that of ratification. Mrs. Darragh took no steps after she arrived of age to disaffirm the mortgage, and procured releases of portions of it from the mortgagee. Such conduct was utterly inconsistent with the claim that the mortgage was invalid, and was a distinct recognition of its validity. Judgment affirmed, with costs. All concur.

¹ As to what constitutes ratification or disaffirmance of contracts made by one while a minor, see *Hill v. Nelms*, (Ala.) 5 South. Rep. 796, and note; *Leacox v. Griffith*, (Iowa,) 40 N. W. Rep. 109, and note; *Ferguson v. Railway Co.*, (Tex.) 11 S. W. Rep. 847, and note.

GUYON *et al.* v. ROONEY.

(*Supreme Court, General Term, Second Department. December 10, 1889.*)

REFLEVIN—JURISDICTION OF JUSTICE OF THE PEACE.

Under Code Civil Proc. N. Y. § 2983, providing that "where the summons [in replevin in a justice's court] has been personally served upon the defendant, or where he appears, the justice must proceed to hear and determine the action, although the plaintiff has not required the chattel to be replevied," a justice has jurisdiction of an action to recover a chattel, though there has been no requisition.

Appeal from Richmond county court.

Action by Cornelius D. Guyon and Walter S. Guyon for the recovery of a horse, and damages for detention, commenced before a justice of the peace. The return shows no requisition in the justice's court, or return thereof. The summons was personally served. On the return of the summons the plaintiffs made a formal written complaint by their attorney, setting forth their ownership of the horse, the wrongful taking and detention thereof, its value, and \$100 damages, and asked for judgment for the delivery of the property, and for the recovery of the damages, with costs. Defendant appeared, and interposed an answer to the merits, and pleaded the want of a return to the requisition by the constable, predicated thereon an objection to the jurisdiction of the justice. Thereupon the justice tried the case on the merits, and entered a judgment in plaintiffs' favor for the delivery of the horse, and for \$50 damages, with \$3.15 costs. Defendant appealed to the county court, and demanded a new trial. On the new trial before the county court, defendant moved to dismiss the action for the alleged want of jurisdiction, and the court granted his motion, and, without further proceedings, entered judgment reversing the justice's judgment, and dismissed the action, with \$74.14 costs. From this judgment plaintiffs appeal. For former report, see 6 N. Y. Supp. 99.

Argued before BARNARD, P. J., and DYKMAN and PRATT, JJ.

W. J. Powers, for appellants. *William M. Mullen*, for respondent.

PRATT, J. This case came before us at the May general term, but the papers were not properly certified, so that a decision could be properly rendered. We, however, expressed our views upon the merits of certain questions, which must, if adhered to, determine this appeal. We see no reason to change the views expressed at that general term, which lead to a reversal of the judgment, and sending the case back for trial in the county court upon the merits, under section 3068, Code Civil Proc., as stated in the opinion referred to. Judgment reversed, on opinion written at May term. All concur.

RODRIAN v. NEW YORK, N. H. & H. R. Co.

(*Supreme Court, General Term, Second Department. December 10, 1889.*)

1. RAILROAD COMPANIES—ACCIDENTS AT CROSSINGS—PROVINCE OF JURY.

In an action against a railroad company for the negligent killing of plaintiff's intestate, there was evidence that deceased was walking slowly along a rough road towards the crossing; that at the time there was the noise of another train to attract her attention; that the view in the direction from which the train that struck her was approaching was obstructed; that defendant neither rang the bell nor blew the whistle until within about 50 feet of the crossing; that the train was an express, and behind time, and was running about 80 miles an hour. There was no evidence that deceased looked both ways before crossing the track. *Held*, that the questions of negligence and contributory negligence were properly submitted to the jury.

2. SAME—DISCONTINUANCE OF ROAD—SIGNALS.

The fact that the street crossing defendant's tracks had been discontinued by the commissioners of highways on condition that defendant should open another road did not relieve defendant from the statutory duty of giving warning on the approach of trains, so long as the new road was not prepared for travel.

Appeal from circuit court, Westchester county.

Action by Charles A. T. Rodrian, as administrator of Catherine Rodrian, deceased, against the New York, New Haven & Hartford Railroad Company, for damages for the negligent killing of plaintiff's intestate. There was a verdict for plaintiff for \$5,000, and judgment was entered thereon. Defendant appeals.

Argued before BARNARD, P. J., and DYKMAN and PRATT, JJ.

Page & Taft, (*Henry W. Taft*, of counsel,) for appellant. *Arthur T. Hoffman*, for respondent.

PRATT, J. The most doubtful question in this case is whether or not the case ought to have been dismissed for a failure of sufficient evidence that the deceased exercised due care before attempting to cross the railroad. The rules of law are too familiar and well settled to require any but the briefest statement here. The law required the deceased to use all the care that a prudent person conscious of the danger to be apprehended would ordinarily exercise. This rule requires a vigilant use of the eyes and ears in looking and listening for approaching trains. But there is another rule in reference to the question of contributory negligence which we think this case fairly falls within, to-wit, where there is any evidence, direct or inferential, of care and caution on the part of the person injured it becomes a question of fact for a jury to determine. The deceased was walking slowly, picking her way along over a very rough course. There was the noise of a gravel train to attract her attention, and in the direction from which the train that struck her was approaching there were various obstructions to cut off her view. Considering all circumstances, we think the inference might be drawn that the deceased was exercising due care. She was in the prime of life, and well acquainted with the locality, and of the danger to be apprehended in crossing the railroad. She was approaching it deliberately and carefully, and, we must assume, possessed the ordinary instinct of self-preservation and fear of injury. The omission of defendant to ring the bell or blow the whistle, as required by law, was an assurance of safety, and has an important bearing upon the conduct of the plaintiff, and must be material in estimating the amount of care the deceased should have observed. It is urged in this case, as it was in the case of *Smedis v. Railroad Co.*, 88 N. Y. 13, that inasmuch as no witness testifies that the deceased looked both ways for an approaching train it must be assumed that she did not, and that such omission was negligence on her part. It was held in that case that this rule only applied in cases where, if a party had looked or listened, he might have seen or heard the approaching train. In this case there is abundant proof of obstructions in the direction from which the train was coming; and considering the passing of the gravel train, and the absence of any sound of the bell or whistle, the deceased might well be likely to fail to hear the coming train, even had she listened. We think it was a question for the jury to determine whether the intestate exercised proper care, under all the circumstances of the case. There was sufficient proof of the defendant's negligence to warrant the submission of that question to the jury.

We are of opinion that the fact that Grade street had been discontinued by resolution of the commissioners of highways, but not practically closed, did not relieve the defendant from the statutory duty of giving warning upon the approach of trains at this crossing. The discontinuance was conditional upon the defendant's opening another road and preparing it for travel. Until this was done, Grade street was to be used as a public street. There was no error in the charge of the judge; in fact, it was quite as favorable to the defendant as the facts warranted. Judgment affirmed, with costs. All concur.

PEOPLE *ex rel.* KEMMLER v. DURSTON, Warden.¹

(*Supreme Court General Term, Fifth Department. December 30, 1889.*)

1. CONSTITUTIONAL LAW—DEATH PENALTY—ELECTRICITY—PRESUMPTION.

Where the validity of Laws N. Y. 1888, c. 489, providing that the death penalty shall be inflicted by means of electricity, is assailed on the ground that the constitutional prohibition of "cruel and unusual punishments" has been violated, evidence *abundante* the statute will not be received; but it will be conclusively presumed that the legislature had ascertained the facts necessary to determine that death by the mode prescribed was not a cruel punishment.

2. SAME—BURDEN OF PROOF.

The burden of proving that Laws N. Y. 1888, c. 489, providing that the death penalty shall be inflicted by means of electricity, violates the constitutional prohibition of "cruel and unusual punishments," is on him who assails the law on that ground.

Appeal from order of Cayuga county judge.

Application by William Kemmler for a writ of *habeas corpus*. The application was denied by an order of the county judge, (*ante*, 145,) and relator appeals.

Argued before BARKER, P. J., and DWIGHT and MACOMBER, JJ.

W. Bourke Cockran, for appellant. *William A. Poste*, Dep. Atty. Gen., for respondent.

DWIGHT, J. The relator, being in the custody of the respondent as agent and warden of the state prison at Auburn, sued out a writ of *habeas corpus* to inquire into the cause of detention, which was made returnable before the county judge of the county where he was imprisoned. The petition for the writ of *habeas corpus* alleged that the cause or pretense of the imprisonment complained of was that, after the indictment and trial of the relator for the crime of murder in the first degree, and his conviction thereof in the court of oyer and terminer of Erie county, he was sentenced by that court to undergo a cruel and unusual punishment for such crime, contrary to the constitution of the state of New York and of the United States, and that he was deprived of liberty, and threatened with deprivation of life, by virtue of such illegal sentence and judgment of the court. The return of the respondent, which was not traversed as to the facts, showed that the sentence or judgment of the court mentioned in the petition was pronounced, and the warrant under which the relator was held was issued to the respondent thereupon, in pursuance of chapter 489 of the Laws of 1888, which amended the Code of Criminal Procedure in respect to the time and mode and place of inflicting the death penalty; and, among other things, substituted death by electricity for death by hanging. Section 505 of the Code, as thus amended, reads as follows: "The punishment of death must in every case be inflicted by causing to pass through the body of the convict a current of electricity of sufficient intensity to cause death, and the application of such current must be continued until the convict is dead." To the return of the respondent a demurrer *ore tenus* seems to have been interposed in behalf of the relator, and an offer was made to prove that the punishment prescribed by the statute, quoted, was a "cruel and unusual punishment." The offer was objected to by counsel for the respondent, but the objection was overruled, and a referee was appointed to take and report such proofs as should be offered by either party on the question proposed. Very voluminous evidence, offered by counsel on both sides, was taken, accordingly, and returned to the county judge, and is printed in the record before us.

The order below dismissed the writ, and remanded the prisoner to the custody of the agent and warden of the state prison. An appeal from that order brings the case into this court, and presents a question very novel in its char-

¹Affirming *ante*, 145.

acter, and in the manner of its presentation. The attempt is to enforce the provision of the constitution against cruel and unusual punishments by judicial condemnation of an act of legislature, based upon evidence *aliunde* the statute assailed, intended to show the character of the penalty prescribed thereby. The constitutional provision here invoked originated in the well known "bill of rights" of England. That celebrated enactment was one of the first fruits of the great revolution of 1688. It was entitled "An act declaring the rights and liberties of the subject, and settling the succession of the crown." It has been said to be, "next to *Magna Charta*, the greatest landmark in the constitutional history of England, and the nearest approach to the written constitutions of other countries." *Encyc. Brit.* It had been first proposed to the Prince and Princess of Orange, by the revolutionary convention which called them to the throne of England, as a declaration of the principles and conditions upon which the call was made; and, being accepted by them with the crown, was enacted as a bill of rights by the parliament into which the convention was resolved. This declaration recited, in a preamble, the oppressive and unconstitutional measures and proceedings of the lately deposed king and his ministers and judges, among others, "that excessive bail hath been required of persons committed in criminal cases, to elude the benefit of the laws made for the liberty of the subject; and excessive fines have been imposed, and illegal and cruel punishments inflicted," all of which it declared were "clearly and directly contrary to the known laws and statutes and freedom of this realm;" and it went on to declare, among other things, "that excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." Just a century later, the particular provision in question was adopted into the constitution of the United States as the eighth article of the amendments proposed by the first congress, "begun and held March 4, 1789," and which were ratified by the required number of the original 13 states. The variation in the terms of the constitutional provision of the United States from those employed in the declaration of the English parliament consisted in the substitution of "shall not," in the former, for "ought not," in the latter. The provision was first ingrafted upon the fundamental law of this state in the constitution of 1846, where it occurs, with the addition of the clause, "nor shall witnesses be unreasonably detained."

It seems very clear that no provision of the English bill of rights was intended to operate as a restriction upon the power of the legislative branch of the government of England. That enactment was, as has been said, in the nature of a compact between the crown and the parliament, as the representative of the people. Its protest was chiefly against acts of tyranny and oppression on the part of the crown, in excess or abuse of its prerogative, and in derogation of the authority of parliament. The acts declared illegal were those of the administrative and judicial departments of the government. The whole tenor of the bill, its title, the history of the times, and of the emergencies which gave it occasion, forbid the idea that it was intended in any manner to restrict or control the law-making power. Besides, in respect to the particular provision here in question, at the time of its enactment the punishments of crime were prescribed, not by statute, but wholly by the common law; and the common law in this respect was largely subject to the discretion of the judges. It was the oppressive exercise of that discretion by judges appointed by the crown, and removable at its pleasure, that was among those things denounced by the preamble, and declared to be illegal in the body of the bill; and the compact in this particular on the part of the crown may be said to have been not to appoint or retain in office judges capable of grossly abusing the judicial authority. Moreover, the context of the provision against cruel and unusual punishments, on the principle of *noscitur a sociis*, opposes the assumption that it had any reference to legislative action; since the fixing

of bail, and the imposition of fines, pertain wholly to judicial procedure. In regard to the similar provision of the constitution of the United States, (article 8, *supra*,) it is, in the first place, to be observed that it has no application to any department of the government of the states, but is a restriction upon the federal government only. *Barron v. Baltimore*, 7 Pet. 243; *Percear v. Com.*, 5 Wall. 475; *Jackson v. Wood*, 2 Cow. 819; *Barker v. People*, 3 Cow. 686. In this respect it differs from the inhibition of the passage of *ex post facto* laws, which, when it first occurs, (in subdivision 3, § 9, art. 1,) restricts the power of congress; and, when repeated in subdivision 1 of the next section, is expressly addressed to the states.

Whether the provision of article 8 was intended to limit or control the action of congress in prescribing penalties for crime might be questioned upon some of the grounds mentioned under the point last discussed; especially because, at the formation of the federal government, the common law of England prevailed in the communities which the new government embraced, the penalties for crimes had not been fixed by statute, and no change in this respect was introduced or foreshadowed by the constitution. The case was quite otherwise with the state of New York at the time of the insertion of the provision in question into its constitution. Then, after nearly 60 years of constitutional existence as a state, the punishment of crime was almost wholly in the control of the legislature. Gradually, the statutory definitions and statutory penalties of crimes had superseded those of the common law, until, by the Revision of 1829, a complete codification was attempted of all the penal laws of the state; the intention being to define, either specifically or by classes, all crimes cognizable by its courts, and to prescribe the character of the punishment to be inflicted in every case. Under the Revised Statutes the judicial discretion was limited to fixing the term of the imprisonment to be inflicted, or the amount of the fine to be imposed. The death penalty was confined to the three felonies of treason against the state, murder, and arson in the first degree. The punishment of all other felonies was limited to imprisonment in the state-prison for life, or a term of years, and of misdemeanors to fine or imprisonment in the county jail, or both; and the term of imprisonment, either in the state-prison or in the county jail, was, in most cases, limited by a maximum fixed by statute. Such being the case, it would seem that the provision in the state constitution against cruel and unusual punishments, if it were to have any practical operation,—if it was anything more than a mere glittering generality, calculated to please the popular fancy, and gratify the popular taste for a “declaration of rights,”—must have been intended as a restriction upon the legislative authority; and such, without further discussion of the question, we conclude is the import and effect of the provision, and that if occasion should arise it would be the duty of the courts to enforce it. We have no doubt that if the legislature of this state should undertake to prescribe, for any offense against its laws, the punishment of burning at the stake, breaking on the wheel, disembowelling, or hanging in chains, to perish by exhaustion, it would be the duty of the courts to pronounce upon such attempt the condemnation of the constitution. In the case supposed, no doubt could exist, because the statute would be, on its face, repugnant to the provision of the constitution against cruel and unusual punishments. It is common knowledge that the punishments mentioned are unusual, and, by the common consent of mankind, they are cruel punishments, because they involve torture and a lingering death.

The question is now to be answered whether the legislative act here assailed is subject to the same condemnation. Certainly it is not so on its face, for, though the mode of death prescribed is conceded to be unusual, there is no common knowledge or consent that it is cruel; on the contrary, there is a belief, more or less common, that death by an electric current, under favorable circumstances, is instantaneous and without pain. It was therefore a ques-

tion of fact whether an electric current, of sufficient intensity, and skillfully applied, will produce death without unnecessary suffering. Is this question open to the investigation of the court, when called upon to decide upon the validity of the law in question? or must it be presumed to have been determined by the legislature in favor of the mode of punishment prescribed? It may be safely assumed that now, for the first time in the history of our jurisprudence, has the court been called upon to enter upon such an investigation. Ordinarily, the question of the constitutionality of the legislative act is a question of interpretation merely, viz.: what is the scope and intent of the constitutional provision invoked, and what, judged by the legal construction of its terms, aided, if necessary, by the history and circumstances of its enactment, is the legal import and effect of the statute assailed; and, when the two are so interpreted, is the latter in clear and undoubted repugnance to the former? It is conceded that there is nothing in the terms of this act to bring it into hostility to the constitutional provision; and the history and circumstances of its enactment, as demonstrating its purpose and intent, are of directly contrary effect. It is a part of the history of the state that the legislation in question was based upon the report of a commission, consisting of three well-known citizens, appointed by chapter 352 of the Laws of 1886 "to investigate and report to the legislature * * * the most humane and practical method known to modern science of carrying into effect the sentence of death in capital cases." The report of the commission, presented to the legislature in January, 1888, detailed and summarized the results of their investigations and experiments, and was accompanied by the draft of a bill, recommended for passage, and which was, at the same session of the legislature, enacted into the statute amending the Code of Criminal Procedure, the validity of which is here in question. If anything were needed to fortify the presumption of the humane and merciful intent of that statute, this brief history would supply it. Of course there is no contention against this presumption; but the objection of the relator is, in substance, that, notwithstanding its manifest purpose to conform the statute by this amendment, more closely than before, to the letter and spirit of the constitutional provision, the legislature was in fact ignorant of the character and effect of the penalty prescribed by the amendment; and that, through ignorance, it has fallen into a palpable violation of the constitution; and the proposition is to support this objection by proofs *aliunde* the statute.

The inquiry, we believe, it is not competent for the court to make. No rule of law is better settled than that every intendment is in favor of the constitutional validity of legislative acts. *People v. Insurance Co.*, 92 N. Y. 328; *In re Railroad Co.*, 70 N. Y. 327; *People v. Albertson*, 55 N. Y. 50. The rule includes intendments of fact as well as of legal interpretation, and we are bound to presume that the legislature knew, even though the court may be ignorant of the facts necessarily involved in the legislative action. In this respect, the presumption which arises upon the statute must be conclusive on the court, and not liable to be rebutted by proof *aliunde*. There is nothing in the constitution of our government, or in the nature of things, which gives any color to the proposition that, upon a mere question of fact involved in legislation, the judgment of the court is superior to that of the legislature itself; nor is there any authority for the proposition that, in respect to such question, relating either to the manner or the matter of legislation, the decision of the legislature can be reviewed by the court. In the case of *In re Railroad Co.*, *supra*, it was said that the courts cannot take proofs *aliunde* for the purpose of ascertaining whether a statute, valid and regular on its face, is unconstitutional; that they cannot go behind the statute itself; that they cannot assume to know that facts necessary to the constitutionality of the legislative act did not exist, but, on the contrary, may assume that the legislature found that those facts did exist. So, too, in respect to the man-

ner of the passage of a bill, whether the constitutional quorum was present, and a vote of a constitutional majority was given in its favor, the statute must be its own evidence, and cannot be rebutted. The question is not one of fact, but of law, to be determined by the record. *Warner v. Beers*, 23 Wend. 125; *People v. Devlin*, 33 N. Y. 280. It is not merely upon principles of comity between co-ordinate branches of the government of the state, but because of the separate province and responsibility of the legislature from that of the courts, that we hold that the latter are not permitted to inquire whether the former was ignorant of the facts necessary to determine the meaning and effect of the laws which it has enacted; and, in respect to the particular statute in question, that the presumption that the legislature had ascertained the facts necessary to determine that death by the mode prescribed was not a cruel punishment is conclusive upon the court. But, even if the inquiry proposed were open to the court, our decision upon the question of fact must undoubtedly be controlled by the principle that the burden is upon him who assails the law to demonstrate its repugnance to the constitution in the respect alleged. In the case of *Dartmouth College v. Woodward*, 4 Wheat. 518, in which some of the most important questions of constitutional law were settled for all time, Chief Justice MARSHALL said: "On more than one occasion this court has expressed the cautious circumspection with which it approaches * * * such questions, and has declared that in no doubtful case would it pronounce a legislative act to be contrary to the constitution;" and in *Fletcher v. Peck*, 6 Cranch, 87, the same great judge said: "It is not on slight implication and vague conjecture that the legislature is to be pronounced to have transcended its powers." In *Ogden v. Saunders*, 12 Wheat. 270, Mr. Justice WASHINGTON said: "It is but a decent respect, due to the wisdom, the integrity, and the patriotism of the legislative body by which any law is passed, to presume in favor of its validity until its violation of the constitution is proved beyond all reasonable doubt." And in *People v. Albertson*, *supra*, the court of appeals of our own state, by ALLEN, J., said: "There should be no reasonable doubt of the unconstitutionality of a statute before it should be annulled by judicial action." The case of *Hartung v. People*, 22 N. Y. 95, is urged upon our attention by counsel for the relator, as, in some manner, impugning the application of this principle in the case of statutes prescribing or regulating the punishment of crime; but we are unable to see that it has that effect in any degree. That case arose under the act of 1860, which made the offense of murder, previously committed, and even of which the accused had been already convicted, punishable otherwise than as it was punishable at the time of its commission. This was, as Judge DENIO said, "of the essence of an *ex post facto* law;" but the convict could not complain if the only effect of the new law was to remit a separable portion of the penalty prescribed by the old; and that was held not to be the effect of the new law then in question. It is argued here that the decision was upon the ground that the new penalty might turn out to be in excess of that prescribed by the former statute. But there seems to have been no question of possibilities in the case. The law was absolutely, and on its face, *ex post facto* as to all cases of the class to which that of the plaintiff in error belonged. On its face it did not lessen, but added a year of imprisonment to the penalty of death formerly imposed. True the governor, and successive governors, might, in the exercise of supposed clemency, refrain from issuing the required warrant for the execution of the death sentence after the convict's year of imprisonment; and so the sword, that forever hung by a single hair, might never fall. But so, under the old law, might the governor remit or commute the penalty imposed by the sentence of the court. The new law afforded no remission of the penalty of death.

There seems to be no reason, either upon principle or authority, why the rule, so strenuously held in regard to the burden of establishing the uncon-

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stitutionality of a law, should not apply with full force to an objection based upon matters of fact, if that objection were open to investigation by the court. We have read with much interest the evidence returned to the county judge, and we agree with him that the burden of the proof is not successfully borne by the relator. On the contrary, we think that the evidence is clearly in favor of the conclusion that it is within easy reach of electrical science at this day to so generate and apply to the person of the convict a current of electricity of such known and sufficient force as certainly to produce instantaneous, and therefore painless, death. It detracts nothing from the force of the evidence in favor of this conclusion that we do not know the nature of electricity, nor how it is transmitted in currents, nor how it operates to destroy the life of animals and men exposed to its force. Neither do we know the nature of the attraction of gravitation, which is the operative force employed in the infliction of death by hanging, nor how that force operates to draw towards each other masses of matter freely moving in space. We know these, and all other forces of nature, by their effects: and we avail ourselves of them in the daily processes and pursuits of life with a confidence based upon common experience, without inquiry as to the essence of the force, or the mode of its operation. The experiments with electricity as a death-dealing agency, disclosed by the evidence, were necessarily confined to the lower animals; but, unfortunately, the experience of mankind in this respect has not been confined to experiments purposely made. Death by stroke of lightning has been known to the world in all ages, and the frequency and publicity of death by accidental contact with electric wires during the last few years, and especially the last few months, has made the deadly power of the electric current shockingly familiar wherever the newspaper is read. In most casualties of this sort, the exposure being wholly accidental, the contact is imperfect, the resistance unregulated, and the force of the current accidentally deflected through the body of the subject, only a fraction of that being transmitted through the wires. Accordingly, in some cases, the victim of the accident has escaped with his life, and in some cases death has been accompanied with burnings and contortions. But in all such cases the effects mentioned have evidently been due to lack of force in the current received, or to the imperfect manner of its application to the body of the victim; and the general result of these demonstrations, in the light of the scientific evidence in this case, is, as we think, to remove every reasonable doubt that the passage of a current of electricity of a certain well-determined intensity through the vital parts of the human body, under chosen conditions of contact and resistance, must result in instant death.

If the question here were of the wisdom and advisability of the proposed change in the mode of inflicting the death penalty, the discussion might be prolonged. As we are confined to the question of the constitutionality of the statute which introduces the change, we deem further discussion unnecessary for the presentation of our views.

The order dismissing the writ of *habeas corpus* and remanding the prisoner must be affirmed.

GARVEY v. NEW YORK LIFE INS. & TRUST CO. *et al.*

(Supreme Court, General Term, First Department. November 8, 1889.)

I. INFANCY—LIMITATION OF ACTIONS—TRUST-DEED—ACCOUNTING.

Code Civil Proc. N. Y. § 832, limits an action on a contract or liability, express or implied, other than a judgment or a sealed instrument, to six years. Section 896, subd. 3, provides that a disability may extend the period for commencing an action for not more than one year after it shall cease. A trust-deed provided that the trust should cease on the beneficiary's coming of age. *Held*, that an action by the beneficiary against the trustee's personal representatives for an accounting of rents and profits was within section 832, though the deed was under seal, and,

where the action was brought within six years after the beneficiary became of age, he was entitled to an accounting for seven years, though section 468 provides that an action on behalf of an infant shall not be delayed on account of his infancy.

2. ACCOUNTING—TRUSTEES—RENTS AND PROFITS.

Where the record title is in the deceased trustee, and his personal representatives pay off a mortgage on the land in ignorance of the trust-deed, and to protect the property, the amount of such payment is properly deducted from the amount of rents and profits due plaintiff.

Appeal from special term, New York county.

Action for an accounting by Joseph J. Garvey against the New York Life Insurance & Trust Company and others. Pending the suit, plaintiff died, and his administrator, John J. Garvey, was substituted. From an interlocutory judgment directing an accounting, John J. Garvey appeals.

Argued before VAN BRUNT, P. J., and BRADY and DANIELS, JJ.

George C. Genet, for appellant. *Frederick P. Forster* and *R. E. Robinson*, for respondents.

DANIELS, J. This action was brought by Joseph J. Garvey, who died during its pendency, and his father, as his administrator, was substituted as plaintiff in his stead. James Garvey was the owner of the real estate from which the rents and profits to be included in the accounting were obtained. In 1860, he mortgaged the property to secure the payment of the sum of \$4,000, and interest. In December, 1869, he conveyed the property to John Garvey. On the day following, John Garvey and James Garvey entered into an agreement and deed by which it was agreed that James Garvey "shall and will collect all rents from said described premises, and defray all necessary repairs, taxes, and insurance that may accrue out of the said rents, and * * * shall and will grant, release, and convey forever to Joseph James Garvey, of Tompkinsville, Richmond county, and state of New York, a son of the aforesaid John Garvey, for the sum of one dollar, all the above-described lot of land, with the building erected thereon, and also all sums of money that may have been collected for rents or otherwise from the same, after deducting the sum of three thousand five hundred dollars, without interest thereon, and also the expenses defrayed for all repairs, taxes, and insurance from the day and year first above written until the time when the said Joseph James Garvey shall become at the age of twenty-one years, which will be on the twenty-eighth day of October, in the year eighteen hundred and eighty-one." James Garvey, after the execution of this instrument, entered upon the performance of the trust in this manner declared, and he continued to collect the rents of the property to the 18th of October, 1877, when he died intestate. After his decease, letters of administration were issued to his widow and Henry De Forest Weekes. She was removed by the surrogate, and the letters, so far as they had been issued to her, revoked, in December, 1878; and after that the other administrator continued in the sole administration of the estate of the intestate.

The beneficiary in the trust created by the agreement was at that time an infant. He became 21 years of age on the 28th of October, 1881, but did not commence this action until the 20th of February, 1885. Neither this beneficiary, nor any person in his behalf, appears to have applied to the administrators for the proceeds or rents and profits of the trust until shortly prior to the time of the commencement of the action. The trustee left an infant son, who apparently inherited the property at the time of his decease, for the trust-deed was not placed upon record, or brought to the attention of himself or his guardian. The court, upon the facts, held that the accounting should be limited to the period of six years prior to the time of the commencement of the suit; and this limitation has been resisted as erroneous on the part of the plaintiff in the action. And it does appear to be liable to that objection; for, while section 468 of the Code of Civil Procedure has declared that a

right of action on behalf of an infant shall not be deferred or delayed on account of his infancy, subd. 3, § 396, of the same Code has further declared that a disability may extend the period for commencing an action for not more than one year after it shall cease. And this has been made to include the disability of infancy. The plaintiff, by whom the action could be, and was in fact, commenced, become subject to this general limitation. By section 382 of this Code, an action has been required to be brought within six years upon a contract, obligation, or liability, express or implied, when it is not upon a judgment or sealed instrument. This was such an action; for it was brought for the recovery of such rents and profits only as were collected by the representatives from the estate, after the decease of James Garvey, the trustee. The trust-deed was executed under seal, but by its terms the trust was to cease when the beneficiary became of age; and the object of the action was to oblige the defendants to account for the rents and profits which they themselves had received from their use and enjoyment of the property. And, when such an action may be brought, it has been restricted to the period of six years. *Pierson v. McCurdy*, 33 Hun, 520, affirmed, 100 N. Y. 608, 2 N. E. Rep. 615; and *Carr v. Thompson*, 87 N. Y. 160. But, as the original plaintiff was an infant, by the last subdivision of section 396, he had an additional one year beyond the six in which to commence the suit. That, in its effect, gave him seven years before the statute of limitations would apply to an action brought for the enforcement of his rights. If six years had elapsed after the attainment by him of the age of 21 years, then he would have been within the six-years limitation; but it did not, and the consequence is that he was entitled to this additional year given to him on account of his infancy, and included with the period for which he was entitled to an accounting. In this respect the judgment should be corrected by extending the time over which the accounting is to take place to the period of seven years, instead of six, as that has now been declared in it. With this modification, the judgment appears to have been right on the subject of the accounting.

The personal representatives of James Garvey had no knowledge or information of the existence of the trust-deed, but supposed, as that was the record title, the property to have descended to his heir at law; and in its care and management, and for its protection and preservation, paid off the mortgage which James Garvey had given upon the property in 1860. This payment was made in 1878, amounting to the sum of \$4,256.66, and by the judgment which has been recovered the defendants were held to be entitled to credit for this payment against the amount of rents and profits for which they would otherwise be accountable. This payment, as the facts were proven, was for the benefit of the estate, whether it went to the beneficiary under the trust-deed or to the present plaintiff, who is his father, and sole heir and next of kin. If this payment had not in this manner been allowed, then the personal representatives of this estate would have been entitled, under the authorities, to have had the mortgage revived and enforced for the reimbursement of this money out of the property. *Barnes v. Mott*, 64 N. Y. 397; *Bedell v. Shaw*, 59 N. Y. 46; *Clute v. Emmerich*, 26 Hun, 10, affirmed, 99 N. Y. 342, 2 N. E. Rep. 6. And no more than that advantage was in this manner provided for, or secured, by the judgment. If the mortgage had been revived against the property in favor of the personal representative, the beneficiary in the trust and the present plaintiff, his father and heir, would have received it, correspondingly reduced in value, to this extent. Neither of them has or will suffer any other or greater loss by the judgment than that which would have resulted from the revival of the security itself. The payment of the mortgage was a just charge against the property; and, as the personal representatives of the estate paid it from the personal property of that estate, they were entitled to be reimbursed the amount paid from the rents and profits received from this land. The moneys of the estate, so far

as the plaintiff has become entitled to their appropriation, have been deposited with the New York Life Insurance & Trust Company, but that company has not been required fully and formally to account to the plaintiff; but no injustice will result from the direction contained in the judgment on this subject, for a statement of the accounts of the trust company is required to be made out and delivered in the action. That will furnish the plaintiff with all the information that is necessary in the progress of the case, and in ascertaining the amount which he may be entitled to recover. As the interlocutory judgment has been entered, it should be so far changed and modified as to extend the period of the accounting for seven, instead of six, years, and, as so modified, it will afford full protection for all the rights of the plaintiff and the intestate, as they existed at the time of the commencement of the action; and, as modified, the judgment should be affirmed, without costs. All concur.

SWAN v. JACKSON.

(*Supreme Court, General Term, Second Department. December 10, 1889.*)

NEGLECT—DANGEROUS APPLIANCES—LIABILITY OF MANUFACTURER.

An ice-chest, with a platform six feet from the ground, to be used in putting in ice, is not a naturally dangerous article; and the manufacturer is not liable, to a person who uses it with consent of the purchaser, for any defect therein.

Appeal from circuit court, Kings county.

Action by Joseph Swan against John F. Jackson to recover damages for injuries sustained by reason of defendant's negligence in making an ice-chest, by reason of a defect in which plaintiff was injured. There was judgment dismissing the complaint. Plaintiff appeals.

Argued before BARNARD, P. J., and DYKMAN and PRATT, JJ.

Chas. J. Patterson, for appellant. *Isaac Fromme*, for respondent.

DYKMAN, J. The defendant in this action constructed an ice-box for one John Boettcher, who kept a meat market in the city of Brooklyn. The box was about 12 feet high, and upon the front side there was a platform about 6 feet high from the floor. The platform was supported by iron arms and was designed as a standing place for men who were filling the ice-box, to enable them to place the ice in the box, when the ice was hoisted for that purpose by ropes and pulleys. There was testimony tending to show that these iron arms were defective. The plaintiff was in the employ of an ice company which supplied Boettcher with ice, and it was the duty of the plaintiff to deliver and deposit the ice into the box. To enable him to perform that duty, he was obliged to go upon the platform with another man; and while he was so upon the platform, engaged in placing ice into the box, one of the iron arms broke, and gave way, and let the platform down, and the plaintiff, in falling, received very severe injuries. The plaintiff's complaint was dismissed upon the trial at the close of his case, and he has appealed from the judgment.

Negligence is an omission of duty, or the violation of the obligation which enjoins care. Generally, the law imposes no liability where there is no privity; and hence the rule by which actions of this character are determined is that a stranger cannot recover from the builder for damages resulting from the defective construction of any edifice, structure, or article, after the title of the object has changed, and has passed from his possession, control, and direction; the reason for the rule being that the person sought to be charged has no connection with the wrong, because the entire control of the article has passed from the builder, and is at the time of the injury subject to the existing owners and proprietors. Judge STRONG, in his opinion in the case of *Mayor v. Cunliff*, 2 N. Y. 175, illustrated the rule by the following hypothetical case: "A carpenter is hired to build a barn and furnish the materials.

He carelessly places a timber, slightly defective, under the mow, and the barn is accepted by the owner. Some years afterwards the timber, owing to its original defect, breaks, and falls upon a laborer, who sustains a serious injury. Can he recover of the carpenter?" After stating another suppositional case in the same connection, he says: "I know of no decision which would authorize a recovery under such circumstances." The case of *Loop v. Litchfield*, 42 N. Y. 351, was this: The defendants in that action manufactured a balance-wheel for sale, and sold it to one Callister, who purchased it for his own use in a machine for sawing wood by horse-power. There was a hole in the rim of the wheel, caused by shrinkage in casting, which weakened the wheel. That defect was visible, and the attention of Callister was called to it before the purchase. The defendants filled the cavity with lead, secured by a bolt, to receive which a hole was drilled through the rim, still further weakening the wheel; and it was then painted over, and, by the request of Callister, adjusted to the machine by the defendants. After it had been in use over four years, the wheel burst, parting where it had been drilled to receive the bolt, and a fragment struck the plaintiff's intestate, who was using the machine with the consent of Callister, with such violence as to cause his death. In that case, it was decided by the court of appeals in an action brought under the statute for causing death by negligence, that the plaintiff could not recover. This case and the suppositional case of Judge STRONG have been cited fully, because they bear much similarity to the case in hand. The case of *Loose v. Clute*, 51 N. Y. 494, bears much resemblance to the last case, and was decided in the same way, upon the same principle; and we think these cases are decisive of this appeal. Yet, notwithstanding the well-settled rule of law which we have stated, the builder or manufacturer of an article may incur liability to third parties where the defects are such as to render the article itself imminently dangerous, and where serious injury and misfortune would result from its use. The case of *Thomas v. Winchester*, 6 N. Y. 397, involved that principle, and in the subsequent cases of *Coughtry v. Woolen Co.*, 56 N. Y. 124, and *Declin v. Smith*, 89 N. Y. 470, the doctrine was extended so as to apply to the erection of a very high scaffold. In the former case the scaffold was about 50 feet from the ground, and in the latter it was about 90 feet. In both these cases the court of appeals reached the conclusion that misfortune to third persons, not parties to the contract, would be a natural and necessary consequence of the builder's negligence, and that the cases were taken out of the operation of the general rule of law by that fact. Now, the plaintiff seeks to bring this case within these last-named decisions, and the decision of the English court of appeal in the case of *Heaven v. Pender*, L. R. 9 Q. B. Div. 302. We do not think this case sufficiently analogous to the last-named cases to justify the application of the principle upon which they were decided. The scaffold in question was six feet from the floor, and constructed and intended to sustain the weight of a man while he was filling the ice-box; and we do not think it can be assumed that misfortune or injury to third persons, not parties to the contract, would be a natural and necessary consequence of the imperfect construction of the box or the scaffold, within the meaning of the decisions invoked in and of this action. Our conclusion is that this case is to be controlled by the general rule of law established in this state, and not by the exceptions to that rule recognized in the case of *Declin v. Smith*, 89 N. Y. 470. The judgment should be affirmed, with costs.

RIDDEN v. THRALL et al.

(Supreme Court, General Term, Second Department. December 10, 1889.)

GIFTS—CAUSA MORTIS—DEATH OF DONOR.

The evening before going to a hospital decedent delivered to plaintiff a tin box, expressing a fear that he would die from the results of a surgical operation which

he was to undergo at the hospital, and declaring that if he did not return plaintiff was to have the box and its contents. He underwent the operation 8 days after his admission to the hospital, and died 11 days later. Held a valid gift *causa mortis*, though "technically" death resulted from a thinning of the muscular fibers of the heart, and not from the direct results of the operation.¹

Appeal from special term, Kings county.

Action by James A. Ridden against James H. Thrall, as administrator, etc., of Charles H. Edwards, deceased, and another, to determine the validity of an alleged gift *causa mortis* made to plaintiff by defendants' decedent. From a judgment in plaintiff's favor, defendants appeal.

Argued before BARNARD, P. J., and DYKMAN and PRATT, JJ.

Norwood & Coggeshall, (Carlisle Norwood, Jr., of counsel,) for appellants. Harris & Corwin, (John H. Corwin and Wm. D. Veeder, of counsel,) for respondent.

DYKMAN, J. This is an appeal from a judgment entered in favor of the plaintiff after a trial before a judge without a jury. The action was commenced against the Manhattan Savings Institution, for the recovery of \$2,208.54 deposited in the bank by Charles H. Edwards, deceased; and, when the present defendants interposed a claim to the fund as the administrators of Edwards, the savings bank obtained an order of interpleader, and the money was left in the bank, subject to the judgment and order of the court. The material facts are these: The plaintiff and Charles H. Edwards, deceased, were warm personal friends. They grew up together, and the friendship of their childhood continued unbroken in their manhood, and their relations were at all times very intimate. For a year and a half before his death, Edwards lived with the plaintiff; and when he became afflicted with hernia, and was about to go to the hospital, to submit to a surgical operation for that difficulty, on the 1st day of October, 1888, he went down-stairs in the evening with a japanned tin box, about 8 inches long, 6 inches wide, and about 4 inches deep, with a brass handle on the top of the box. The plaintiff was in the room with Edwards, and his wife was in the adjoining room, with the door open between the two rooms. Edwards then said he was going to the hospital, to have an operation performed, and, if he did not return, he wished the plaintiff to have the box, and its contents; and then handed the box to the plaintiff, who received it, and held it on his lap. Then the wife of the plaintiff entered the room, and he said to her: "Sophia, Charles has given me this box, as he is going to the hospital. If he doesn't return, the box is for me to keep, as my own." Then Edwards arose, and said: "Yes, Mrs. Ridden, if I never come back, this is for Jim." The key to the box was tied to the handle. The wife of the plaintiff then took the box and wrapped it up, and put it in a place of safety, and kept it. Edwards wept at the time, and expressed much concern respecting the result of the contemplated operation; and, when the plaintiff endeavored to cheer him, and dissipate his fears, he said: "Oh, Jim! you don't know. I don't fear the operation, but I fear the results." He evidently feared he would die from the operation. He left the house of the plaintiff on the 2d day of October, 1888. The same day he was admitted to the hospital, and never returned. He underwent the surgical operation on the 5th, and died on the 16th. Edwards was a single man, about 46 years of age, and left no relatives nearer than first cousins; and of those he had no knowledge, for he told the plaintiff, in his conversation the evening before he left for the hospital, that he had no relatives, that he knew of, living. According to the testimony of the house surgeon of the hospital where Edwards died, the cause of his death, as indicated by the autopsy, so far as could be determined, was myocarditis, or a thinning of the muscular

¹ Concerning what constitutes a valid gift *causa mortis*, see *Walsh v. Bank*, ante, 669, and note.

fibers of the heart. The testimony, however, is unsatisfactory; for the witness said, "technically" such was the cause of his death, and how far that should qualify his testimony, we cannot ascertain. The tin box so delivered to the plaintiff by Edwards contained 16 savings bank books, with credits aggregating about \$40,000, among which was the book issued by the Manhattan Savings Institution, with a credit of the amount claimed in this action. About one week after the death of Edwards, the wife of the plaintiff found a letter, written and signed by Edwards, under the cover of the bureau in his room, inclosed in an unsealed envelope directed to the plaintiff, of which the following is a copy:

"James A. Ridden.—FRIEND JIM: Should I not survive from the effects of the operation about to be performed on me at St. Luke's Hospital, this is my last will and request: that you will take charge of my body, and have it placed in my family plot in Greenwood Cemetery, and also that you will take full charge of all my personal effects, of every kind, and to have and hold the same unto yourself, your heirs and assigns, forever. You will find my papers, and all my accounts, in the box. C. H. EDWARDS."

The uncontradicted testimony upon the trial established the facts as we have recited them, and the trial judge found and directed that they constituted a valid gift *causa mortis*, and that the plaintiff was entitled to the fund as the donee of the depositor. Gifts in prospect of death are natural, and it is a curious fact that the son of Ulysses made a valid and effectual gift *causa mortis* to Piraus of his treasure, in view of the peril he was to encounter with the suitors. Homer's *Odyssey*, bk. 17. Such gifts were well known and well regulated in the Roman civil law, and the common law on the subject was derived wholly from that system of jurisprudence. We have not, however, adopted all the formalities of the civil law; but our law views them as conditional gifts, to be made in contemplation and expectation of death by the donor, from some cause imminent and impending, or the conceived near approach of natural death,—imminency of foreseen peril or apprehended approach of death from existing sickness, from which there is no recovery. It is essential to the validity of such gifts that there shall be a present delivery in contemplation of death, and death without recovery from the ailment or illness from which the donor then suffers, and which induced his apprehension of death. If the ailment of the donor furnishes him with an admonition of the near approach of death, and the gift be made in view of approaching dissolution, the law is so far satisfied; and, if unrevoked in his life-time, and he do not recover, or escape from the impending peril of death, the title of the donee becomes absolute and perfect at his death, and by relation, from the time of the actual delivery of the property. The foregoing propositions are sustained by the following authorities: 1 Story, Eq. Jur. § 606; 2 Kent, Comm. 444; *Grymes v. Hone*, 49 N. Y. 17; *Irish v. Nutting*, 47 Barb. 370. There is no reason why gifts should not be upheld as well as sales. Both are based upon the right of all people to do what they will with their own. Gifts are made without money and without price, from motives of affection or esteem, while grants are made for a consideration. Sales throughout the world are made verbally, and perfected by physical transfer and acceptance of the subject, and gifts are made in the same way, and consummated by delivery; and one method of transfer should be as free as the other. Devises and bequests, like donations *causa mortis*, are but gifts, to take effect absolutely only upon the death of the giver; and, if they are to be surrounded with safeguards beyond this requisite in transactions between the living, let it be so, but let not the intention of donors be defeated. In this case, Edwards intended to give the tin box and its contents, if he did not return from the hospital, to the plaintiff; and the evidence manifests the presence of every element necessary to constitute a gift in prospect of death. It never was revoked; and the donor never returned from the hospital, and never re-

covered from the illness from which he was suffering at the time when he made the gift. Much is said by the appellants respecting the immediate cause of the death of Edwards at the hospital, and their contention is that he died of a disease, and from a cause, which he did not anticipate, and from a peril which he did not foresee, when he made the gift; but there is no insistence that he recovered from the illness or survived the peril from which he apprehended his death. When he made the gift, he was under the shadow of a great danger. He was about to submit to a surgical operation which he apprehended would be serious, and might be fatal; and, if he never returned from the hospital, the property was to belong to the plaintiff. His return was the only condition impressed upon the gift; and there is no reason why the court should impose another, or any additional contingency. While there are expressions in books and opinions of judges which, considered separately, favor the contention of the appellants, yet there are as many which look the other way. All sorts of views have been expressed by judges upon the subject of gifts *causa mortis*, and they are incapable of reconciliation. The assertion is often found in books that the donor must die of the ailment or peril in view when the gift was made, and the expression is sufficiently accurate; for, if the donor recover or escape from the impending peril, the gift is thereby defeated, not because death did not ensue from the illness or peril in view, but because it did not result at all. If a person in the last stages of a fatal disease made a gift in expectation of death therefrom, and died in a few days from heart failure, without having recovered from the illness, the gift would be valid, because the revocation depended upon the recovery of the giver, and that event never happened. In this case, if Edwards had been prostrated with a malignant disease, from which he expected to die, and made the gift he did in prospect of death therefrom, and then died of myocarditis in 10 days, and before he recovered from the disease which prompted the donation, the gift would be complete. The gift was only ambulatory and incomplete during his life-time, and in case he recovered from his illness. Our view is that such a gift is only defeated by a revocation in the life-time of the donor, or recovery from the illness or escape from the danger in view at the time of execution of the gift; and, if death intervenes, from a sudden and unforeseen cause, before such recovery or escape, the gift stands complete, and the title vests absolutely in the donee. A different conclusion would defeat the intention of the donor, which the law is careful to execute. The essential conditions of a gift *causa mortis* are contemplation of death, clearly-expressed intention to make a present gift, and a delivery of the subject-matter thereof. A delivery of the bank-book which was the evidence of the claim against the bank, and the death of the donor without a revocation of the gift, and without a recovery or escape from the dreaded peril, was sufficient to vest the fund in question in the plaintiff. *Champney v. Blanchard*, 39 N. Y. 111; *Westerlo v. De Witt*, 36 N. Y. 340. The judgment appealed from should be affirmed, with costs.

RALPH v. BRICKELL *et al.*

(*Supreme Court, General Term, Fourth Department. November, 1889.*)

PARTNERSHIP—FIRM DEBTS—INDIVIDUAL ASSETS.

A partner can, by a general assignment, devote his individual property to the payment of debts due by the firm.

Appeal from judgment on report of referee.

This judgment was entered in Oswego county, April 15, 1889, setting aside as fraudulent and void a general assignment made by Brickell to Wilcox. On the 6th March, 1884, the plaintiff duly recovered a judgment against the de-

fendant Brickell for \$656.41 damages and costs, for rent due upon a lease given by plaintiff to Brickell on July 16, 1881. On August 4, 1881, Brickell and one W. S. Gardner entered into an arrangement whereby it was agreed that they would conduct and carry on a grocery business, as copartners, in the store covered by the lease, under the firm name of W. S. Gardner & Co., Gardner to be paid for his personal services in the management thereof the sum of \$15 per week, and one-third of the net profits of the business, if any, but not to be liable for any losses in the business. Under this agreement, the business was carried on in the firm name of W. S. Gardner & Co. until on or about July 1, 1883; Brickell contributing all the capital, and Gardner contributing his services under the arrangement. The business was a losing one, and there were no profits; and Gardner received nothing, and was entitled to nothing, but the \$15 per week. During all this time, Brickell was in the employ of Francis H. Leggett & Co., a wholesale grocery house of New York city, traveling and selling goods for them, under the arrangement that he was to have for his services one-third of the net profits on the goods sold by him; all losses and expenses of every kind on the sales made by him to be first deducted, in arriving at the net profits. During the time W. S. Gardner & Co. conducted business, the firm of Francis H. Leggett & Co., through Brickell, sold and delivered to W. S. Gardner & Co. goods from time to time; and on July 1, 1883, the firm of W. S. Gardner & Co., upon such sales, was indebted to the firm of Francis H. Leggett & Co. in about the sum of \$1,465.54. At that date, W. S. Gardner assigned to Brickell all his interest in the firm of W. S. Gardner & Co., and in the goods and business of the firm; Brickell agreeing, as the consideration of the sale, to assume and pay all the firm debts. This transfer and agreement was in writing. Shortly after this, and on 10th July, 1883, Brickell executed to the defendant Wilcox a general assignment for the benefit of creditors, in which he preferred, first, the debt to Francis H. Leggett & Co.; then, a debt to Thomas Kingsford, of \$100.24, and the debt of plaintiff; and, after that, his other debts, to be paid *pro rata*. The assets amounted to about \$1,200. The foregoing facts were found by the referee, and he also found, as matter of fact, that the purchase of Gardner's interest by Brickell was made in good faith, and without any intent to hinder, delay or defraud creditors of the firm; and that the general assignment of Brickell "appropriates all the property of the assignor to the payment of debts for which he is liable, in one capacity or another, and the same must stand, unless it be fraudulent in law, because of the distribution of the assets in the payment of debts contrary to law by the preferential appropriation of the individual property of Brickell to the payment of the firm debts of W. S. Gardner & Co., to the prejudice of the plaintiff." The referee then held, as matter of law, that, by the transfer from Gardner to Brickell, the firm property became the individual property of Brickell, and that he had no right, as against his individual creditors, to prefer a firm creditor, and upon that ground declared the assignment void as against plaintiff, an individual creditor. The defendants duly excepted. It further appears in the case that all the property that passed under the assignment was what remained of the firm property. The case does not contain all the evidence. Defendants appeal.

Argued before HARDIN, P. J., and MARTIN and MERWIN, JJ.

D. P. Morehouse, for appellants. H. C. Benedict, for respondent.

MERWIN, J. The referee, in his findings of fact, in effect negatives the existence of any cause for setting aside the assignment, except such as may be inferred, as matter of law, by reason of the preference of the firm creditor, so that, if the referee was not correct in his conclusion on this subject, the judgment cannot be supported. It would not be warranted by the facts found. *Stoddard v. Whiting*, 46 N. Y. 627. Upon such facts, it would be

erroneous. *Collender v. Phelan*, 79 N. Y. 366. The question, then, is, can one partner, by a general assignment, devote his individual property to the payment of a firm debt? A court of equity, in the distribution of equitable assets, applies the rule that, as between the joint and separate creditors of partners, the partnership property is to be first applied to the payment of the partnership debts, and the separate property of the individual partners to the payment of their separate debts. *Meech v. Allen*, 17 N. Y. 301. In *Re Estate of Gray*, 111 N. Y. 404, 18 N. E. Rep. 719, this rule was applied to the distribution of the assets of a deceased partner in the hands of his administrator. In *Wilson v. Robertson*, 21 N. Y. 587, it was held that the appropriation, in a general assignment by an insolvent firm, of partnership property to the payment of the individual debts of one partner, avoids the assignment, at the suit of the firm creditors. Such an assignment assumes to appropriate the share of one partner to the payment of debts that neither he nor his property is liable for. No case is cited showing that a like rule applies to the case of an assignment by one partner of his individual property for the payment of firm debts, except the case of *Jackson v. Cornell*, 1 Sandf. Ch. 348. In that case, it was held by Vice-Chancellor SANDFORD, in 1844, that such an assignment, preferring the firm creditors to the exclusion of the individual, was fraudulent and void, as to the latter. On the other hand, there are many cases laying down a contrary rule. In *Kirby v. Schoonmaker*, 3 Barb. Ch. 46, (decided in 1848,) it was said by Chancellor WALWORTH that copartners may assign their individual as well as their partnership property to pay the joint debts of the firm, thereby giving the creditors of the firm a preference over the separate creditors. This doctrine was followed in *Van Rossum v. Walker*, 11 Barb. 237, where the question was directly met and passed upon. It was approved by Judge ALLEN in *O'Neil v. Salmon*, 25 How. Pr. 252. There are several other cases to the same effect. *Becker v. Leonard*, 42 Hun, 224; *Haynes v. Brooks*, Id. 528; *Smith v. Perine*, 1 N. Y. Supp. 495. In *Crook v. Rindskopf*, 105 N. Y. 476, 12 N. E. Rep. 174, it is said, in reference to a general assignment, that it is lawful for an insolvent member of a firm to devote his individual property to the payment of firm debts, or to any debt owing by him to his partners, to the exclusion of his individual creditors; and no inference of fraud can legally be derived from such disposition. It thus seems to be well settled on authority that a preference of a firm debt by one partner, in an assignment of his individual property, does not make the assignment void. Partners, as between themselves, have an equitable right to have the partnership property applied first to the payment of the partnership debts; and, in certain circumstances, this inures to the benefit of the creditors of the firm, and is sometimes called a "lien." *Saunders v. Reilly*, 105 N. Y. 20, 12 N. E. Rep. 170. There is no such lien, as between the separate partners and their individual creditors. SELDEN, J., in *Meech v. Allen*, *supra*. Each partner can, therefore, as long as he has control of his property, use it to pay either class of debts, for he is under legal obligation to pay both. BROWN, J., in *Hurlbert v. Dean*, *41 N. Y. 104. The general rule adopted by courts of equity, when distribution is made by the court, does not apply to voluntary dispositions, by partners themselves, that are in other respects good. It follows that the referee erred in his legal conclusion.

In the present case, it is at least doubtful whether, as against the plaintiff, the debts preferred are not to be deemed individual debts of the assignor. As between the assignor, Brickell, and the retiring partner, Gardner, Brickell, by assuming and agreeing to pay the firm debts, became the principal debtor, and individually liable, and Gardner was simply a surety. *Colgrove v. Tallman*, 67 N. Y. 95. Gardner certainly had the right to have the assumed debts treated as the individual debts of Brickell; and it is not clear that the plaintiff has any better position, especially, in view of the fact that all the property assigned by Brickell was firm property at the time of the dissolution.

Be this as it may, the conclusion reached on the other branch of the case is fatal to the judgment. Judgment reversed upon the exceptions, and a new trial ordered; costs to abide the event. All concur.

In re WILEY'S ESTATE.

(*Supreme Court, General Term, First Department. December 2, 1889.*)

GUARDIAN AND WARD—ACCOUNTING BY GUARDIAN'S ADMINISTRATRIX.

Where a guardian dies before final settlement, his administratrix may be required by the surrogate's court, at any time, to render an account of the trust of her intestate, under Code Civil Proc. N. Y. § 2606, providing that the surrogate's court shall have the same jurisdiction to compel an administrator to account which it would have had against the decedent, if his letters had been revoked.

Appeal from surrogate's court, New York county.

In the matter of the estate of James Wiley, deceased, his ward, Emily L. Middleton, obtained an order from the surrogate's court directing Laura E. Wiley, the administratrix of decedent's estate, to render an account of her intestate's guardianship; from which order the administratrix appeals.

Argued before VAN BRUNT, P. J., and BARTLETT, J.

Wilder, Wilder & Lynch, (E. P. Wilder, of counsel), for appellant. *Davenport, Smith & Perkins, (George Putnam Smith and Edward C. Perkins, of counsel),* for respondent.

VAN BRUNT, P. J. It appears that James Wiley, deceased, was appointed general guardian of the estate of the respondent by the surrogate of this county; that by his account filed on the 1st of January, 1884, he showed himself to be in possession of her estate; that he died on the 23d of October, 1884, and on September 20, 1889, the appellant, Laura E. Wiley, was appointed his administratrix. The respondent attained her majority on the 8th of November, 1888. The respondent having presented her petition to the surrogate of New York county to compel an accounting, the surrogate, on the 26th of September, 1889, issued a citation to Laura E. Wiley, requiring her to show cause on the 10th of October, 1889, why she should not render and settle an account of the proceedings of James Wiley, deceased, as guardian of the respondent. Upon the return of this order the appellant filed an affidavit setting up that she had only received her letters of administration on the 20th September, preceding; that one year had not expired since letters were issued to her, and that by reason thereof the surrogate was without jurisdiction in the premises to compel her to account; that the appellant, since her appointment, had retained counsel to aid her in making diligent search for, and to recover possession of, the property of the trust-estate of which the deceased was guardian; that no portion had come into her hands, but that she believed considerable portions of it might be recovered by proper actions brought therefor. The learned surrogate, upon the hearing, directed the administratrix to render an account of the proceedings of said James Wiley as general guardian of the respondent; and from the order thereupon entered this appeal is taken.

The objection which seems to be urged is that the surrogate had no jurisdiction to compel the accounting, one year not having expired since the issuing of the letters of administration. We think this objection is not well founded, as the right to compel such accounting seems to be distinctly conferred by section 2606 of the Code, where it is provided that the surrogate's court shall have the same jurisdiction to compel an executor or administrator of the decedent to account which it would have had against the decedent, if his letters had been revoked. The word "decedent" refers to an executor, administrator, guardian, or testamentary trustee who has died. Prior to this provision of the Code, it would appear that there was no way in which such

an accounting might be compelled, except upon filing a bill in equity; and the cumbersomeness of this proceeding was intended to be avoided by the provision in the Code to which attention has been called. It seems to be clear that it was the intention that the representative of the deceased trustee or guardian might be called upon to render an account of the proceedings of his intestate, where such intestate had been a guardian or trustee, without waiting for the final settlement of the estate of such deceased guardian or trustee. It was simply calling upon the representative of the deceased guardian or trustee to render an account of his trust, and had nothing to do with the general accounting in respect to the whole of his estate. In view of this provision of the law, there does not seem to have been any want of power on the part of the surrogate to order the accounting; and the mere fact that the general guardian had dissipated his ward's estate does not seem to render it proper that extraordinary delays should be indulged in, in determining the deficiency which may exist. The order should be affirmed, with \$10 costs and disbursements.

BARTLETT, J., concurs.

PENDERGAST v. GREENFIELD *et al.*

(*Supreme Court, General Term, First Department. December 2, 1889.*)

1. TRUSTS—ACCOUNTING—EQUITY JURISDICTION—ACCOUNT STATED.

An action on a declaration of trust, whereby defendant acknowledged that an assignment to him was "in trust only" to pay certain claims against his assignor, brought by one of such claimants for an accounting and for the application of trust funds to trust purposes, is properly and necessarily in equity, and is not on an account stated, so as to entitle defendant to a jury trial, though the complaint alleges that from time to time accounts were had between the parties concerning the trust fund, and that at a certain time an account was stated between them showing a certain amount due by defendant, under his trust, as this is simply an allegation as to the amount agreed upon by the parties as applicable to the trust purposes.

2. SAME—ACCOUNTING.

The assignment was of all sums payable to the assignor for certain work under a contract, and the declaration of trust provided that the assignment was to pay "all liens, claims, debts, and demands growing out of said work, and existing against" the assignor "by reason of said work." *Held*, that this referred to work to be done until the completion of the contract, as well as to work already done, and covered moneys furnished for such work after as well as before the declaration of trust.

3. SAME.

When defendant neither denies the averment of an agreed account, nor alleges any mistake, he is entitled to no credits other than are contained therein.

Appeal from special term, New York county.

Action by Charles H. Pendergast, as receiver of the Produce Bank of the City of New York, against Ernest Greenfield, as trustee and individually, impleaded with the Continental National Bank of New York. Defendant Greenfield appeals from a judgment for plaintiff, and from orders (1) denying his motion for a jury trial, (2) granting plaintiff an extra allowance for costs, and (3) denying a motion for new trial.

Argued before VAN BRUNT, P. J., and DANIELS and BARRETT, JJ.

Burton N. Harrison, for appellant. Strong & Cadwalader, (John L. Cadwalader, of counsel,) for respondent.

BARRETT, J. This action is founded upon a declaration of trust executed by the defendant on the 24th day of January, 1880, whereby he acknowledged that an assignment, executed contemporaneously by one Decker, was made to him (Greenfield) "as trustee and in trust only" for certain specified purposes. The assignment vested in the defendant all sums payable by the city for the improvement known as the "Riverside Drive." Decker's firm were the contractors for its construction; and the bank, of which the plaintiff is

receiver, had discounted Decker & Co.'s notes to a large amount, to enable them to carry on the work. Prior to the date above mentioned, assignments were made which vested in Decker individually all the rights of his firm in their contract with the city. He thereupon assigned all such rights to the defendant, and the latter then executed the trust instrument in question. By that instrument the defendant acknowledged that the assignment to him was "in trust only" to pay, out of the moneys or profits derivable from the Riverside Drive contract, "all liens, claims, debts, and demands growing out of said work, and existing against the firm of Decker & Co., or either member thereof, as such, by reason of said work." The defendant further agreed to account to Decker for all moneys or profits "received, or to be received, under or by reason of the assignment, * * * after payment of said liens, claims, debts, and demands by him to be paid as aforesaid." The effect of these instruments—the assignment and declaration of trust—was to create the relation of trustee and *cestui que trust* between Greenfield and all the persons whose liens, claims, debts, and demands were thus to be paid. Among the latter was the Produce Bank. The plaintiff, as its receiver, brought this action against Greenfield for an accounting, and for the application to the purposes of the trust of whatever sums should be found in his hands as such trustee under the assignment and declaration of trust.

The defendant's first point is that the action was, in substance, upon an account stated; that he was therefore entitled to a jury trial; and that, because of its denial, he is entitled to a reversal of the judgment. He founds this point upon an allegation in the complaint which reads as follows: "(3) That from time to time accounts were had as between the said Produce Bank of the City of New York and said Ernest Greenfield, such trustee, concerning the amounts from time to time collected, disbursed, and in his hands; and that on or about the 1st day of April, in the year 1885, an account was stated between the plaintiff, as receiver of the said Produce Bank, and Ernest Greenfield as trustee as aforesaid, as to all sums and amounts up to that time collected, and as to all sums or amounts paid or payable by him to such date, by which account and statement as aforesaid a balance was found due by the said Ernest Greenfield as such trustee, under his trust, of the sum of \$5,958.48." The appellant's contention proceeds upon an inaccurate view of the scope of the complaint, and of the effect of this averment. The action is not upon a common-law demand, but is in equity for an accounting. Nor is the form of the action unnecessarily in equity, and thus designed to evade the constitutional rights guarantied in common-law actions. There was no contract between Greenfield and the Produce Bank which the latter could enforce at law. The agreement was between Greenfield and Decker, and the declaration of trust could only be enforced in equity by the persons for whose benefit it was executed. The action by one of the *cestuis que trustent* was therefore properly and necessarily of an equitable character, invoking the equity powers of the court to compel the trustee to perform his trust duty, to account to the *cestuis que trustent*, and to apply the moneys received by him under the assignment to the purposes specified in the contemporaneous declaration. The action was not upon an account stated at all, either technically or substantially. The averment above quoted amounts to nothing more than a statement that prior to April 1, 1885, the trustee had from time to time voluntarily accounted to one of the *cestuis que trustent*; and that on April 1, 1885, he again accounted, giving his *cestui que trust* full statements of receipts and disbursements up to date, and agreeing upon the ascertained balance then in his hands under the trust. The effect of this was simply that the trustee duly accounted to a particular *cestui que trust* for all his doings as trustee up to a certain date. So far he became bound to that *cestui que trust* in any subsequent proceeding by the latter to enforce the trust. The fact of such settled accounting was but an incident of pleading and proof in an ac-

tion calling for the application of the ascertained balance to the trust purposes. That accounting settled nothing with regard to the extent of the plaintiff's demand against the ascertained balance. There was in fact no account to be stated between the plaintiff and the defendant, in the ordinary sense of that expression. The word "stated" is used in the complaint, as applicable to the defendant's account of receipts and disbursements, in the sense of "agreed upon." The allegation is, in substance, that the plaintiff and the defendant agreed upon the latter's account of April 1, 1885, and that, as between them, a balance was then found due, applicable to the trust purposes of \$5,958.48. The court, therefore, properly retained the action for trial at special term, without a jury. Upon the trial the plaintiff gave evidence tending to show that the Produce Bank and the defendant the Continental Bank were now the only remaining *cestuis que trustent* who have any "liens, claims, debts, or demands" growing out of the work on Riverside drive, and existing against Decker & Co. He also gave evidence tending to show that such liens, claims, debts, and demands amount to considerably more than the ascertained balance of April 1, 1885, namely, from \$13,000 to \$14,000. The defendant contested these claims, insisting that the plaintiff and the Continental Bank should be confined to notes which were discounted prior to the date of the trust instrument. This contention runs through the appellant's points, and seems to be his main reliance, so far as the merits are concerned. It is not altogether clear that the claims sought to be enforced are, as matter of fact, amenable to the defendant's criticism. But I have no doubt that they are fully covered by the trust instrument, read in the light of the surroundings. Its spirit and purpose cannot well be doubted. It was to enable Greenfield to collect all sums due at and after the date of the assignment, and to require him to pay all claims growing out of the work. The appellant contends that this expression is qualified by the words which immediately follow in the trust instrument, "and existing against the firm of Decker & Co." This clearly does not mean so existing only at the date of the instrument, but existing then or at any time during the progress of the work. The language is: "Growing out of the work, and existing against Decker & Co. by reason of said work." This referred to work done and to be done until the contract was completed, and to moneys furnished from time to time to aid in the construction. And this is the interpretation of the instrument which the parties acted upon. For Greenfield collected large sums subsequently, and also paid large sums arising after the date of the assignment. Indeed, Greenfield recognized the rights of the plaintiff and the Continental Bank as late as December, 1884, when he entered into an agreement with them whereby, in consideration of his promise to account, they released him from all personal responsibility, and took certain suits brought by other claimants off his hands.

The remaining question is whether the defendant was entitled to further credits besides those which entered into the account of April 1, 1885. This seems to be settled by the pleadings themselves, for there is in the defendant's answer neither denial of the averment already quoted, nor affirmative allegation setting up mistake or specifying any additional claim of credit. The defendant does deny in a general way that the account comprises each and every item which he was entitled to charge against the trust fund, but he does not set forth the particulars of any item omitted from the account, nor allege, even in general terms, that any item was, by mistake or otherwise, in fact omitted, nor does he in any manner qualify the admission that an account was stated (meaning, as we have already seen, agreed upon) as to all receipts and disbursements up to the date specified, and that a balance was then found due by the defendant, as such trustee under his trust, of \$5,958.48. The claims that he attempted to make upon the trial, despite his admission, were plainly after-thought, and were wholly without merit; such, for instance, as the effort to credit himself with the commission originally allowed by Decker, when

he was already credited with a larger commission, allowed by the plaintiff and the Continental Bank, in ignorance of the prior agreement. The learned counsel for the defendant very properly admitted upon the trial that "the efficacy of this prior agreement was destroyed by the subsequent agreement" with the plaintiff and the Continental Bank. The plaintiff might well have relied upon the pleadings upon this head, but he did, quite unnecessarily, furnish testimony in support of the admitted account; and that testimony, though subjected to criticism, in my judgment fully supports the averment.

No other points were presented calling for special consideration. The court might properly have tried the entire cause at one time, for the defendant was not entitled, as of course, to a jury trial upon the issues raised by the counter-claim and reply, such counter-claim being in an equity action. *Mackellar v. Rogers*, 109 N. Y. 468, 17 N. E. Rep. 350. But the defendant cannot now take advantage of the procedure which he induced the court to adopt. The plaintiff was the only one prejudiced by remitting the trial of the counter-claim to the circuit. He was thus seriously delayed in obtaining his rights, and we think the learned judge wisely exercised his discretion in refusing at the later trial substantially to reopen the earlier. The judgment, and all the orders appealed from, should be affirmed, with costs. All concur.

SCOFIELD *et al.* v. DEMOREST, (two cases.)

(Supreme Court, General Term, First Department. December 2, 1889.)

PLEADING—NEW MATTER—REPLY.

Although an answer pleading truth in justification to an action for libel is "new matter by way of avoidance," within Code Civil Proc. N. Y. § 516, which provides that "where an answer contains new matter, constituting a defense by way of avoidance, the court may, in its discretion, on the defendant's application, direct the plaintiff to reply to the new matter," yet, where such answer consists of a lengthy statement, partly of facts, and partly of evidence of facts, a great deal of it being statements with regard to proceedings in a certain lawsuit which can easily be proved by the record, a motion to compel plaintiff to reply is properly denied.

Appeals from special term, New York county.

Actions for libel by Gerrit S. Scofield against W. Jennings Demorest, and by Frank M. Scofield against the same defendant. Defendant answered in both actions, pleading truth in justification, and moved that plaintiffs be compelled to reply. Code Civil Proc. N. Y. § 516, referred to in the opinion, provides that "where an answer contains new matter, constituting a defense by way of avoidance, the court may, in its discretion, on the defendant's application, direct the plaintiff to reply to the new matter." Defendant's motions were denied and he appeals.

Argued before BARTLETT and BARRETT, JJ.

Norwood & Coggeshall, (Carlisle Norwood, Jr., of counsel,) for appellants. *Rabe & Keller*, for respondents.

BARRETT, J. These are actions for libel. The defendant justifies, pleading the truth of the entire libel. It must be conceded that, strictly speaking, such justification is in the nature of "new matter by way of avoidance," as that expression is used in section 516 of the Code of Civil Procedure. The plaintiff may rest upon proof of the publication. The presumption of innocence attaches until it is overthrown by the defendant. The allegation of falsity is not traversable, and the defendant must plead the facts which constitute justification. Granting all this, we still think that this motion was properly denied. It is not every case of confession and avoidance which calls for the exercise of the discretionary power conferred by the section in question. Here the justification pleaded covers the entire history of a judicial controversy. It is a lengthy and detailed statement, partly of facts, partly of evidence of facts. It would be oppressive to put upon the plaintiff the bur-

den of going minutely over this elaborate recital, and of admitting, denying, ignoring, or explaining every component part of it. It is, besides, quite unnecessary. A great deal of this "new matter" consists of statements with regard to the various proceedings in a lawsuit, the contents of affidavits, and the decisions of a court, all of which can, without inconvenience, be proved by the production of the record. The plaintiff should not be required to compare the papers on file with the averments of the answer, and then say whether such averments are accurate. Much of what the defendant asks amounts to just that. It is plain from the nature of the case and the circumstances disclosed that the defendant cannot well be surprised upon the trial by the way in which the plaintiff may seek to meet this new matter; and we agree with the learned judge at special term, that these motions were an attempt, in substance, to require the plaintiff to reply to the defendant's evidence. The orders appealed from should therefore be affirmed, with \$10 costs on each appeal, and the usual disbursements. All concur.

DOVALE v. ACKERMAN *et al.*

(*Supreme Court, General Term, First Department. December 2, 1889.*)

JUDGMENT BY DEFAULT—VACATION—REFERENCE.

On motion to vacate a judgment entered on defendant's alleged default in answering plaintiff's amended complaint, where defendant charges that his admission of service of such amended complaint was fraudulently altered by inserting the date, and plaintiff denies this, a reference should be had, to ascertain the fact; and it is erroneous to deny the motion and open the default, on payment of costs, allowing the judgment to stand as security.

Appeal from special term, New York county.

Action by Ricot J. Dovale against Bernard L. Ackerman, Sr., and Bernard L. Ackerman, Jr., for money loaned. A judgment for plaintiff against the first-named defendant was entered on his alleged default in answering plaintiff's amended complaint. He moved to vacate the judgment. His motion was denied, but the default was opened, and defendant was allowed to answer on payment of \$10 costs; the judgment being allowed to stand as security. Defendant appeals.

Argued before VAN BRUNT, P. J., and BARTLETT and BARRETT, JJ.

Coudert Brothers, (W. F. Randel, of counsel,) for appellant. *James M. Lyddy*, for respondent.

VAN BRUNT, P. J. The claim upon the part of the appellant is that the admission of service of the amended complaint herein was altered by the insertion of the date of May 20, 1889, in such admission. It is urged upon the part of the respondent that such is not the case, but that the date was inserted at the time of the signing of the admission in question. This condition of things presents a very serious question, which should have been attempted, in view of the contradictory nature of the evidence, to be solved by some sort of an oral hearing of the parties acquainted with the facts. The learned court below, in the decision of the case, was not prepared to adopt the forgery theory, or the claim that a willful default for the purposes of delay had been submitted to. We think that this question should have been sifted to the bottom, to ascertain as to who was in fault. If this date had been interlined, there is no question but that the defendants would be entitled to an order granting this motion to vacate the judgment without terms; and if this charge of alteration was made without evidence to sustain it, then the terms imposed were entirely inadequate. We think, upon an examination of these papers, that the order should be reversed, and that a reference should be had, to ascertain the fact whether or not this admission of service of the amended complaint has been fraudulently altered, as claimed by the appellant. Upon the coming in of this report of the referee, application may then

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be made to the special term for such relief as the nature of the report may warrant. Costs of this appeal should not be awarded to either party. All concur.

UNITED STATES LIFE INS. CO. v. POILLON *et al.*

(Supreme Court, General Term, First Department. December 2, 1889.)

MORTGAGES—FORECLOSURE—LEAVE TO SUE FOR DEFICIENCY.

On application for leave to sue for part of a mortgage debt after judgment of foreclosure, as required by Code Civil Proc. N. Y. § 1628, the court will, in the exercise of its discretion, consider the equitable rights of defendant, which cannot be pleaded by him in the action at law.

Appeal from special term, New York county.

Action by the New York Life Insurance Company against the heirs of Cornelius Poillon, to recover a deficiency on a judgment of foreclosure of a bond and mortgage. The application for an order *nunc pro tunc*, granting leave to sue as of date prior to the commencement of the action, was denied at the special term, in the following opinion of the court filed September 4, 1889:

"BARRETT, J. The court, when called upon to exercise its authority under section 1628 of the Code of Civil Procedure, should, as was said in *Insurance Co. v. Stevens*, 63 N. Y. 346, 'be governed by principles of equity in granting or refusing the application.' It appears that the plaintiffs commenced their action in entire disregard of this section. When their difficulty became apparent, and their failure imminent, they sought to save themselves by obtaining leave to sue without giving their adversaries an opportunity to be heard. The general term having condemned that practice, and vacated the *ex parte* order, the plaintiffs now invoke the equitable consideration of the court—on proper notice to all parties—to give them a foundation for their action *nunc pro tunc*. This ought not to be done, under all the circumstances disclosed. There is no force in the suggestion that the order of April 17, 1885, (made by me,) substantially gave this leave. That order simply denied a motion for a distribution of the fund in question, without prejudices to an action by any of the claimants. But it did not attempt to grant these plaintiffs leave to bring such an action. It was a mere judicial suggestion as to the manner in which an appropriate adjudication might be obtained. The first step, if these particular claimants desire to proceed, was to obtain leave under section 1628. It is entirely clear that no leave was ever granted, directly or indirectly, such as would sustain this action, until the plaintiffs secured the *ex parte* order to which reference has been made; which order, as we have seen, has been vacated. In addition, however, to the plaintiffs' laches and inequitable practice, the application should be denied, because of the failure to make the legatees of Alexander C. Poillon parties to the foreclosure suit. Whether their legacies were chargeable upon the real estate, was, to say the least, a doubtful question. It was distinctly held in *Forster v. Civill*, 20 Hun. 282, that they were so chargeable. This case has never been overruled. It is true that, in the later case, the ordinary residuary clause, unaided and alone, is said to be insufficient to evince an intent to charge legacies upon the real estate. But all the cases agree that it is a question of intent, and that extrinsic circumstances may be resorted to to ascertain such intent. *Brill v. Wright*, 112 N. Y. 133, 19 N. E. Rep. 628; *Schnorr v. Schroeder*, 45 Hun. 148. The intent to charge was found in *Forster v. Civill*, upon the facts then before the court. Indeed, it might also well be found upon the present affidavits. Certainly there was enough to require that these legatees should be made parties. See, also, *Jordan v. Poillon*, 77 N. Y. 518, holding that they were necessary parties in partition. Their absence rendered the title conferred by the judicial sale doubtful, and may well have affected the pecun-

iary result. Upon the affidavits it must be found that the prices realized at the sale (for a large part of the property) were exceedingly inadequate, and thus the plaintiffs have secured values largely in excess of their claim. The hardship of asking these heirs, who had no legal notice of the foreclosure suit, and whose property has been taken from them by defective proceedings, to make up a technical deficiency thus produced, is apparent. In my judgment, the application made at this late day, and to relate back, (so dilatory that now the statute of limitations is invoked against the claim,) is in every way inequitable, and should be denied."

From the order denying the motion plaintiff appeals. For former report, see 6 N. Y. Supp. 870.

Argued before VAN BRUNT, P. J., and BARTLETT, J.

Jay & Candler, for appellant. *A. P. & W. Man*, for respondents G. W. Poillon and another. *E. M. Wight*, for respondent G. P. Leveridge. *Wilmot & Gage*, for respondents Jordan & Gage.

VAN BRUNT, P. J. This action was brought to enforce against the heirs of Cornelius Poillon a foreclosure deficiency judgment recovered on the 6th February, 1876, against Poillon's administratrix. The action was commenced without leave of the court. A demurrer upon the part of one of the defendants that the complaint did not set forth a cause of action having been sustained upon the ground that leave to sue had not been obtained as required by section 1628 of the Code, the plaintiff obtained an *ex parte* order permitting it to sue, and providing for the entry of the order as of a time prior to the commencement of the action. A motion was made to set aside this order, which was denied at the special term; but it was reversed at the general term, upon the ground that notice should have been given to the defendants who had appeared in the action of the application. Thereupon the plaintiff renewed its application, upon notice when the application was denied, and this appeal is taken.

Applications of this kind are necessarily addressed to the sound discretion of the court. If the circumstances are of a character that render it inequitable to allow the deficiency judgment to be enforced, then the court, being governed by principles of equity in granting or refusing such an application, should deny the same. The plaintiff in this action commenced its proceeding in entire disregard of the provisions of the Code in this respect, and it was not until a demurrer had been sustained to its complaint that it made any effort whatever to obtain the order in question, and then made the application to the court without the knowledge of the parties who had appeared in the action. We are of opinion that, for the reasons stated in the opinion of the learned judge who heard the application in the court below, the same was correctly denied; and it would be unnecessary to add anything to what has been said upon the decision of the motion, were it not for the fact that the learned counsel for the appellant claims that it is unusual to finally dispose of the property rights of a litigant upon *ex parte* affidavits, without giving him the right to a trial in a plenary action. It is perfectly clear that the equitable considerations which call upon the court to deny this application could not be availed of as matters of defense in the action itself. And it was because these equitable considerations, which might constrain the court to deny an application of this kind, could not be set up by way of answer in the action, that the provision of law obtained, requiring applications to be made to the court for leave to sue under circumstances like those in the case at bar. If it had been possible to set up these considerations in the case itself, there would be no necessity for a provision of law that application should be made to the court for leave to sue; and, as already stated, these applications are to be disposed of upon equitable principles; and if it should be inequitable to allow the enforcement of the deficiency judgment under all the facts and cir-

cumstances of the case, as they existed at the time of the application, then the court is called upon to deny the motion. The claim that the application should be considered as of the date when the deficiency judgment was entered cannot prevail, because the question as to whether it would be equitable or inequitable to grant the motion must depend upon the facts existing at the time the application is made. We think, for the reasons stated in the opinion of the court below, the order appealed from should be affirmed, with \$10 costs and disbursements.

BARTLETT, J., concurs.

In re WOOD'S ESTATE.

(Supreme Court, General Term, First Department. December 2, 1889.)

WILLS—CONSTRUCTION—PERPETUITIES.

Testator, by his will, made his three executors trustees to create and maintain a benevolent institute, directing them to vest in it all his property not otherwise disposed of, and to apply to the legislature for a charter of incorporation; "and, in case said charter shall not be obtained within the life of the longest liver of my executors," then over to the city of New York, to be strictly devoted to the charitable uses declared in the will. *Held*, that both the primary and substituted gifts were void because limited on three lives, in violation of the statute against perpetuities.

Appeal from surrogate's court, New York county.

Petition by the mayor, aldermen, and commonalty of the city of New York to compel an accounting by Alfred L. Simonson and another, executors, etc., of Samuel Wood, deceased. The surrogate made an order denying the prayer of the petition, and the petitioners appeal. Code Civil Proc. N. Y. §§ 2726, 2727, provides that "a person interested in the estate or fund" may present a petition praying that an executor or administrator be compelled to account.

Argued before VAN BRUNT, P. J., and BARTLETT, J.

William H. Clark, (B. E. Valentine, of counsel,) for appellants. *Edward Schenck*, for respondents.

BARTLETT, J. The appellants failed in their application because, in the opinion of the learned surrogate, they were not persons interested in the estate or fund in the hands of the executors, within the meaning of the Code; and the only question presented by this appeal is whether that view is correct. We think it is. The claim of the city to any interest in the estate of the testator rests upon the second subdivision of the seventh article of the will, which seeks to establish a trust in three executors, for purposes which are thus stated: "To create, endow, and forever maintain an institution in the city of New York, to be called 'The Samuel Wood Benevolent Institute,' and to vest in said institute all of my property and estate not otherwise disposed of, and for the use and purposes thereof as the same are hereinafter declared; and to the end that the said 'The Samuel Wood Benevolent Institute' may, by the laws of this state, be capable of taking and holding real estate and other gifts and donations to its use, I hereby direct and order my executors, as soon as may be after my decease, to apply to the legislature of this state for an act of incorporation incorporating the said 'The Samuel Wood Benevolent Institute,' with power to take and hold real estate for the purposes of said institute, and to prosecute said application until a charter shall be obtained conformably to this my will, and to be governed as hereinafter provided; and, in case said charter shall not be obtained within the life of the longest liver of my executors, I give, devise, and bequeath the said rest, residue, and remainder of my estate, real and personal, to the mayor, aldermen, and commonalty of the city of New York, in their corporate capacity, to be strictly devoted by the city of New York to the charitable uses in this my will declared." The primary gift, for the establishment of the Samuel Wood Benev-

olent Institute, changed by the codicil to a college of music, was invalid. So far as the real estate was concerned, the power of alienation was suspended for more than two lives. So far as the personal property was concerned, the absolute ownership was suspended for more than two lives. In neither case was the period of suspension limited by two lives in being, but, on the contrary, the testator contemplated that it might last through the lives of his three executors. But, notwithstanding that the primary gift must be deemed void, the learned counsel for the appellants insists that the substituted gift to the city of New York is good; and he refers to *Cruikshank v. Home for the Friendless*, 113 N. Y. 337, 21 N. E. Rep. 64, as a case in which a somewhat similar primary devise was adjudged void, while the alternative and substituted gifts were upheld. But in that case the testator plainly intended that the gifts over should take effect at once, if the prior disposition of his property for the benefit of a non-existent corporation was invalid in law. In the will now under consideration, however, the language upon which the substituted gift is dependent manifests a clear intention that the mayor, aldermen, and commonalty of the city of New York shall receive nothing until the death of the last of the testator's three executors. "In case said charter shall not be obtained within the life of the longest liver of my executors" is the phraseology. The suspension of the absolute ownership and power of alienation is thus attached to the substituted gift itself, and operates to invalidate it, equally with the primary devise. The lurking doubt of the validity of the prior trust which influenced the testator in the case of *Cruikshank v. Home for the Friendless*, (see opinion of FINCH, J.,) 113 N. Y. 350, 21 N. E. Rep. 64, does not appear to have existed in the mind of Mr. Wood. He contemplated possible and probable delay in the formation of such a corporation as he desired to have organized, but no legal objection to the testamentary disposition he attempted to make. He distinctly postponed his gift over to the city of New York until the expiration of three lives in being, and hence rendered ineffectual the only portion of his will under which the city could assert any interest to compel his executors to account. The order of the surrogate should be affirmed, with costs.

FISHER v. RANKIN.

(Supreme Court, General Term, First Department. December 2, 1889.)

1. PLEADING—VARIANCE—CAUSE OF ACTION.

In an action for personal injuries the complaint stated that, while passing along the sidewalk in front of defendant's premises, plaintiff stepped on a flag-stone placed on the sidewalk, when the stone suddenly gave way under her feet, and she was thereby violently precipitated to the ground. The complaint then stated that the injuries were caused wholly by defendant's negligence, in that he failed to keep the sidewalk in a proper condition, but, on the contrary, permitted it to be and remain in an unsafe and dangerous condition. Held that, the cause of action depending wholly on defendant's negligence, plaintiff could not recover on the theory that defendant had been guilty of maintaining a nuisance, since that would enable her to recover for a cause of action not set up in her complaint.

2. SAME—AMENDMENT.

The defect cannot be cured on appeal by amendment, since a complaint alleging a nuisance will not support a judgment on the ground of negligence.

On rehearing. For former report, see 5 N. Y. Supp. 627.

Argued before VAN BRUNT, P. J., and BARRETT and DANIELS, JJ.

Robert E. Deyo, for appellant. *Christopher Fine*, for respondent.

DANIELS, J. The appeal in this action has already been heard and decided by this general term, but, upon an application made by the defendant, a re-argument has been ordered. This direction for the rehearing of the appeal proceeded to some extent upon the case of *Wasson v. Pettit*, 1 N. Y. Supp. 613. The appeal has been again argued pursuant to this direction; and the

point taken in support of it has now been made mainly dependent upon the construction to be placed upon the complaint in the action. It was for a personal injury sustained by the plaintiff in falling upon the sidewalk on Forty-Eighth street, in front of premises owned by the defendant. This walk had been excavated to receive a concrete filling, and then to be covered by an asphalt or other smooth surface. The plaintiff was passing along the walk on the 15th of July, 1884, and stepped upon that which had been excavated, and upon which a rough surface of cinders, ashes, and broken stone had been placed. In endeavoring to pass along this part of the walk, she fell, and received severe injuries. The court, in submitting the case to the jury, placed the plaintiff's right to maintain the action wholly upon the question whether, under the defendant's authority or employment, an unlawful excavation had been made in the sidewalk, rendering it unsafe for use, and substantially a public nuisance. Her right to maintain the action was in no respect made dependent upon the finding of fact by the jury that the defendant was chargeable with negligence for the condition in which this part of the walk had been placed. Upon that subject the charge was that it was not a case in which the jury could take into account the subject of negligence at all, but that it depended upon the unlawful interference of the defendant with the previous condition of the walk. The defendant excepted to the submission of the case in this form to the jury, and claimed that without amending the pleadings they could not proceed on that theory. Whether this exception was well taken depends wholly upon the construction to be placed upon the complaint; for no statement or admission contained in the defendant's answer enlarged the scope of the action, as the complaint had been made to describe it. By the complaint, it was stated that the defendant was the owner of the premises where the injury took place; and that the plaintiff was lawfully passing along the sidewalk in front of the premises; and "that, while in the act of passing as aforesaid, she stepped upon a flag-stone placed on said sidewalk, when the said stone suddenly gave way from under her feet, and the plaintiff was thereby violently precipitated to the ground." Then it is stated that from her fall she received the injuries for which remuneration was demanded in the action; and after that the complaint proceeded and stated: "(3) That the said injuries were caused wholly by the carelessness and negligence of the defendant, in that, among other things, he failed to keep the said sidewalk in a safe and proper condition, but, on the contrary, permitted it to be and remain in an unsafe and dangerous state and condition; all of which the defendant well knew or ought to have known. That this plaintiff did not, through any fault or negligence on her part, contribute to the said injuries." There was no statement or averment whatever that the defendant had unlawfully made or authorized the excavation in the sidewalk; but what he was charged with having done were acts and omissions which, in judgment of law, were careless or negligent. And no facts whatever were stated in the complaint characterizing what had been done as an unlawful interference with the surface or any other part of the sidewalk. It is plainly evident that the cause of action set forth in the complaint depended wholly upon the charge made against the defendant that this unsafe condition of the walk had been brought about wholly by his carelessness and negligence; and that presented a case entirely different from the case which the court in this manner submitted to the jury. A very manifest distinction in the law, as well as the facts, exists between the case stated in the complaint and that upon which the right of the plaintiff was made to depend in this submission of the action. In *Dickinson v. Mayor, etc.*, 92 N. Y. 584, this distinction was clearly maintained; for it was there said, as to that case: "This was not an averment for keeping, maintaining, and suffering a nuisance, but merely for negligence in not removing the ice and snow. The complaint was not for a positive wrong committed by the defendant, but for an injury sustained by reason of defendant's

negligence. The authorities establish a distinction between an action for wrong and an action for negligence." *Id.* 588. And, under a complaint alleging one cause of action, the plaintiff is clearly disabled, by this principle, from recovering for another, not mentioned or referred to in any manner in the pleading. If she could recover at all, her right to do so was restricted to the case contained in her complaint. *Stevens v. Mayor, etc.*, 84 N. Y. 296, 305; *Day v. Town*, 107 N. Y. 149, 154, 155, 13 N. E. Rep. 915; *Neudecker v. Kohlberg*, 81 N. Y. 296, 305. That she did not do in this case, as it was submitted to the jury, and the exception taken by the defendant is well founded.

It has been urged by the plaintiff's counsel that this may be obviated by so amending the complaint as to make it conformable to the theory of the case on which it was submitted to the jury. But an amendment or change of that description cannot be made upon the trial, or after the trial, upon the argument of an appeal; for the effect of that would be to change the action from one cause to another and different ground of action, and such a change cannot be, under the authorities, made to support the judgment from which an appeal has been taken. *Davis v. Railroad Co.*, 110 N. Y. 646, 17 N. E. Rep. 733. In this respect, the amendment or change would not be supported by anything which was said in *Harris v. Tumbidge*, 83 N. Y. 92; for it was there conceded that a new cause of action could not be introduced into the case by an amendment, either at the trial or upon an appeal. The only manner in which the error in the submission of the case can be corrected is by a new trial, and for that reason the judgment and order should be reversed, and a new trial ordered, with costs to the appellants, to abide the event.

PEOPLE v. MASSETT.

(*Supreme Court, General Term, First Department. December 2, 1889.*)

1. TRIAL—VERDICT—INCONSISTENT FINDINGS.

Defendant and two others were indicted for robbery. There was evidence that while in defendant's saloon the prosecuting witness was pushed and held down by all three, and that his money was forcibly taken from his trousers pocket by defendant; the two others all the while assisting. Defendant's evidence was to the effect that, on the refusal of the prosecuting witness to pay for his drinks, he was ejected from the saloon; and that he was not pushed down, nor in any way assaulted, further than being shaken by defendant, who took hold of the lapels of his coat, on his refusal to pay for the drinks. *Held*, that a verdict convicting defendant, and acquitting his two co-defendants, was contrary to the evidence, since that against defendant was precisely the same as against the others; and, if the two co-defendants were innocent, defendant could not have been guilty.

2. ROBBERY—EVIDENCE—DEGREE OF OFFENSE.

By Pen. Code N. Y. §§ 228, 229, "all robbery accomplished by force or violence, or by fear of immediate injury to the person," is robbery in the first or second degrees. By section 230, all other robbery is in the third degree. *Held*, that a verdict of guilty of robbery in the third degree was not warranted by the evidence, since it showed that the robbery, if any, was by force and violence.

Appeal from court of general sessions, New York county.

Argued before VAN BRUNT, P. J., and DANIELS and BARRETT, JJ.

Purdy & McLaughlin, for appellant. *John R. Fellows*, Dist. Atty., (*McKenzie Semple*, Asst. Dist. Atty., of counsel,) for the People.

VAN BRUNT, P. J. The appellant was jointly indicted with Charles Cornell and Joseph Lull for robbery in the first degree. The indictment charges that these three men, by the use of violence, robbed John O'Byrne of a sum amounting to \$34. The defendants were jointly tried, and the jury, under the proof submitted to them for their consideration, rendered the extraordinary verdict acquitting the defendants Cornell and Lull, and convicting the appellant Massett of robbery in the third degree. The evidence upon the part of the people consisted principally of the testimony of the complainant John O'Byrne; and, as the question of the guilt or innocence of the persons

indicted depended upon this evidence, it may be necessary to refer to it somewhat in detail. The complainant testified that after, on the day in which the robbery was alleged to have been committed, wandering among various saloons, he found himself going down Christopher street, towards West, and, in the middle of the block, Cornell met him, and, as he was passing him, nodded to him; that he had never seen him before, but that he thought he recognized him as being somebody whom he knew, by the name of Kelly, and he said, "Hello, Johnny," and he nodded to me, and I asked him if his name was Kelly, and he said, "Yes." While this conversation was going on, they were walking towards West street, and nothing more was said, but they entered the saloon of Massett, at the corner of Gay street. After going into the saloon, the defendant Lull being there, drinks were called for, and they were had. At this time, Massett was not in the saloon. Drinks were subsequently called for, and a dispute arose in reference to payment for the drinks on the one side, and upon the other a demand of change for a two-dollar bill which the complainant alleges he gave to the woman who tended bar in payment of the drinks. While this controversy was going on the defendant Massett came in. The complainant continued his testimony, as follows: "Mr. Massett, when I first saw him, was passing behind the bar; I asked for my change before he came in. While I was asking the second time, he came around the bar. I had said, 'I want my dollar and sixty cents.' I was on the point of finishing. As soon as Massett came in, the woman said: 'This young man owes me sixty cents, and I can't get it out of him,' and Massett said, 'Has he got any money?' I made a demand for my change—the dollar sixty—again. Before Massett, I said: 'I want my change. I don't owe nothing. I want my change,—the dollar and sixty cents.' When he asked if I had any money, the woman said, 'Yes,' and he came out from behind the bar, and caught me by the coat lapel with both hands, and the other two,—Lull and Cornell. I got tripped and knocked down, (Lull and Cornell were at my back at the time;) then I was forced down backwards by all three, by a push,—no blow. Lull and Cornell took hold of me, and helped to push me down, and when I was down I hollered, 'Police,' and while I was hollering 'Police' this woman says, 'Shut him up,' and she ran to the door on Christopher street and stood there, holding onto the swinging doors, and partly looking out. At this time, my hand was in my left-hand trousers pocket, and I had my money in my pocket, holding onto it, as it was before; and Cornell and Lull were at my shoulders, holding me down with their hands on my shoulders, and Massett was kind of stooping over me, at my feet, rummaging in my pockets. He went first through the vest pockets, and then he was at the right-hand trousers pocket, and Cornell pointed out the pocket it was in. He says, 'This is the one,' pointing to my left-hand trousers pocket, and then I hollered 'Police;' and, as soon as I hollered 'Police,' Lull caught me by the nose, and held his hands up there, (indicating,) with his hand over my mouth. Then Massett, after it being pointed out to him, grabbed for my left-hand trousers pocket, and pulled out my hand, and took the money out of my hand, forcibly. I resisted the pulling out; but I had no power, because they held my arm. In the struggle, my pants got torn,—this pocket, (indicating the left-hand trousers pocket.) The money came out; and he twisted my arm around, and got the money out. Cornell and Lull were holding me there at the time. Cornell was holding my arms at one side. Lull had only one hand employed in holding my nose, and he had the other hand employed in keeping me down. Then they lifted me from where I was—just caught me by the back of the collar—the three of them. I was so confused that I could not say which one of them fired me out. They lifted me up, and put me out in the street, on the Christopher-Street side,—the door I entered. All my money was taken. I had only ten cents left. Massett was the man that took it. All three aided in putting me out. The

woman was there at the time. She stood guard at the time until I got thrown out." Upon this state of the evidence the jury acquitted Lull and Cornell, and convicted Massett of robbery in the third degree.

There seem to be two extraordinary circumstances connected with this verdict. The *first* is the acquittal of Lull and Cornell and the conviction of Massett, when the evidence against Lull and Cornell was precisely the same as that against Massett; the *second* is the rendering of a verdict against Massett of guilty of robbery in the third degree, when it was clear that, if he had been guilty of anything, he was guilty of robbery in the first or second degree. Robbery in the first and second degree is "all robbery accomplished by force or violence, or by fear of immediate injury to the person," etc. And robbery in the third degree is all other robbery.¹

If any robbery whatever was committed, it certainly was committed with force and violence; and therefore the appellant could not have been guilty of robbery in the third degree. This is referred to for the purpose of showing how extraordinary was the conduct of the jury in considering the evidence in the case. The defendants, upon their behalf, were examined, and testified that no such transaction took place; that the complainant refused to pay for the drink; that he was ejected from the saloon, and that was all; that he was neither pulled down, nor was he in any way assaulted, further than being shaken by Massett, who took hold of the lapels of his coat when he refused to pay for the drinks; that he was greatly under the influence of liquor, and was politely assisted out. The jury, in the consideration of this evidence, either must have violated their oaths in the acquittal of Cornell and Lull or in the conviction of Massett, because, as already stated, the evidence against the one was precisely the same as the evidence against the others. They were all engaged in the robbery, or none of them. If the complainant's story was not sufficient to convince the jury as to Cornell and Lull, clearly it was not sufficient to convince them as to Massett. If Lull and Cornell were not guilty, Massett could not possibly have been guilty. Under these circumstances, it would seem as though Massett had been convicted of keeping a liquor saloon, rather than of the offense for which he was indicted. Juries should not be permitted to render verdicts which are so inconsistent the one with the other. A verdict of this kind is entitled to no consideration, and should be set aside at once, as it shows, whichever horn of the dilemma you may take, a disregard by the jury of the evidence adduced in the case. The judgment must be reversed, and new trial ordered. All concur.

PEOPLE v. SMITH.

(Supreme Court, General Term, First Department. December 2, 1899.)

CRIMINAL LAW—EVIDENCE—IDENTIFICATION.

Defendant was arrested for robbing complainant, the arrest being made on a description given by complainant. On being confronted with defendant, complainant declared that he was the man, but afterwards said that he had a doubt. After two days spent with a detective, looking for a man whose appearance would agree with his recollection of the man who robbed him, complainant again saw defendant, and then stated that after calm reflection he thought defendant was the man who had robbed him. *Held*, that the identification was not sufficient.

Appeal from court of general sessions, New York county.

Argued before VAN BRUNT, P. J., and DANIELS and BARRETT, JJ.

Purdy & McLaughlin, for appellant. *John R. Fellows*, Dist. Atty., (*McKenzie Semple*, Asst. Dist. Atty., of counsel,) for the People.

BARRETT, J. The sole question in this case was one of identification, and the complainant, Matthews, was the only witness on that head. He was

¹Pen. Code N. Y. §§ 228-230.

robbed at about the corner of South Fifth avenue and Bleecker street by three colored men, whom he had never seen before. Two (Dorsey and Crumes) were arrested, and confessed their guilt; the third escaped. The appellant, Smith, was arrested (as the guilty third) the same afternoon by Officer O'Hara, and taken to the station-house. O'Hara testified that he made the arrest from a description of the third robber received from the complainant, and from the fact that he had himself observed Smith in company with Dorsey and Crumes at about the time of the robbery. Matthews was at once confronted with Smith in the station-house, and declared that he "was the man." The police captain then said that the charge was a serious one, and that Matthews should be very careful about the identification. Matthews then said: "Well, I have got a doubt. I think he was the tallest of the three. I have got a doubt of this matter, and I will give the prisoner the benefit of the doubt." Another witness (Detective Sullivan) testified that Matthews looked at Smith in the station-house very closely,—“went all around him,”—and then said: "I think this is the man," repeating that expression two or three times. Matthews himself testified that he then had a doubt, but that such doubt was regarding the prisoner's height. After the expression of doubt in the station-house, Smith was held for carrying a concealed weapon, and Matthews made an appointment with Detective Sullivan to go about with him at night looking for the third robber; "looking," as Sullivan put it, "for a tall man, six feet in height, with a grey overcoat and a light complexion,—a sharp-featured man, with a long nose." This was Matthews' description of the third man. Sullivan and Matthews spent two nights looking for a person of this description. Once they met a man who Matthews said was not unlike the third robber. This is Sullivan's testimony on that head: "Matthews turns around and says: 'That is not unlike the man; that looks like the man, and his coat is something similar.' I says to him: 'That man! I don't think he would do anything of the kind, for I know him.' He says: 'I am not saying he is, but he is not unlike the man.'" Now, all this was going on while Smith was still confined on the sole charge of carrying concealed weapons. It was only by making this charge that the police felt justified in holding him, without clear and complete identification. Matthews' doubts apparently continued for two days after the arrest, and were only solved when he subsequently saw Smith in the police court in company with Dorsey and Crumes. Then Matthews sent for Sullivan, and said to him: "Sullivan, after calm reflection, and come to think over the matter, I think that man that had the weapon—the concealed weapon—is the third man." That this statement was made to Sullivan is not denied, and yet Matthews now declares that the light came to him not so much from calm reflection and thinking the matter over, as from seeing the three prisoners together in the police court. Matthews never saw Smith in his life prior to the robbery; and then saw him, if at all, for but a moment, and while laboring under great excitement. Within a few hours he examined Smith closely, under circumstances calculated to call forth the best powers of mind and memory, and he then declared that he was in doubt, and would give Smith the benefit of that doubt. This doubt continued for two days, and was sufficiently active to keep Matthews spending his nights looking for the guilty man. Finally his doubts were suddenly cleared up, but whether by observation or reflection seems to be still in doubt. It would be entirely unsafe to permit a conviction upon such testimony. After such prolonged obscurity of vision, upon so crucial a matter, a man's liberty should not be sacrificed upon a sudden flash of unsupported and uncorroborated recognition. The facts from which corroboration was claimed were altogether too slight. They have already been adverted to, viz., the circumstances which induced the officer to make the arrest. Smith's appearance and manner could scarcely have been impressed upon Matthews, in those few seconds, sufficiently to enable him to furnish the officer with special idiosyncracies and distinguishing character-

istics of the defendant. Those that he did furnish were common to very many of the prisoner's race and walk in life. Nor was the circumstance of the officer's seeing Smith with Dorsey and Crumes not long before the robbery sufficient to counterbalance Matthews' doubts. In considering this crucial branch of the case, I have given but little weight to the testimony of Smith, Dorsey, and Crumes. The two latter were entirely unworthy of belief, not merely because of their character, but because of their contradictory statements, and the improbability of their stories. Indeed, my only doubt, in reviewing this record, has sprung from the prisoner's attempt to throw the crime upon another Smith.

The defendant, however, cannot be convicted because of the mere weakness of this defense. The question of identification still remains, and must be determined upon the case made by the prosecution, supplemented by any testimony emanating from the defendant really indicating a consciousness of guilt. There was enough in the case upon the part of the defendant to neutralize the consciousness of guilt which might otherwise, perhaps, be inferred from the endeavor to fasten the crime upon another Smith; for it appeared, by testimony which might be credited, that the prisoner, prior to his arrest, had been informed that one Frank Smith was the guilty person. At all events, the prisoner's assertion on that head was not, under all the circumstances, a plainly false statement, put forward to hide his own guilt, and consequently cannot be said to have supplemented the weakness of the complainant's identification. The charge of the learned recorder did not touch upon the special features of the testimony to which I have adverted. He told the jury that he did not understand that there was any failure on the part of the complainant in the police station to identify the prisoner as one of those who were engaged in the robbery. He also told them that the complainant was there cautioned by the captain of police to be exceedingly careful about the identification, and that Matthews then made an examination of the defendant, and said that he was the man. This was an accurate statement of part of what transpired in the station-house, but it was incomplete, in that it omitted the expression of doubt which I have previously quoted. As a natural result of this doubtless unintentional omission the learned recorder substantially left the case to the jury upon the conflict of testimony between the complainant and the defendants in this indictment. The result could scarcely have been other than a conviction. The court should, in my judgment, (if the case were to go to the jury at all,) have submitted the question of identity on the case made by the prosecution standing alone, except as, possibly, aided by the prisoner's conduct and testimony tending to show consciousness of guilt. That was the substantial question, and I cannot think that if it had been thus presented to the jury, with a complete statement, not only of Matthews' present conviction, but of his past doubts, (as expressed in words and action,) the verdict would not have been what it was. Upon the whole I am satisfied that this judgment should be reversed, and a new trial ordered. All concur.

OBER v. OBER.

(*Supreme Court, General Term, Third Department. December 11, 1889.*)

DIVORCE—COUNSEL FEES—SECOND ACTION.

Counsel fees will not be allowed a plaintiff who, five years after she has procured a decree for a divorce in another state, brings another action for divorce against the same man, alleging that the judgment in the former action was void.

Appeal from special term, Clinton county.

Argued before LEARNED, P. J., and LANDON and FISH, JJ.

R. Corbin, for appellant. John P. Kellas, for respondent.

LEARNED, P. J. The plaintiff brings this action for divorce on the ground of adultery. The defendant admits that he was married to plaintiff as alleged;

avers that, in an action heretofore brought by the plaintiff against him, in New Hampshire, for divorce, on the ground of adultery, a judgment was heretofore entered, by which the marriage was annulled; avers that after said divorce he married, in the state of Massachusetts, the woman with whom in the present complaint he is alleged to have committed adultery. The plaintiff asked for alimony, and an allowance for counsel. The special term granted the latter only, and the defendant appealed. In her petition for alimony the plaintiff set forth the New Hampshire action, giving a copy of the judgment roll, and averred that that judgment was void. The principal fact stated, to show that the judgment was void, is that defendant was not a resident then of New Hampshire. The defendant's contention is that, where the marital relation is shown not to exist, there should be no allowance for alimony or counsel fee, and that by the decree in New Hampshire this relation has been dissolved. On the motion papers for alimony appears a copy of the judgment roll in the divorce suit in New Hampshire.

In considering this question, we should notice the reason for which courts originally granted alimony and allowances. It was that a married woman could make no contract, and therefore could not agree to compensate the counsel, and also that she (to state it loosely) had no property under her control, and therefore had no means of payment. Her condition at this day is quite different, although the power to grant alimony and allowance is continued by the Code. But in the present case the plaintiff, as a practical matter, has been for some five years free from her husband. She, on her own motion, has become separated from him. He has accepted the decision of the New Hampshire court by marrying again. So that he could not, as a practical matter, assert any power or control over her. She really stands as independent of him, whatever the legal position may be, as any plaintiff towards any defendant. Why, then, should he be required to pay her counsel? They will be employed to show that a judgment which she obtained, and which he has in the most solemn manner accepted, is void. They will be employed to show that he has committed the crime of bigamy, and doing this in reliance on her most solemn assertion that he was free to marry. Of course, these considerations may have no effect on the trial of the issues; but it seems to us that they are very important on the present question. We do not think it reasonable to compel the defendant to pay the counsel fees of a litigation where the plaintiff's own act has led him into the alleged wrong. The learned justice at special term had himself much hesitation in granting any allowance; and, on the whole, we think none should have been granted. Order reversed, and motion denied. No costs. All concur.

SARATOGA GAS & ELECTRIC LIGHT CO. v. HAZARD.

(*Supreme Court, General Term, First Department. December 2, 1899.*)

1. TROVER AND CONVERSION—PLEADING—DEMAND.

A complaint which avers that defendant unlawfully converted and disposed of certain bonds to his own use, shows such a conversion that no allegation of demand is necessary.

2. SAME—MATTERS OF DEFENSE.

The complaint need not allege authentication of the bonds, as it would be a matter of defense to show that they were not in a condition to be of value.

3. ARREST IN CIVIL CASES—COMPLAINT—AFFIDAVIT.

In order to justify an arrest in an action for conversion, the complaint must show a cause of action, independently of the affidavit for the arrest.

Appeal from special term, New York county.

The Saratoga Gas & Electric Light Company brought action against Rowland N. Hazard for conversion of certain bonds, and caused defendant's arrest. From an order denying motion to vacate and set aside the order of arrest, defendant appeals.

Argued before VAN BRUNT, P. J., and BARTLETT and BARRETT, JJ.

Moses R. Crow, (D. C. Briggs, of counsel,) for appellant. *Lowrey, Stone & Auerbach*, (C. F. Stone, of counsel,) for respondent.

VAN BRUNT, P. J. The ground upon which this motion is made is that the complaint fails to set forth a sufficient cause of action; and it must be conceded that, if this is the case, then the motion must be granted. The complaint alleges the incorporation of the plaintiff; that at the times therein mentioned the plaintiff was entitled to the immediate possession of certain bonds, being in the form of which a copy is annexed to the complaint, the property of the plaintiff; and that on the 31st of January, 1889, in the city of New York, the defendant, being then in possession of the bonds, unlawfully converted and disposed of the same to his own use, and to the plaintiff's damage. The objection to this complaint is that it does not allege a demand and refusal. It is undoubtedly true that where a defendant has come lawfully into the possession of personal property a demand must be made before trover will lie, unless there is evidence that the defendant has unlawfully parted with the possession of the property. So it has been held that an action for conversion against one who has received property under an agreement to return it cannot be maintained until it has been proven that its return has been demanded; so a *bona fide* purchaser of personal property, wrongfully taken from the possession of the owner, is not liable for conversion until after demand and refusal. *Gillet v. Roberts*, 57 N. Y. 28. But it is equally true that where it appears that the defendant has exercised a dominion over the property such as he was not entitled to exercise by reason of its possession,—for example, has sold and disposed of the property,—an action for conversion will lie without a demand. *Kelsey v. Griswold*, 6 Barb. 440. This principle is also upheld in *Colgate v. Pennsylvania Co.*, 102 N. Y. 120, 6 N. E. Rep. 114, and cases there cited. The allegation, therefore, contained in the complaint, that the defendant had disposed of the bonds, and converted them to his own use, seems to fulfill the requirement showing a conversion, and no demand thereafter was necessary. It is undoubtedly true that the mere allegation that the defendant had converted the property to his own use would not have been sufficient; but, where it is coupled with the allegation that he has disposed of the property, which he had no right to do, and which disposal constituted the conversion, the allegation seems to be sufficient.

We concur with the learned counsel for the appellant that the infirmities of the complaint cannot be aided by any allegation in the affidavit; and that, if the complaint is defective in setting up a cause of action, the order of arrest should be vacated.

It is urged that there is another defect in the complaint, in that it appears from the complaint that the bonds referred to had no force or effect whatever, and were therefore worthless, because the complaint did not contain an allegation that they were duly authenticated by the signature of the trustee to the certificate indorsed upon the bonds. We do not think that this objection is well taken. The bond itself is made a part of the complaint. But whether or not the certificate which appears to have been indorsed upon the bond bore the signature of the trustee we are not aware, because such certificate is not made a part of the complaint; and it is impossible for us to tell whether or not these bonds were in a condition to be of value. This would be a subject-matter of defense, and does not in any way invalidate the cause of action set out in the complaint. The order should be affirmed, with \$10 costs and disbursements.

BARTLETT, J., concurs.

BARRETT, J. I concur. The allegation that the defendant disposed of and converted the bonds is equivalent to saying that he disposed of them, which is a fact, and thereby converted them.

SMITH v. GERMAN-AMERICAN INS. CO.

(Supreme Court, General Term, Third Department. December 11, 1889.)

INSURANCE—CONSTRUCTION OF POLICY—CONDITIONS.

An insurance policy on an unfinished house contained the words, "to be occupied as a residence when completed," and gave permission to mechanics to work in and about the house for 90 days. *Held* that, while insured was to have the right to complete the building, this was to be done within 90 days, and work done in the construction of the house after the expiration of that time was a violation of a clause in the policy prohibiting carpenters or other mechanics from working on the house without written permission, even though done by the insured himself.

Appeal from circuit court

Action by Theodore V. Smith, administrator, against the German-American Insurance Company. Verdict directed for plaintiff, and defendant appeals.

Argued before LEARNED, P. J., and FISH and PUTNAM, JJ.

Hobart Krum, for appellant. *Don S. Mayham*, for respondent.

LEARNED, P. J. This is an action on an insurance policy issued by defendant to one Anthony, the plaintiff's intestate, upon a certain dwelling-house, unfinished at the time of issuing the policy. The court directed a verdict for the plaintiff, and the defendant appeals. In the description of the property, the policy contains these words, "to be occupied as a residence when completed," and also the further provision: "In consideration of three dollars and sixty cents, extra premium paid, permission is hereby granted to mechanics to work in and around the building for ninety days from date." The date was June 27, 1881. The policy contained the usual clause, that the working of carpenters and other mechanics in building, altering, or repairing would vitiate, unless permission were indorsed in writing on the policy. The building was burned May 13, 1882, and was not then completed. The 90-days permission expired September 25, 1881. On the trial, Anthony testified that he put in some drawers when he finished the kitchen, some time in the winter; that he worked in the building some six weeks before the fire, made the thresholds, and put them in; that a few days before the fire he put in three crocks, for the stove-pipe to go through; that the lathing was finished about two months before the fire. Anthony was a carpenter and builder, and did most of the work on the building himself.

It seems to us that the fair construction of the whole policy, especially of the parts above cited, is that the insured was to have the right to go on and complete the building, and that the insurer knew that the building was not then complete; but, further, that the parties fixed a time for the work of completion, viz., 90 days from the date of the policy. The insured paid an extra premium for the permission to have mechanics working in and about the building during that length of time. Evidently, then, he did not agree for any longer time. Perhaps, if this express limitation were not in the policy, the plaintiff might urge that there was an implied right to complete the building, and to take for that purpose whatever time the insured desired. But, as if to prevent such a construction, the parties contracted for a definite time within which mechanics might work on the building. This express agreement shows that no longer time was permitted. It is evident that the time was largely exceeded, and the work which was done after the limited time had elapsed was not the ordinary little repairs done in an occupied building. It was work done in the construction of the building, and, though done by the insured, to a large extent, it was none the less done by a mechanic. It came directly and clearly within the prohibition of the policy. The insured paid, and the company accepted, a certain sum in consideration of the privilege to employ mechanics on the building for 90 days. This sum, certainly, would not have been paid or accepted if the clause above mentioned, which indicated that the building was unfinished, was to give the insured all the time

he might choose, or even all that he might need, to complete it. The plaintiff urges that one may work upon his own building. But the risk which insurance companies fear from the working on buildings does not come from the person who does it, but from the thing done. It is known, or thought, that extra hazard is caused by the work of mechanics, and therefore the work is prohibited. And, as we have seen, the work done by plaintiff was construction, not incidental repairs, such as are permitted for the length of five days. We think, therefore, that the condition of the policy was violated. The judgment and order are reversed, and new trial granted; costs to abide event. All concur.

BRINK v. GUARANTY MUT. ACC. ASS'N.

(*Supreme Court, General Term, Second Department. December 10, 1889.*)

1. INSURANCE—APPLICATION—MISTAKE OF AGENT.

Where defendant's agent, in writing for deceased an application for a policy in his company, deceased merely giving him the year in which he was born, made a miscalculation, and wrote down the wrong age, there was no misrepresentation as to his age on the part of deceased.¹

2. SAME—REPRESENTATIONS—OCCUPATION.

Deceased stated that his occupation was that of a "livery stable proprietor, (not working,)" and his duties "such as were required of him in that occupation." The evidence showed that he hired men to do the work around his stable, though he sometimes hitched up a horse himself, and drove persons out. *Held*, that the statement of his duties sufficiently apprised defendant of their character, and, if anything more definite was required, it was the duty of defendant to ascertain the facts by proper inquiry.

3. SAME—HEALTH OF INSURED.

Deceased, in his application for an accident policy, stated that he had no disease, and was not subject to fits, or any disorder which would render him liable to accidental injury. There was evidence that he had several times been thrown from his buggy, receiving injuries, and in some instances remaining unconscious for a while; that he had once or twice fallen down without apparent cause, at such times acting strangely, trembling, etc. Several persons, who had known him for many years, testified that he was strong and robust in health, and that they had never known of his having an ailment. *Held*, that the weight of evidence was not in favor of deceased's having misrepresented his physical condition.

4. SAME—NOTICE—WAIVER OF OBJECTIONS.

The policy provided that failure to give the company notice in writing of the injury within 10 days after the accident happened should invalidate all claims under the policy. A month after the accident, plaintiff addressed a notice of the injury to defendant, who received and kept it, and afterwards defendant's secretary stated to plaintiff's agent that the notice was sufficient. *Held*, that the notice, though not technically what the policy required, being served on and retained by defendant, further notice was waived.

Appeal from circuit court, Orange county.

Action by Hannah C. Brink against Guaranty Mutual Accident Association to recover on a certificate of membership issued by defendant to plaintiff's husband, in which plaintiff was named as beneficiary. The application for membership stated that the applicant was 59 years old, that his occupation was "a livery stable proprietor, (not working,)" that his duties were "such as were required of him in that occupation;" that he was not suffering from any disease that would retard recovery, or be aggravated by personal injuries, and was not subject to fits, disorders of the brain, or any infirmity which would render him liable to personal injuries. His age was not stated in the application. Defendant's agent had filled in his age, deceased having given him the correct year of his birth. Deceased was a livery stable pro-

¹ Concerning the estoppel of insurance companies to deny liability on policies on the ground of false representations in the applications, when such applications are filled out by the company's agents, to whom the applicant has made no misrepresentation, see *Bentley v. Association*, 5 N. Y. Supp. 223, and note; *Insurance Co. v. Barnes*, (Kan.) 21 Pac. Rep. 166, and note; *Pudritzky v. Knights of Honor*, (Mich.) 48 N. W. Rep. 873, and note.

prietor, who superintended the business, and occasionally hitched up a horse and drove people about. There was evidence that he had several times, before making application, been thrown from a buggy and rendered unconscious for a while, and that he had several times fallen down, without apparent cause. Persons who had known him for many years testified that he was "strong, robust, and rugged in health," and that they had never known of his having any ailment. On February 25, 1889, a few days after the certificate was issued, deceased, on entering a store, tripped, and fell against the stove. The blow moved the stove a couple of inches, and left a mark on his forehead and the side of his face. He was unconscious for several minutes. After the accident, he began to grow worse, and in a few days became violent, complaining of pains in his head. On March 11, 1889, he was taken to the insane asylum, where, a few days later, he died. Two physicians testified that in their judgment death resulted from the accident. On March 25, 1888, a month after the injury was received, a letter was addressed to and received by defendant, and retained by it, in which plaintiff gave notice of the accident to deceased. Afterwards, defendant's secretary stated to plaintiff's agent that the notice was sufficient. The policy required that immediate notice of any accidental injury should be given to the company in writing, and that failure to give such notice within 10 days after the date of such injury should invalidate all claims under the policy. Judgment was entered on a verdict in favor of plaintiff for \$4,122, and costs. Defendant appeals.

Argued before BARNARD, P. J., and DYKMAN and PRATT, JJ.

Levis S. Burchard and James Fox, for appellant. *W. F. O'Neill*, for respondent.

PRATT, J. All the questions of fact in this case were properly submitted to the jury, and the issues decided in favor of the plaintiff. The verdict is amply sustained by the evidence. The first defense alleges a breach of warranty as to age, occupation, duties, and physical condition. All of these questions of fact were submitted to the jury under an unexceptionable charge, and that must be held conclusive. It is clear that there was no deception or fraud in regard to age of the insured, as the agent was informed of his true age, and made the mistake in putting it down.

What was stated as to the duties sufficiently apprised the defendant of their character; and, if anything more definite was required, it was the duty of the company to ascertain the facts by proper inquiries.

Neither is the weight of evidence in favor of the proposition that any misrepresentation was made as to physical condition. There was no dispute that the assured was injured; and the question whether the accident caused his death was decided by the jury, upon conflicting testimony, in favor of the plaintiff. The notice and proofs of injury and death, while, perhaps, not technically what were required by the policy, were served upon the company, and retained by them; and further or more definite notice and proof were waived. *Keeney v. Insurance Co.*, 71 N. Y. 396; *Brink v. Insurance Co.*, 80 N. Y. 108. The case of *Aldrich v. Association*, 21 N. E. Rep. 873, we do not regard as in point. In that case the different duties pertaining to the occupation of the assured had been classified, and the question was, under what class did the assured's occupation fall at the time of the injury? It was not claimed that there was fraud in the warranty which rendered the policy void, but it was a question as to the construction of the policy. In this case the claim was made that the warranty was false. It was, therefore, a question of fact, to be determined by the jury upon conflicting testimony. We have examined with care the very able brief of the counsel for defendant, but are unable to find in the record any errors sufficient to warrant a reversal of the judgment. It is therefore affirmed, with costs. All concur.

CORDES v. KENNEY et al.*(Supreme Court, General Term, Second Department. December 10, 1889.)***SPECIFIC PERFORMANCE—CONTRACT—TIME OF ESSENCE.**

Specific performance of a contract to convey land will be granted where it appears that plaintiff was the sole purchaser, and was the party to whom the deed was to be made; that time was not of the essence of the contract, and that the time for completing it had several times been postponed, and payments received thereafter; that plaintiff was in possession, and had made valuable improvements; that no notice had been given him that defendant intended to terminate the contract; and that a conveyance to a third person was without consideration, and with notice of plaintiff's claim.

Appeal from special term, Richmond county.

Action by Louis Cordes against Rosanna Kenney and Mary Ellen Kenney for specific performance of a contract to convey land. Judgment for plaintiff, and defendants appeal.

Argued before BARNARD, P. J., and DYKMAN and PRATT, JJ.

J. R. Van Hoesenberg, for appellants. *Julian B. Shope*, for respondent.

PRATT, J. The findings of fact of the judge below seem to be sustained by the evidence, and the conclusions of law strictly follow the findings of fact. The title of the property stood in the name of Rosanna Kenney, and the plaintiff was the sole purchaser. The proof does not disclose any interest in Kellennan, and therefore he was not a necessary party to the suit. In fact, the weight of evidence is decidedly to the effect that the plaintiff was the sole party to whom the deed was to be made. It is also fairly proved that time was not of the essence of the contract. The time for closing the transaction was several times adjourned, and after such a state of facts the defendant could not elect to make time of the essence of the contract without giving the plaintiff reasonable notice. The contract was fairly entered into, and partly executed by the payment of money and the transfer of possession to the plaintiff. It would have been a gross fraud upon the plaintiff's right, after he had made payments upon the purchase, and valuable improvements upon the property, to refuse specific performance. The case is too plain to require the citation of authorities that there was a sufficient performance of the contract to authorize a court of equity to decree specific performance. The pretended conveyance by Mrs. Kenney to her daughter cannot stand in the way of granting proper relief to the plaintiff. The conveyance was without consideration, and to a party who had notice of plaintiff's claim. There was no error in the admission or rejection of evidence sufficient to reverse the judgment.

NELSON v. LODER et al.*(Supreme Court, General Term, Second Department. December 10, 1889.)***MORTGAGES—JUNIOR MORTGAGEE—TENDER.**

During the pendency of foreclosure proceedings on a first mortgage, and before the adjustment of costs, plaintiff, the second mortgagee, tendered the first mortgagee an amount sufficient to cover her mortgage debt and costs, and accompanied his tender by a demand for an assignment of her mortgage. She offered to cancel her mortgage, but refused to execute an assignment. After the tender, plaintiff mingled the money tendered with his other money, and used it as his own. Held that, while plaintiff was entitled to an assignment of the first mortgage, the first mortgagee was entitled to interest thereon to the present time; plaintiff's tender being insufficient to stop the running of interest.

Appeal from special term, Westchester county.

Action by Thomas Nelson against Sarah E. Loder and others to restrain defendant Loder from the further prosecution of an action of foreclosure, and to compel an assignment to him of her bond and mortgage. Defendant Loder held a first mortgage on the land, and she commenced foreclosure proceedings

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September 25, 1880, making Ada E. Briggs, the then owner, one of the defendants. While these proceedings were pending, on October 18, 1880, Ada E. Briggs gave a mortgage to plaintiff, Nelson, purporting to secure \$500 for legal services previously rendered. On the same day, plaintiff tendered to defendant Loder what he alleged was the principal, interest, and costs of the foreclosure she commenced, and demanded an assignment of her mortgage. Defendant Loder refused to take the money, or say definitely what she would do. Her attorney subsequently offered to receive the money and cancel the mortgage, but refused to execute an assignment. There was a judgment in plaintiff's favor, directing that on the payment by plaintiff of the sum tendered by him October 18, 1880, defendant Loder execute an assignment of her bond and mortgage, and that she or her attorney give a substitution to plaintiff as attorney in person in the action of foreclosure. Defendant Loder appeals, and the principal question is whether plaintiff's tender stopped the running of interest.

Argued before BARNARD, P. J., and PRATT, J.

N. S. & W. F. Cassidy, for appellant. *M. V. B. Travis*, for respondent.

BARNARD, P. J. The tender made in this case was not one which was intended to discharge the lien, and leave outstanding the debt secured by the lien security. It is not a case, therefore, which falls within *Kortright v. Cady*, 21 N. Y. 343, or *Tuthill v. Morris*, 81 N. Y. 94, or *Cass v. Higenbotam*, 100 N. Y. 248, 3 N. E. Rep. 189. The facts in this case are that the plaintiff held a second mortgage on said estate, and the tender was made after foreclosure was instituted upon the first mortgage, and while the foreclosure action was proceeding to judgment, and was accompanied by a demand for an assignment of the security. The costs had not been adjusted, but an amount was tendered sufficient to cover the mortgage debt and costs. The plaintiff, after the tender, mingled the money so tendered with his own other money. He deposited it in his bank account, and it was used by him as his own. The question is whether the tender stopped the interest. We think it did not. The plaintiff had the use of his own money after the tender, and legally is chargeable with the interest upon it. He comes into a court of equity to compel the defendant Loder to assign the mortgage which he seeks to hold for all the interest due upon it, while he has received the interest on the tender since it was made. The court of appeals in *Tuthill v. Morris*, 81 N. Y. 94, held that, when a party affirmatively asked to extinguish a lien by reason of a tender, the tender must be kept good, as between debtor and creditor. When upon payment the debtor is entitled to the possession of his property, a tender need not be kept good. *Cass v. Higenbotam*, 100 N. Y. 248, 3 N. E. Rep. 189. In the present case there was, as has been stated, no wish to discharge the lien, and no injury has resulted to the plaintiff by reason of the tender. He had his money in use after the tender for his own benefit. The costs of the foreclosure were not adjusted, and are not yet, and a tender without the means of determining the amount due which should destroy a lien "would be in the highest degree unreasonable." *Tuthill v. Morris, supra*. The judgment should be modified by giving the relief asked for, but with the interest due to the date of the assignment, without costs of this action, and without costs of this appeal to either party.

JENKINS v. DEAN.

(Supreme Court, General Term, Second Department. December, 1889.)

1. ASSUMPSIT—INSTRUCTIONS—AMOUNT DUE.

In an action to recover one-third of the net profits realized on certain contracts by defendant, where there is no dispute as to his liability if there are any profits, but where he claims that the sum to which he is entitled as compensation for the use of his tools and machinery, and for an item of disbursements paid by him, is sufficient

to wipe out any apparent balance of profits on the contracts, it is in accordance with justice for the trial judge to charge that the jury should find as to the disputed item of disbursements, and as to the value of the use of tools and machinery; to correct the apparent balance of profits in accordance with the finding as to the disbursement, and to deduct from the resulting figures the value of the use of tools and machinery; and to find for plaintiff one-third of the residue, if there should be any.

2. SAME—COMPLAINT—SUFFICIENCY.

In an action at law for services performed, the fact that plaintiff asks for an accounting of the profits realized by defendant on certain contracts, to ascertain the amount of plaintiff's compensation, does not make his complaint demurrable on the ground that it does not state a cause of action.

3. SAME—WHEN CAUSE OF ACTION ACCRUES.

The contract being entire, plaintiff's right of action accrued on the completion of the work; and the fact that defendant had not been paid part of the money on his contracts when the action was brought, does not render it premature.

Motion for new trial on exceptions.

Action by Theodore S. Jenkins against William E. Dean for an accounting to determine the amount of profits realized by defendant on two contracts with the city of New York for the construction of sewers on Eighth and Eleventh avenues, and for one-third of the net profits. Defendant employed one W. L. Holmes to superintend the construction of these sewers. They entered into a written contract under which defendant was to furnish all money, tools, and machinery necessary for the performance of the work, and was to receive a fair compensation for the use of his tools, and two-thirds of the net profits. Holmes was to furnish his labor as superintendent of the work under instructions from defendant, and in lieu of salary was to receive for his services one-third of the net profits. Holmes assigned his salary to one Kingsley, who subsequently assigned to plaintiff. Defendant, in his answer, claimed, among other things, that the work had not been completed; that he had not been paid therefor; and that, until the completion of the work and the payment therefor, the profits could not be ascertained. It was admitted on the trial that the city had paid defendant \$38,603.40, and that the disbursements were \$34,594.94, leaving a balance of \$4,008.46 in defendant's favor. He claimed \$5,925 as compensation for the use of his tools on the Eleventh-Avenue sewer, and \$410 on the Eighth-Avenue sewer. These charges were alleged to be extortionate by plaintiff. There was a verdict of \$1,021.15 in plaintiff's favor at the circuit court for Kings county, and judgment thereon, and defendant moves for a new trial.

Argued before BARNARD, P. J., and PRATT, J.

Bergen & Dykman, (William N. Dykman, of counsel,) for plaintiff. *Jas. Edw. Graybill*, for defendant.

BARNARD, P. J. This was a legal action. The evidence shows that defendant had a contract with the city of New York for the construction of certain sewers. The defendant agreed with Holmes to furnish all tools, machinery, and money needed to perform the work. The agreement provided that the defendant should receive a fair compensation for the use of the tools and machinery, and two-thirds of the net profits of the work. Holmes was to be the superintendent under defendant, and was to receive one-third of the net profits of the work for his services. Holmes assigned to the plaintiff his claim to the one-third profits provided by the agreement as the means of compensation for his services.

It may be necessary to take an account of the profits to reach the amount of compensation, but the accounting is only a means by which the value of the work claimed is to be ascertained. The objections, therefore, that there were no facts to warrant an equitable accounting, and no facts stated in the complaint sufficient to make a cause of action, were properly overruled.

It appeared on the trial that this action had been commenced while certain percentages on work done had been retained by the city of New York. It

was conceded at the trial that there had been paid for one sewer \$24,425.55, and \$14,177.85 for another, by the city of New York, and that the last payment completed the payments for the work, and this was made nearly a year before the trial. The disbursements for the Eleventh-Avenue sewer were shown to have been \$20,220.08, and \$14,542.34 for the other. This left a balance of \$4,008.46 out of which was to come the cost of the use of the tools and machinery. It was the subject of dispute as to the accounts whether an item of \$407 was properly charged among the disbursements of the work. It is also the subject of dispute as to the fair value of the use of the tools and machinery furnished by the defendant. Under this state of the proof, the judge charged the jury to find as to the disputed item of disbursement, and as to the use of the tools; to correct the apparent balance in accordance with the finding as to the disbursement, and to deduct from the resulting figures so made the use of the tools and machinery; and to find for the plaintiff one-third of the remainder, if there should be any. This was in accordance with justice. The defendant had received some of the money after action commenced, but the effect of that was to make certain a calculation which without it would have been more difficult to ascertain. The cause of action was good when it was commenced. All the work had been done. The money had not all been paid over. The case is stronger than *Everson v. Powers*, 89 N. Y. 527, when the court of appeals permitted a plaintiff to recover when the action was brought for a breach of an entire contract for services before the term of service was ended; but the term had ended before the time of the trial. The court stated the rule of damages to be the same as it would be in case of the commencement of the action after term had ended. The judgment should therefore be affirmed, with costs.

In re HERK'S WILL.¹

(Supreme Court, General Term, Second Department. December, 1899.)

LEGACY TAX—EXEMPTION—INDUSTRIAL INSTITUTIONS.

Under Rev. St. N. Y. (7th Ed.) p. 982, § 4, subd. 4, providing that every "house of industry," and "the real and personal property used for * * * purposes belonging to or connected with the same," shall be exempt from taxation, a legacy to such an institution is not subject to the succession tax provided for in Laws N. Y. 1887, c. 718, § 1, since that act excepts "societies, corporations, and institutions now exempted by law from taxation." CULLEN, J., dissenting.

Appeal from surrogate's court, Kings county.

In the matter of the inheritance tax of certain legacies under the will of Frederick Herr, deceased. The surrogate held that all the legacies were taxable, (see 5 N. Y. Supp. 48,) and the Wartburg Orphan Farm School of the Evangelical Lutheran Church appeals. Laws N. Y. 1887, c. 718, § 1, provides: "All property which shall pass by will, * * * other than to societies, corporations, and institutions now exempted by law from taxation, * * * shall be and is subject to a tax of five dollars on every hundred dollars," etc.

Argued before BARNARD, P. J., and DYKMAN and CULLEN, JJ.

Jacob F. Miller, for appellant. D. E. Meeker, for executors.

BARNARD, P. J. The testator, by his will, gave a legacy of \$1,000 to the orphan asylum at Mt. Vernon. The legislature, by special act, incorporated the Deaconess Institution of the Evangelical Lutheran Church, by chapter 161, Laws 1869. The object of the incorporation was to maintain an orphan farm school at Mt. Vernon. The corporation was subjected to the restriction, and was clothed with the privileges, provided in the general law for the in-

¹ Reversing 5 N. Y. Supp. 48.

corporation of religious and benevolent associations. No exemption from taxation was granted by the charter. The charter was amended by chapter 440, Laws 1875, and was again amended by chapter 106, Laws 1884, and the name was changed to the "Wartburg Orphan Farm School of the Evangelical Lutheran Church." Neither of these amending acts gave an exemption from taxation. The Wartburg Orphan Farm School was intended to be the corporation to receive the legacy, and the question presented is whether the legacy is subject to the collateral inheritance tax. There being no general exemption by the charter from taxation, the collateral tax is chargeable, unless there be a special exemption from the operation of the collateral tax law. *Catlin v. Trinity College*, 113 N. Y. 133, 20 N. E. Rep. 864. This special exemption is clearly made in title 1, c. 13, § 4, subd. 4, Rev. St. (7th Ed. p. 982.) This section reads as follows: "The following property shall be exempt from taxation. * * * Every poor-house, alms-house, house of industry, and every house belonging to a company incorporated for the reformation of offenders, or to improve the moral condition of seamen, and the real and personal property, used for such purposes, belonging to or connected with the same." If this appellant, being clearly a house of industry, had personal property invested for the support and maintenance of this orphan home, it would be free from taxation under this subdivision. There is no reason why the general term of "personal property, used for the purposes of the incorporation," should be restricted to the furniture of the home, or to specific articles contained therein. The fact that the legislature, in exempting schools and colleges, only exempted "the furniture belonging to each of them," shows that a larger exemption was designed by this section 4. For a school, the building and its furniture is sufficient, but for a home for orphans, who were to be clothed and maintained, something more was needed; and the legislature met this need by the personal property used for the purposes of its support. In the next subdivision, (5,) a complete exemption of libraries is made, by the use of the same language as that contained in section 4. Section 5 exempts "the real and personal property of every public library." If the money is free from taxation after it is obtained, then, under this collateral tax law, it is free from the collateral tax of 5 per cent.; for the orphan home was "exempted by law from taxation," under chapter 713, Laws 1887. This seems to be the true construction of section 4, subd. 4, of the title and chapter of the Revised Statutes cited above. The decree should therefore be reversed, with costs, each party, out of the estate.

DYKMAN, J., concurs. CULLEN, J., dissents.

In re UNION EL. R. CO.

(*Supreme Court, General Term, Second Department. December 10, 1889.*)

1. EMINENT DOMAIN—DAMAGES.

In proceedings to condemn a right of way for a railroad in a street, evidence of damages to adjacent property, caused by the building of the railroad, arising from the fact that the property is used for a particular purpose, is admissible.

2. SAME—COSTS.

Even if the trial court has power to allow costs in such proceedings, under Code Civil Proc. N. Y. § 8240, as the decision of that matter is in its discretion, it will not be reviewed on appeal, in the absence of abuse of such discretion.

Appeal from special term, Kings county.

Petition of the Union Elevated Railroad Company of Brooklyn, to acquire title to easements in a street in front of property owned by William C. Jughardt, Frederick Koch, and Christiana Koch. Commissioners of appraisal were appointed, and their report was confirmed. From the order of confirmation the petitioner appeals, and from an order denying their motion for costs the property owners appeal.

Argued before BARNARD, P. J., and DYKMAN and PRATT, JJ.
Wingate & Cullen, (Geo. W. Wingate, of counsel,) for petitioner. *Phillips & Avery*, for property owners.

BARNARD, P. J. This is an appeal from an order confirming the report of commissioners appointed to appraise and condemn a right of way along Myrtle avenue, in the city of Brooklyn, in front of two separate parcels of land owned by the respondents above named. The damages awarded for injury to easement was the sum of \$1,500 in each case. It has been the settled practice of the courts in this state not to disturb and reverse the report of the commissioners appointed in such cases, unless an error in judgment can be shown which led to the awarding of excessive and exorbitant damages. *In re Railroad Co.*, 27 Hun, 116. There is sufficient evidence in this case to support the award as found, and there is no basis for a claim that they have mistaken the principle upon which they should proceed in forming their opinion. In regard to the objection to the admission of evidence tending to show damages to respondent's property arising from the special use thereof, in our opinion said objection is not supported by the law of this state. In showing the market value, and the consequent impairment to the same, by the taking of an easement, the owner is at liberty to show the particular suitability of his property to any given business. *In re Railroad Co.*, 27 Hun, 116; *In re Commissioners*, 37 Hun, 537. In the present case the premises were used for a laundry, and the building of the railroad cut off the light, which was highly needful in the conduct of the same, and the drippings from the structure ruined the clothing when it was being loaded in wagons. The owner had the right to carry on any lawful business, and the railroad which took the easement without his consent had no right to deprive him of any advantages which he might derive without paying for the same. The order appealed from should therefore be affirmed, with costs.

In reference to the appeal from the order denying the motion for costs, it has been the settled practice of the courts not to allow costs in these special proceedings. In the cases where costs have been allowed, the order appointing commissioners of appraisal has been reversed on appeal. *Railroad Co. v. Davis*, 55 N. Y. 147. Even assuming that the court at special term had the power, if it so wished, to grant costs under Code Civil Proc. § 3240, yet, having exercised its discretion in the negative, its decision in regard to the matter will not be questioned by the appellate court, unless we can show misuse or gross mistake in the exercise of the same. *Marrison v. Agate*, 20 Hun, 25. The order denying costs, appealed from, should therefore be affirmed, with costs. All concur.

GANLEY v. BROOKLYN CITY R. CO.

(Supreme Court, General Term, Second Department. December 10, 1899.)

HORSE AND STREET RAILROADS—NEGLIGENCE—EVIDENCE.

In an action against a street-car company for personal injuries, where plaintiff testifies that after the car had slackened speed, and while he was waiting for it to stop, it made a sudden start forward, and threw him off, thus causing the injuries, and defendant's witnesses are not entirely harmonious as to the circumstances, though they all testify that plaintiff got off while the car was in motion, a verdict for plaintiff will not be disturbed on appeal.

Appeal from circuit court, Kings county.

Action by John Ganley against the Brooklyn City Railroad Company, for personal injuries sustained by plaintiff while a passenger on defendant's street-car. Verdict and judgment for plaintiff, and defendant appeals.

Argued before BARNARD, P. J., and PRATT, J.

Morris & Whitehouse, for appellant. *F. J. Moissen*, for respondent.

BARNARD, P. J. The evidence is more than usually conflicting. The plaintiff testifies that he told the defendant's conductor to let him out of the car at Rockaway avenue. The conductor passed the lower crossing, and the car was slackening its speed, but had not stopped. The plaintiff got to the edge of the platform, and had his foot raised so as to step down when it was safe to do so, when the car suddenly started ahead, and threw the plaintiff, who was a feeble old man, into the street. The plaintiff is the only witness called in his own behalf. The defendant produced the conductor and driver of the car, four passengers, and a few who stood on the sidewalk at the time of the accident, who all testify that the plaintiff got off while the car was in motion, and after he was told to wait until the car stopped. There are only two test points of difference, as all admit the plaintiff either got off or was thrown off before the car stopped. The plaintiff says he had no notice to wait until the car stopped, but he was waiting until the car fully stopped, when he was thrown off. The question of fact is therefore reduced to one,—did the car suddenly start just before it came to a full stop? for the whole action rests on this. The plaintiff testifies positively to the sudden start forward, and that it threw him off. The car did not in fact stop till it reached the upper crossing, or a few feet above the upper crossing, and the witnesses say that the plaintiff jumped off between the tracks. The order to the plaintiff to wait for a full stop is of no weight if the car suddenly started before it did stop, causing the accident. The witnesses for the defense are not entirely harmonious as to the facts surrounding the fall, and the plaintiff's narrative best agrees with the admitted facts in the case. The plaintiff would not voluntarily jump off between the tracks, and while the car was slackening its speed, so as to stop in a few feet of the crossing. The jury have found in his favor, and an appellate court should not, under the case as related, interfere with the verdict. The judgment should therefore be affirmed, with costs. All concur.

In re CONNOR'S WILL.

(Supreme Court, General Term, First Department. December 2, 1889.)

1. WILLS—CAPACITY TO MAKE.

The evidence showed that testator, though so sick that he died the next day, was able to direct the preparation and comply with the usual forms in the execution of his will. The will was not an unnatural one. There was no evidence at all that testator was not of disposing mind, except the opinion of physicians, who were not present at the time the will was executed, based on their observations before that time. *Held*, that the will was properly admitted to probate.¹

2. WITNESS—COMPETENCY—PHYSICIANS.

Code Civil Proc. N. Y. § 884, which declares that a physician shall not be allowed to disclose information which he has acquired while attending a patient in a professional capacity, applies where the physician is called as a witness in proceedings for the probate of a will.²

Appeal from surrogate's court, New York county.

In the matter of the probate of the will of John Connor, deceased. The contestant, Mary Ann McGarity, appeals.

Argued before VAN BRUNT, P. J., and DANIELS and BARRETT, JJ.

Kelly & MacRae, (William F. MacRae, of counsel,) for appellants. *Mathew Daly*, (F. R. Coudert, of counsel,) for respondent.

BARRETT, J. In view of the decision of the court of appeals in *Renthan v. Dennin*, 103 N. Y. 573, 9 N. E. Rep. 320, but little need be said in this case.

¹See, on the general subject of testamentary capacity, *In re Bull*, 2 N. Y. Supp. 52, and note; *Thompson v. Ish*, (Mo.) 12 S. W. Rep. 510, and note.

²On the competency of physicians as witnesses concerning professional communications, see *Jones v. Railroad Co.*, 8 N. Y. Supp. 253, and note; *Thompson v. Ish*, (Mo.) 12 S. W. Rep. 510, and note.

It is substantially conceded that the contest rests for its main support upon the testimony of the physician who attended the deceased during his last illness. The other testimony in support of the contestant's claims is slight, and it is completely overborne by the evidence adduced by the proponents. Indeed, apart from the physician's testimony, the contestant seems mainly to rely upon the cross-examination of the proponent's witnesses, and upon the doubts as to their credibility believed to have been thereby created. But, although some of the statements made by the proponent's witnesses are lacking in candor, and are suggestive of too great watchfulness with regard to the effect of their answers, I cannot think that the substance of this testimony should be rejected. There is not, it is true, perfect concurrence between the witnesses, nor entire harmony in all the statements of each witness. That, however, is not unfavorable to their credibility, for we usually find just such inconsistencies when a number of persons attempt to narrate a particular incident or subject of observation. It would, indeed, be a suspicious circumstance if the testimony of all these witnesses had fitted perfectly, especially in matters of detail. The conclusion at which I have arrived, after a careful review of this record, is that, even with the physician's testimony in the case, the will was properly admitted to probate. John Connor was undoubtedly a very sick man when the will was executed, but, unless scientific opinions with regard to human possibilities are to outweigh actual facts as testified to by otherwise unimpeached witnesses, he was competent to make a testamentary disposition within the rules laid down in the cases. He was able to give clear instructions for the preparation of the will, and to comply with the usual forms attending the execution of such an instrument. We have no right arbitrarily to reject the testimony of several apparently respectable and unimpeached witnesses to this effect, merely because physicians who were not present when the events occurred tell us that, from anterior observations, they are quite confident no such event could have occurred. The will, too, was not, under the circumstances, an altogether unnatural one. John Connor was a single man, and his principal relatives were two brothers, Charles and Robert, and a sister, the contestant. His estate was not large. He left \$3,000 to Felix Wilson Connor, his brother Robert's son, and a like amount to an aunt,—Mrs. Kitchen, or Kitching. The remainder of his estate was bequeathed to his brother Charles, in whose house he died, and who cared for him in his last illness. The record shows plainly enough why the contestant was not remembered. She had treated John harshly,—so much so that he wept over her unkindness, and spoke of it to several people. The brother Robert does not contest, being evidently satisfied with the provision made for his son, and doubtless deeming Charles' kindness in taking the deceased home and caring for him throughout his last illness worthy of special consideration. Upon all the evidence in the record, I think the learned surrogate was entirely justified in finding that the will was properly executed, and was the free act of a disposing mind.

Applying to the case, however, the doctrine of *Renihan v. Dennin*, *supra*, the foundation of the contest falls. It was there expressly held that the provisions of section 834 of the Code of Civil Procedure, to the effect that a physician "shall not be allowed to disclose any information which he acquired in attending a patient in a professional capacity, and which was necessary to enable him to act in that capacity," are applicable where the physician is called as a witness in proceedings for the probate of a will. This testimony, therefore, should not be considered, except, possibly, so far as he narrated the incident of Mr. Graham's call upon him, in company with Charles Connor, and the advice which he says he then gave as to the impossibility of executing a will. This was perhaps a fact to be considered on the question of undue influence. It is proper to say, however, that the physician's version of that interview is denied by Messrs. Graham and Connor, who both testify that the

advice which he really gave was that a will might "possibly or probably" be made. Upon the whole, I think that this decree should be affirmed, with costs. All concur.

MYERS *et al.* v. TABER.

(*Supreme Court, General Term, First Department. December 2, 1889.*)

1. SALE—RESCISSON—NOTICE OF FRAUD.

In replevin against an assignee for the benefit of creditors for goods alleged to have been obtained by the assignor from plaintiffs through false representations, it appeared that plaintiffs had theretofore sued the assignor for the price of the goods, and levied an attachment thereon. It also appeared that before the attachment suit plaintiffs had made affidavit that the assignor's said statements were untrue. *Held*, that the evidence justified a finding that plaintiffs knew the falsity of said statements at the commencement of the attachment suit, and therefore had elected to proceed on the contract.

2. APPEAL—REVIEW—WEIGHT OF EVIDENCE.

The question of plaintiffs' knowledge of the falsity of the assignor's statements prior to commencing the first action being the only issue presented to the jury in the replevin suit, and no other issues having been asked for, and no exception taken to the charge, plaintiffs cannot, on appeal, question the sufficiency of the proof as to the object of the first action, or as to the levy therein.

Appeal from circuit court, New York county.

Replevin by Samuel F. Myers and Marcus A. Myers against Elbert A. Taber. From a judgment entered on verdict for defendant, and from an order denying a new trial, plaintiffs appeal.

Argued before VAN BRUNT, P. J., and DANIELS and BARRETT, JJ.

Geo. C. Comstock, for appellants. *F. N. Gilbert*, (*J. Delahunty*, of counsel,) for respondent.

VAN BRUNT, P. J. This action was brought to recover certain chattels, consisting of jewelry, and damages for their detention. The goods were sold to one Charles Van Zandt in September, 1885. The plaintiff alleges that at the time of the sale Van Zandt made certain fraudulent representations to the plaintiff's agents, in order to obtain possession of the goods; and that, relying upon these statements, the plaintiffs sold and delivered the goods. Afterwards, Van Zandt assigned all his property to the defendant, for the benefit of his creditors. The defendant's answer, among other things, alleged that at the time of the commencement of this action the defendant was in the possession of the goods mentioned in the complaint, and had a right to their possession as assignee for the benefit of the creditors of Van Zandt; and that prior to the commencement of this action the plaintiffs commenced an action in this court against Van Zandt to recover for the price of said goods, in which action they procured a warrant of attachment on the same facts alleged in the complaint in this action, and levied the same upon the goods in question.

The only issue which was presented to the jury was whether the plaintiffs, at the time when they commenced the action in which the attachment was issued, had knowledge of the falsity of the representations that were made; the court holding that, if they had such knowledge, by bringing the attachment suit they had elected to go for the purchase price, and were barred from afterwards rescinding the contract and claiming a return of the goods. It is claimed in support of this appeal that there is no evidence that the suit which was pleaded as a bar was upon contract to recover the value or price of the goods in question, and that there is no evidence that the action was prosecuted to judgment, or that the claim or demand of said action was secured by some provisional remedy in said action, nor is there any evidence that the plaintiffs knew when they began their first action of the falsity of Van Zandt's statement. The difficulty with the claim made upon the part of the appellants is that the only question which was raised by the appellant's counsel upon

the trial was as to the fact of the knowledge of the plaintiffs regarding these false representations prior to the attachment. In other words, that they did not know, at the time they commenced the action for the contract price of these goods, that the representations made by the defendant were false. And this was the only issue presented to the jury. They asked to go to the jury on no other issue, and no exception whatever was taken by them to the judge's charge. The only exception taken by them was as to the refusal of the court to direct a verdict because the proof was conclusive that the defendants did not know, at the time of commencing the attachment action, the facts as to the fraud. Therefore, the only question which was raised upon this appeal is as to whether there was sufficient evidence to go to the jury upon this point.

It appears from the evidence in this case that the representations in question were made in September, 1885; that the assignment was made on the 23d of February, 1886; that on the 12th of March, 1886, the defendants were informed that Van Zandt had failed in February, and that his liabilities were over \$2,400, and his assets only \$1,000, and they learned, also, in March that Van Zandt had gone west. It further appeared that on the 23d of March, 1886, one of the plaintiffs made an affidavit stating the representations which had been made, and also facts which, if true, show that such statements were untrue. Under these circumstances, the jury had the right to infer that the plaintiffs had knowledge at the time they commenced their attachment action, which was subsequent to the date of this affidavit, of the falsity of the representations made by Van Zandt, and that they had, with this knowledge, commenced an action for the purchase price, and had obtained a levy upon property, and therefore had elected to proceed upon the contract. This being the position taken at the time, the plaintiffs cannot now be heard to claim—no question in regard to what that action was commenced for, and no question as to the levy, having been raised on the trial—that these facts were insufficiently proved; the infirmity of the proof, if any, having probably arisen from the fact that these issues were not contested. The jury, therefore, having found against the plaintiffs upon the question of knowledge, the judgment and order appealed from must be affirmed, with costs. All concur.

SCHELL v. COHEN.

(Supreme Court, General Term, First Department. December 2, 1889.)

1. INFANCY—GUARDIAN AD LITEM NISI—CONSENT.

The provisions of Code Civil Proc. N. Y. § 472, that a guardian *ad litem* shall not be appointed unless his written consent, duly acknowledged, is produced to the court or judge making the appointment, does not apply to a guardian *ad litem* nisi, appointed under section 473, providing that where defendant is an infant resident of the state, but is temporarily absent, the court may appoint a guardian *ad litem* nisi, and give special directions in the order for the service thereof.

2. SAME—AMENDMENT OF ORDER.

Jurisdiction having been acquired by compliance with the special directions of the court as to the service of the order, appointing a guardian *ad litem* nisi on the infant and his mother, the fact that the consent of the guardian *ad litem* afterwards appointed was not acknowledged at the time of his appointment was a mere irregularity, which could properly be amended thereafter, *nunc pro tunc*.

Appeal from special term, New York county.

Action by Theodore C. Schell against Jacob Cohen to recover money paid on a contract to purchase land, together with the expense of examining title, on account of a defect in defendant's title. Judgment was for plaintiff, and defendant appeals.

Argued before BARRETT and DANIELS, JJ.

John W. Pirsson, (Albert Matthews, of counsel,) for appellant. Gustav S. Drachman, for respondent.

BARRETT, J. The defendant's title came through a sale under a decree of foreclosure. The sole objection to this title is that the guardian *ad litem* for an infant defendant failed to acknowledge his consent to become such guardian. The infant was under 14 years of age, and he resided with his mother, in this state. At the time of the commencement of the action, he was temporarily absent from the state. His temporary abode was Old Bridge, N. J. Upon proof of these facts the court made an order designating Jeff. M. Levy guardian *ad litem nisi*, and directing personal service of such order upon the mother. The court also directed service of the order upon the infant, by depositing a copy thereof, properly inclosed in an envelope, with postage prepaid, in the post-office at the city of New York, directed to the infant at Old Bridge, N. J. This deposit was properly made upon the day when the order was granted, and within two days thereafter personal service of the order was duly made upon the mother. Thereupon the court acquired jurisdiction, and the infant became its ward. The service of such an order, (properly granted, under section 473 of the Code of Civil Procedure,) in the manner specially directed by the court, is equivalent, for the purpose of acquiring jurisdiction to appoint a guardian *ad litem*, to personal service of the summons upon a resident infant, who is not absent from the state, and his father, mother, or guardian, and is also equivalent, for the same purpose, to service by publication upon a non-resident infant. Service of process upon the infant is not constitutionally required, in order to confer jurisdiction. **ANDREWS, J.**, in *Ingersoll v. Mangam*, 84 N. Y. 626, said that "there is no invariable rule defining what legal proceedings constitute due process of law, conferring due jurisdiction upon a court to deal with and find the property of infants. Notice in some form, actual or constructive, is essential; but the legislature may prescribe that such notice shall be given to the parent or guardian, or other person, as representing the infant, and proceedings in conformity with the statute in such cases will be valid, and the infant will be bound. This was a reaffirmation, in substance, of the rule stated in *Croghan v. Livingston*, 17 N. Y. 218; *Gotendorf v. Goldschmidt*, 88 N. Y. 110.—and in many other cases.

The contention that jurisdiction was not acquired, because of the fact that Levy never acknowledged a consent to become such guardian, is without merit. Levy was not appointed a guardian *ad litem* for this infant; and, consequently, the provision of section 472, requiring the production of such acknowledged consent upon the making of the appointment, is inapplicable. There was simply a designation of Levy to be such guardian *nisi*; and his actual appointment would not become operative unless the infant, or some one on his behalf, failed to procure the appointment of a guardian within the time specified in the order. If, in the case at bar, the infant, or some one on his behalf, had so failed, then the question would have arisen whether Levy should not have acknowledged a consent before the designation *nisi* had ripened into an appointment. This is the only reasonable construction of the statute. When an appointment is made, there is an application for some particular person; and that person is required to make his acknowledged consent a part of the motion papers. When, however a designation is made *nisi*, the court exercises its discretion with regard to the person; and, as the applicant does not know who the court will designate, he cannot well come fortified with an acknowledged consent, which consent, it will be observed, must be "produced to the court or judge making the appointment."

In *Ingersoll v. Mangam*, *supra*, the infant was a non-resident, and the summons was not served upon him, either personally or by publication. The court held that there was no jurisdiction to appoint a guardian *ad litem*, for the reason that the statute in such cases had not been complied with. Here the infant was a resident temporarily absent from the state, and the statute in such cases was strictly complied with. Jurisdiction having been acquired by

compliance with the special directions of the court as to service of the order upon the infant and his mother, all subsequent irregularities were amendable. *Rogers v. McLean*, 34 N. Y. 536; *Croghan v. Livingston*, *supra*; *Gribbon v. Freel*, 93 N. Y. 93; *Tobin v. Cary*, 84 Hun, 433. It appears that, within the time specified in the order *nisi*, the infant's mother applied for the appointment of a guardian *ad litem*; and upon that application Mr. John E. Ward's consent to act was produced. This consent, by an inadvertence, was not then acknowledged, but the appointment was made. In my judgment, this was not a jurisdictional defect, but, at most, a mere irregularity. It was so held in *Croghan v. Livingston*, *supra*, with regard to the failure of a guardian *ad litem* in partition to file the bond required by statute. In opinion of PRATT, J., at p. 221. In *Rogers v. McLean*, *supra*, an amendment to the petition upon which the guardian was appointed, to the effect that the infant was residing with the petitioner, or was under his charge or custody, when the petition was originally verified, was permitted *nunc pro tunc*; and this amendment was sustained by the court of appeals. In *Gribbon v. Freel*, 93 N. Y. 93, it was held that the publication of a 6 instead of a 10 day summons in the marine court was not a jurisdictional defect, but only an irregularity, and that, as the court acquired jurisdiction by the granting of a provisional remedy, an order amending the summons *nunc pro tunc* was properly made. And in *Tobin v. Cary*, *supra*, the precise question here involved was decided adversely to the plaintiff's contention. The court there also held that the order, duly executed by inserting the acknowledgment in the record, removed all objections to the title; and the purchasers were required to complete. The present objection seems especially trivial, in view of the fact that the summons was served upon Mr. Ward the day after his appointment, and thereupon he duly acknowledged, before a notary public, personal service of such summons. He also interposed a verified answer.

I have no doubt that the irregularity was completely cured by the order, made on consent of all parties who appeared in the foreclosure suit, of March 25, 1886, permitting the proper acknowledgment to be filed *nunc pro tunc*, and by the execution of that order when the acknowledgment was filed and attached to the original consent and record. The judgment appealed from should therefore be reversed, and a new trial ordered, with costs to abide the event.

***In re* NEW YORK INSTITUTION FOR THE INSTRUCTION OF THE DEAF AND DUMB.**

(*Supreme Court, General Term, First Department. December 2, 1889.*)

1. MUNICIPAL CORPORATIONS—PUBLIC IMPROVEMENTS—REDUCTION OF ASSESSMENTS.

Under Laws N. Y. 1880, c. 550, § 12, the court cannot reduce an assessment for a sewer, constructed by the department of public works, on the ground that it could be legally constructed only by the department of parks, and that, if constructed by the latter, one-half of the expense only could have been assessed. The department of parks not having ratified or accepted the work, or taken any action in the matter, the property owner cannot claim benefits which would have arisen had that department legally constructed it; and, if it was constructed by the proper authorities, there is no basis for the reduction.

2. SAME—CONSTRUCTION OF SEWERS—DEPARTMENT OF PUBLIC WORKS.

Laws N. Y. 1865, c. 331, passed April 12th, provided for the adoption of a general system of sewerage in New York city on a general plan, under the control of a board, and that no sewer should be constructed except on that plan. An act passed April 24, 1865, gave the commissioners of public parks the right to regulate, grade, and improve such streets as they might lay out on a plan to be adopted by them. In 1870 the powers and duties of the board named in the act of April 12, 1865, were conferred on the department of public works. The charter of 1873 provided for a bureau in the latter department having charge of sewers, and another having charge of regulating and grading streets, etc. The consolidation act, §§ 327, 331, gives the commissioner power to revise and frame a plan for sewers, and prohibits the construction of a sewer except on that plan. *Held*, that the department of public works has power to construct sewers, to the exclusion of the department of parks.

3. STATUTES—REPEAL BY IMPLICATION.

The subject-matter of the act of April 24, 1865, relating to the commissioners of parks, having been dealt with by Laws 1874, c. 604, provisions of the former not contained in the latter will be presumed to have been intentionally omitted.

Appeal from special term, New York county.

Petition by the New York Institution for the Instruction of the Deaf and Dumb to vacate or reduce assessments to the extent that the same exceed the limitations fixed by statute. The petition was denied, and petitioner appeals.

Argued before VAN BRUNT, P. J., and BARTLETT and BARRETT, JJ.

James A. Deering, for appellant. *William H. Clark*, (*Geo. L. Sterling*, of counsel,) for respondent.

PER CURIAM. The question involved in the appeal in this case seems to be disposed of by the decision in *Re Wheelock*, 3 N. Y. Supp. 890. The order appealed from should therefore be affirmed, with \$10 costs and disbursements.

*In re MARSHALL.**In re FERRIS.*

(*Supreme Court, General Term, First Department. December 2, 1889.*)

ABATEMENT OF ACTIONS—SPECIAL PROCEEDINGS.

A petition to vacate a street assessment is a special proceeding, and abates with the death of the petitioner.

Appeals from special term, New York county.

Appeals from orders denying motions for revivals of the proceedings under the petitions of Jesse A. Marshall, deceased, and Francis Ferris, deceased, to vacate street assessments.

Argued before VAN BRUNT, P. J., and BARTLETT and BARRETT, JJ.

T. F. Neville, for appellants. *G. L. Sterling*, for respondent.

VAN BRUNT, P. J. The denial of this motion seems to have been fully justified by the principles laid down in *Re Roberts*, 6 N. Y. Supp. 195, (decided by this court on the 9th of July, 1889,) where it was held that this was a special proceeding, and that, under the rule applied in *Leavy v. Gardner*, 63 N. Y. 624, it was entirely abated by the decease of the petitioner. The order should be affirmed, with \$10 costs and disbursements. All concur.

PEOPLE v. SIMONSON et al.

(*Supreme Court, General Term, Second Department. December 10, 1889.*)

1. WILLS—CONSTRUCTION—PERPETUITIES.

Testator devoted part of his estate to the creation and maintenance of a musical college, for which he directed his three executors to apply to the legislature for a charter; and, in case of the death of the longest lived of the three before the charter should be granted, he gave the fund in trust to the city of New York for certain purposes. *Held*, that the bequest was void, under the law forbidding perpetuities.

2. SAME—UNCERTAINTY.

A bequest for the purpose of creating and maintaining a "musical college," without any directions or the expression of testator's wishes as to a plan for its working, is void for uncertainty.¹

Appeal from special term.

Action by the people of the state of New York against Alfred L. Simonson and Edward T. Schenck, individually and as executors of and trustees under the last will and testament of Samuel Wood, deceased, Lewis L. Fosdick, and

¹ On the subject of certainty of beneficiaries as affecting charitable bequests, see *Tilden v. Green*, 7 N. Y. Supp. 882, and note; *Trustees, etc. v. Guthrie*, (Va.) 10 S. E. Rep. 818, and note.

Van Wyck Hewlett, as executors of Abraham Hewlett, deceased, to enforce a trust under the will of said Samuel Wood, deceased. There was judgment dismissing the complaint. The people appeal.

Argued before BARNARD, P. J., and DYKMAN, J.

Chas. F. Tabor, Atty. Gen., (*B. E. Valentine*, of counsel,) for appellants. *J. T. Marean*, of counsel, for respondents. *Wakeman & Campbell*, for Alfred L. Simonson. *E. Schenck*, for E. T. Schenck. *J. T. Marean*, for Lewis L. Fosdick and Van Wyck Hewlett.

BARNARD, P. J. The testator, Samuel Wood, devoted a large part of his estate to the creation and maintenance of a hospital to be called the "Samuel Wood Benevolent Institute." The will directed the executors to apply to the legislature for a charter, and to prosecute the application until it was granted, and, in case of the death of the longest lived of them before the same was obtained, then the testator gave the fund devoted to the hospital to the city of New York, to be strictly devoted by the city to the hospital charity "until such charter shall be obtained." By the codicil the testator revoked the bequest for the hospital, and applied it "to the founding of a musical institution to be known and called the 'Samuel Wood Musical College.' * * * And that appropriate legislation and means be adopted to perfect the incorporation and general plan of the institution as near or similar to the plan or method given in my said will with regard to the formation and endowment of the Samuel Wood Benevolent Institute and Hospital." No charter has been applied for by the executor, and none has been passed by the legislature. The codicil named four executors, three of whom qualified. As this appeal is based upon a decision dismissing the complaint because the people had no cause of action, it must be assumed that the executors are irresponsible; that they have squandered the estate; have collusively suppressed the codicil; and procured or invited a judgment, based on ignorance of the facts by the court which granted it, that the codicil was void for want of capacity in the testator; and then had the surrogate read the will without the codicil, and grant new letters testamentary to one of the executors who was superseded by the codicil. That the probate of the codicil had been litigated and approved by the court of appeals before this collusive judgment was obtained, and that this fact was suppressed before the surrogate who succeeded the surrogate who tried the case, (8 N. E. Rep. 387,) is a damaging statement, but the present case rests entirely upon the validity of the hospital trust in the will, and the musical college trust in the codicil. The will expressly ties up the estate for three lives. The executors are to keep it, or may do so, until the longest lived of three designated persons are deceased. The codicil merely changes the name of the beneficiary, but leaves the will in other respects still standing. It is therefore liable to the same objection as to illegal suspension. It is impossible to found a beneficiary under the codicil with such definiteness as would enable a court of equity to enforce the trust. The hospital scheme is definite, but it is entirely incongruous when applied to a musical college. The trust is also void for indefiniteness as to the beneficiary. The legislature must provide a working plan for the college, if it grants a charter, and must of necessity construct it, in the absence of the testator's directions, or even wishes, for he has given neither. It is void, therefore, for indefiniteness of the trust. *Holland v. Alcock*, 108 N. Y. 312, 16 N. E. Rep. 305; *Cruikshank v. Home for the Friendless*, 113 N. Y. 337, 21 N. E. Rep. 64. The attorney general has no standing to enforce a trust void by our law, and the judgment should therefore be affirmed, with costs.

ESTES v. ST. PAUL, M. & M. R. Co.

*(Supreme Court, General Term, Second Department. December 10, 1889.)***1. RAILROAD COMPANIES—INJURIES TO BAGGAGE—EVIDENCE.**

Plaintiff's baggage was delivered to defendant in good and dry condition on September 2d, at Larrimore, and was by it brought through to St. Paul, whence by another road it was brought to New York, where, upon its arrival, on September 6th, it was found to be damaged by water. There was evidence that it rained very hard and nearly or quite all night of the day on which defendant received the baggage, and that it reached St. Paul on the morning of September 3d. There was evidence that it was not exposed to the action of water after it reached St. Paul. The mould on the baggage tended to show that the injury was not of a date later than the arrival in St. Paul. *Held*, that the evidence justified the finding that the baggage was injured while in defendant's possession, between Larrimore and St. Paul.

2. SAME—CHANGE OF ROUTE.

Where the agent of a railroad company checks the baggage of a passenger over a different route from the one agreed on, and it is injured while on such route, the company is liable as an insurer.

Appeal from judgment on report of referee.

Argued before BARNARD, P. J., and Pratt, J.

M. D. Grover, (F. E. Smith, of counsel.) for appellant. *Frederick E. Barnard*, for respondent.

BARNARD, P. J. The case shows that the plaintiff had tickets on the road of the defendant as a passenger from Larrimore to Fargo, by way of Grand Forks. On the 2d of September, 1886, he delivered his baggage to the defendant's baggage-master. The baggage was to be checked by the train upon which plaintiff was to travel, but was to be checked for Chicago, which would involve a change of road at Fargo, to be carried to Chicago. The defendant failed to check the baggage by the route, but sent it to St. Paul, over another of its roads,—a much greater distance. The only question in the case is one of fact. Was the baggage injured by negligent exposure on the route from Larrimore to St. Paul? It is proven that when it arrived at New York it was injured by water. The proof tends to show that on the evening of the day the baggage was received by the defendant it rained very hard, and nearly or quite all night. The baggage was received in St. Paul on September 3, 1886, in the morning. The same was delivered to the defendant in good order, and dry. There is proof tending to show that the baggage was not exposed to the action of water after it reached St. Paul. This proof covers the entire distance to the plaintiff's house in Brooklyn. When it reached this place it was seriously injured by water. The injury was not of a date later than the arrival of the same at St. Paul, as was fairly inferable from the appearance of the baggage. The mould was not recent. There is proof tending to show that at St. Paul the place where baggage is placed waiting for transfer is only protected by the projecting eaves of a shed, and that in a storm, with a wind, the eaves are not such a protection as will prevent the baggage from being wetted by the rain. Under this evidence the referee was justified in finding the injury to have been caused while the baggage was in defendant's possession.

Assuming this fact, the case is a plain one. The defendant agreed to send baggage by a particular route, and violated its agreement, and sent it by another and much longer route, and while in its possession permitted it to be injured by negligent exposure to water. The defendant was an insurer. *Isaacson v. Railroad Co.*, 94 N. Y. 278. The cases cited to show that the liability of a railroad extends no further than its delivery to the connecting carriers have no applicability to the facts. The judgment should therefore be affirmed, with costs.

VOIGHT v. SCHENK *et al.*

(Supreme Court, General Term, Third Department. December 11, 1889.)

NUNC PRO TUNC ENTRY—NAME OF NEW DEFENDANT.

An order, made after judgment in an action of foreclosure, inserting the name, as a party defendant, of one who, as receiver, had become owner of the equity of redemption before commencement of the action, in the summons, complaint, *lis pendens*, judgment, notice of sale, and all papers, *nunc pro tunc* as of the dates of such papers, is erroneous, as a new defendant can be brought in by supplemental summons only, under Code Civil Proc. N. Y. § 453, unless on his own application.

Appeal from special term, Albany county.

Action to foreclose a mortgage by Herman Voight against George Schenk and others. After judgment of foreclosure and sale, an order was made entering the name of Thomas A. Murray, receiver, as a party defendant in the various papers, *nunc pro tunc*, and from this order Murray appeals.

Argued before LEARNED, P. J., and LANDON and FISH, JJ.

John R. Langan, for appellant. Myers & Norton, (John T. Norton, of counsel,) for respondent.

LEARNED, P. J. The order appealed from was made after judgment. It inserted the name of Thomas A. Murray, as receiver, as a party defendant to the action in the summons and complaint, *lis pendens*, judgment, notice of sale, and all papers and proceedings, *nunc pro tunc* as of the date of the several papers. The very object of a *lis pendens* might be destroyed if the name of a defendant could be inserted *nunc pro tunc*. If a new party is brought in, a new *lis pendens* should be filed. The effect of this order would be to create a judgment against a man who had never been sued. This cannot be done. *Association v. Agricultural Works*, 89 N. Y. 22, 25 Hun, 475; *Bassett v. Fish*, 75 N. Y. 304. The defendant Murray, as receiver, had become the owner of the equity of redemption before the commencement of this action of foreclosure. His rights could not be barred by an order inserting his name in a judgment entered on a summons and complaint to which he had not been a party, and with which he had not been served. Furthermore, if he were to be brought in as a defendant, a supplemental summons would have to be served on him. Code, § 453. In no other way could he, except on his own application, be made a party. We do not think that the fact that Murray is a receiver deprives him of the right of defending an action lawfully brought against him. It is true that a receiver is an officer of the court; but even officers of the court are entitled to be sued by due process of law, when sued at all. The order appealed from must be reversed; but the plaintiff, if he chooses, may apply to the special term for leave to open the judgment and the sale, and to make Murray, as receiver, a party defendant, by serving a supplemental summons on him. We cannot grant this order here, because we do not know what persons may be interested as purchasers at the sale, and who may therefore be entitled to notice. No costs are allowed on this appeal. All concur.

DARRAGH v. ROSS.

(Supreme Court, General Term, Second Department. December 10, 1889.)

1. PAROL EVIDENCE TO VARY WRITINGS.

Parol evidence that more was received on a mortgage than its face, and less on a check than its face, is not objectionable as varying written instruments.

2. WITNESS—IMPEACHMENT.

Plaintiff may contradict the statement of a witness for defendant, even though such statement is made on plaintiff's cross-examination of the witness.

3. MONEY HAD AND RECEIVED.

One who receives money of another for a specific purpose, to which he does not apply it, but keeps it, is liable to the owner.

Appeal from circuit court, Queens county.

Action by Annie F. Darragh against Reuben Ross. The witness Vernam, referred to in the opinion, was called for defendant, and testified, on cross-examination by plaintiff, that he acted for the latter, in certain transactions, with her authority. Plaintiff afterwards showed by a witness for herself that Vernam had no authority from her. Verdict and judgment for plaintiff, defendant's motion for new trial denied, and he appeals.

Argued before BARNARD, P. J., and PRATT, J.

Rudd & Hunt, (James M. Hunt, of counsel,) for appellant. *S. E. Fairfield,* for respondent.

BARNARD, P. J. This action is brought to recover for money had and received by the defendant for plaintiff's use. The amount claimed is made up of four different sums, amounting to \$11,515, upon which a payment is acknowledged in the complaint of \$4,000, leaving a balance of \$7,515. The answer is a general denial and payment. The evidence shows that the plaintiff was the owner of land at Rockaway, and she sold a part of it to Bester and Mayer, and another portion to a Mr. Scheer. The Bester and Mayer sale required the payment of a \$1,700 mortgage on the property to give them a clear title. The plaintiff testifies that she gave the money to defendant to pay this mortgage, and that he failed to do it, and she was compelled to, and did, pay it out of the \$10,000, which was the purchase price of the property sold Bester and Mayer. The amount due on the mortgage was \$1,700, and that defendant received \$1,700 therefor, which he applied to his own use. There was a bond and mortgage for \$7,000 given plaintiff on the Bester and Mayer sale. This mortgage was assigned to John Ross, defendant's brother, and by him assigned to John Webb. Over \$8,000 was received on this mortgage while only \$4,000 had been paid plaintiff on it, and the assignment was made to secure this \$4,000. The plaintiff claims only \$3,000 had been loaned on it. As to the first of these items, the parties are in direct variance, and as to the second item the defendant claims that John Ross was the real assignee of the mortgage, and made the loan of \$4,000. There is proof tending to show that the real party was Reuben Ross, and his brother's name was merely a cover. The plaintiff claims that \$1,000 was paid by defendant on account of this assignment subsequently, and that the \$4,000 payment was made up in this way. There is the same dispute in respect to the \$600 mortgage growing out of the Mayer and Bester sale. As to the two transactions growing out of the sale to Scheer, the same unaccountable variance exists between the parties in this evidence. The plaintiff says that defendant secured \$1,000 and \$700 out of the moneys secured on the sale. The defendant says he secured the \$1,000 mortgage for the plaintiff's husband's debts, and he produced a receipt, signed by the plaintiff, acknowledging the receipt of the money. The judge charged the jury that this transaction was clear and clean, and, further, that as to the \$700 no reason appeared why this sum was paid to the defendant. Under this conflicting evidence the jury found for the plaintiff, \$3,200. Unless some error was committed on the trial, it is a case where the verdict of the jury should stand. The tribunal to settle questions of fact has passed upon the case, where the dispute is unusually sharp, and one party or the other mistaken in their testimony. The fact that the papers support the defendant is not controlling. Papers do not always represent the real transaction, and the jury have found that they did not in this case.

It is not erroneous to permit a witness to testify that the defendant admitted that he had received more than the face of the \$7,000 mortgage, and that he had collected a little more than he had a right to collect. It was also

proper to permit evidence that less was received on a check than its face called for, or even that nothing had been received for it. The exception, therefore, is not sustained by the principle that such evidence is objectionable for varying a written paper.

It is competent for the plaintiff to prove that the witness Vernam had no authority from her, even if he had stated that he had, upon his own cross-examination.

It was a correct rule of law which was given in the portion of the charge excepted to by the defendant. It is merely that if the defendant received plaintiff's money for a specific purpose, and kept the same without applying it, he would be liable to plaintiff.

There was no error in the refusal to postpone the trial. The question of the agency of the plaintiff's husband to receive payments on account of his wife's business in the matter involved in this action was not an issue. Payments to him, if made, were treated as payments to her; and proof of his power to receive is abundant. The judge made no allusion to such a question, and the plaintiff testifies: "My husband did all the business." The question being one purely of fact, and the record disclosing no error upon the trial or in the charge of the trial judge, the judgment should be affirmed, with costs. All concur.

In re FLOWER. In re ANABLE, (three cases.) In re TRUSTEES OF UNION COLLEGE. In re McMANN.

(Supreme Court, General Term, Second Department. December 10, 1899.)

TAXATION—LEVY—POWER OF LEGISLATURE.

The legislature has the power to levy taxes, and to apportion the burden among the property holders, and may refer to a void assessment for the purpose of fixing the amount of the tax, and the property on which it is levied.

Appeal from special term, Queens county.

Application by Roswell P. Flower to compel the cancellation of certain water-rates and water-rents levied and charged against his property in Long Island City. Frederick W. Bleckwenn, as treasurer, etc., of Long Island City, appeals from an order entered in favor of petitioner. The following cases were submitted to abide the result of this appeal, viz.: *In re Rosanna F. Anable*, (2 cases;) Application of E. Nott Anable; Application of Trustees of Union College; Application of James D. McMann.

Argued before BARNARD, P. J., and DYKMAN and PRATT, JJ.

W. J. Foster, for appellant. J. Ralph Burnett, (*Elitphalet Nott Anable*, of counsel,) for respondent.

BARNARD, P. J. By the charter of Long Island City vacant lots were subject to rents for water. Title 10, § 9, subd. 4, c. 461, Laws 1871, seems to refer to lots which had buildings on them. The act (section 12, tit. 10) required the rents to be assessed upon the building "or vacant lot" chargeable with water-rent. By chapter 415, Laws 1875, and by chapter 100, Laws 1879, and by chapter 684, Laws 1881, the water-rents are put upon lots vacant or otherwise. By the charter of 1871, a board of water commissioners was authorized to assess the water-rents, and no notice was provided for to the tax-payers. The list was made out and filed, and notice given to the tax-payers, who were then bound to pay the assessment to the city treasurer. The tax was invalid. *Remsen v. Wheeler*, 105 N. Y. 573, 12 N. E. Rep. 564. The legislature confirmed the water taxes, and levied them on the several pieces of land on which they were heretofore assessed, or appeared of record to have been so assessed or charged. Chapter 383, Laws 1882, §§ 1, 2; chapter 656, Laws 1886, § 15. The legislature had the power to impose a tax in this way. The question was directly presented in *Re Van Antwerp*, 56 N. Y. 261. The

court says: "It is also objected that it is not competent for the legislature to validate a void assessment, and that it could only authorize a reassessment. The answer to this is that the legislature did not attempt to legalize the old assessment, but itself exercised the power of making new assessments. The old assessments are referred to, not for the purpose of adoption, but for the purpose of fixing the specific amount by the proportion specified, and the act expressly levies that amount as a tax." This doctrine is not touched in the case of *Stuart v. Palmer*, 74 N. Y. 183. The power of the legislature to tax is only limited by an apportionment of the burden. It is not denied that the legislature may not only tax, but apportion the burden among the property owners. In *Rensen v. Wheeler*, 105 N. Y. 573, 12 N. E. Rep. 564, there was no act of the legislature validating the void tax. In *Spencer v. Merchant*, 100 N. Y. 585, 3 N. E. Rep. 682, the court of appeals say: "The act of 1881 determines absolutely and conclusively the amount of tax to be raised, and the property to be assessed, and upon which it is to be apportioned. Each of these things was within the power of the legislature, whose action cannot be reviewed in the courts upon the ground that it acted unjustly or without appropriate and adequate reason. * * * The legislature may commit the ascertainment of the sum to be raised and of the benefited district to commissioners, but is not bound to do so, and may settle both questions for itself, and when it does so its action is necessarily conclusive and beyond review." These remarks were made in a case where the legislature had removed the tax originally imposed under a void law. The order should therefore be reversed, with costs and disbursements.

BLIVEN v. LYDECKER et al.

(Supreme Court, General Term, Second Department. December 10, 1889.)

USURY—EXACTED BY AGENT.

Usury exacted by an agent in effecting a loan will not invalidate an obligation given to secure the loan, unless the lender knew of and assented thereto.

Appeal from special term, Rockland county.

Action by Albert A. Bliven against Smith Lydecker and others. The complaint was dismissed, and plaintiff appeals.

Argued before BARNARD, P. J., and PRATT, J.

Garrett Z. Snider, for appellant. Irving Brown, for respondents.

BARNARD, P. J. The action in this case is one for foreclosure of a mortgage, and the defense to the same is based upon the usury exacted from the borrower by John W. Schuler, acting as agent for his wife, Margaretta Schuler. The mortgage in this case was executed March 25, 1879, and dated February 1, 1879, and has been transferred by a subsequent assignment to the plaintiff, Bliven. The testimony on behalf of the defendant tends to show that the mortgage, amounting to \$4,000, was made up of the following items:

Note dated December 12, 1878, - - - - -	\$1,000 00
Interest 3 months and 13 days, - - - - -	20 00
Note dated February 15, 1879, - - - - -	1,800 00
Interest 1 month and 10 days, - - - - -	14 00
Note dated January 18, 1879, - - - - -	200 00
Interest 2 months and 7 days, - - - - -	2 59
Ten per cent. on \$4,000, - - - - -	400 00
Cash from Mr. Schuler, - - - - -	563 38

Total sum included in mortgage, - - - - - \$4,000 00

There is no evidence in this case bringing the details of the loan home to Mrs. Schuler, or showing that she took any part, active or passive, in effecting

the same. The testimony of Smith Lydecker, for the defense, expressly states that he never heard her name mentioned in connection with the transaction until John W. Schuler said that he wished the mortgage to be made out in her name. In order to render an obligation by way of mortgage or otherwise void on account of usury, the recent decisions in this state seem to demonstrate that it is necessary to clearly establish knowledge and assent on the part of the lender, and that no usury on the part of an agent is fatal to the validity of an obligation unless such assent is shown beyond a reasonable doubt. In the case under consideration, there is nothing in the evidence to justify the findings in support of such assent. *Stillman v. Northrup*, 109 N. Y. 478, 17 N. E. Rep. 379, cited and approved in *Baldwin v. Doying*, 114 N. Y. 453, 21 N. E. Rep. 1007; *Philips v. Mackellar*, 92 N. Y. 34. In *Stillman v. Northrup*, cited above, the court says: "It is not sufficient for the defendants merely to show that plaintiff's agent took and exacted the \$50 as a condition of the loan, but it was incumbent upon them to show that he took the \$50 with the knowledge and assent of the plaintiff, so that she, at least by acquiescence, became a party to the usurious exaction." The tendency and spirit of the cases above referred to seem to overrule the decision in *Wyeth v. Brantiff*, 84 N. Y. 627, and to establish a more just and equitable rule than that there laid down. In *Stillman v. Northrup* the court further decides that any subsequent knowledge, after the date of the making of the loan by the lender, in regard to usury on the part of the agent in connection with the making thereof, even if proved, makes no fatal objection to the force and validity of the obligation. The judgment, therefore, should be reversed, with costs. All concur.

DIAMOND BRICK CO. v. NEW YORK CENT. & H. R. R. CO.

(*Supreme Court, General Term, Second Department. December 10, 1889.*)

RAILROAD COMPANIES—FARM CROSSINGS—GATES.

Under 2 Rev. St. N. Y. (7th Ed.) p. 1604, § 3, providing that railroad companies shall maintain fences with openings, bars, or gates at farm crossings, "for the use of the proprietors of the land," where a gate is so maintained by a railroad company it is the duty of the owner of the land to close the gate after using it.

Appeal from circuit court, Rockland county.

Action by the Diamond Brick Company against the New York Central & Hudson River Railroad Company, for the alleged negligent killing of plaintiff's horse. Judgment for plaintiff, and defendant appeals.

Argued from BARNARD, P. J., and PRATT, J.

Ashbel Green and *Herbert E. Kinney*, for appellant. *George W. Weiant*, for respondent.

BARNARD, P. J. The defendant operates the West Shore Railroad. The railroad passes through the land of Mrs. Reed. The company built a fence along its lands as required by statutes, and made a gate in the fence at one part for a farm crossing. In September, 1886, the plaintiff had a horse on Mrs. Reed's land by her permission, and on the occasion in question the horse passed through the gate, which was open, and was killed by the defendant's train. The evidence is very conflicting as to the fact whether this gate was commonly or only occasionally open, and as to the fact whether any one but the occupants and lessees of Reed's farm used it. There was evidence given by the defendant tending to show that the employes of the company constantly shut the gate, sometimes as often as four and five times in a day. There was proof that the defendant's track-walker shut the gate twice on the day of the accident, the last time in the afternoon of the day. The horse was seen alive at about 3 o'clock in the afternoon, and was killed a little after 5 o'clock of the same day. Under this state of the evidence the court charged the jury

that Mrs. Reed owed no duty in reference to keeping the gate closed. This was erroneous. The law directs the railroad to fence, but when the land was cut, one part from another, openings, bars, or gates were to be made "for the use of the proprietors of the land."¹ These proprietors are bound to keep the gates shut when not open for use in passing over the railroad. It is a private gate to be kept in repair by the railroad company, but which is to be used solely by the proprietors of the land. If the company shut the gate after midday, and it was left open by Mrs. Reed subsequently, a direction to the jury that she was not bound to shut the gate after using it put a duty upon the railroad company which was not required by the law. The case of *Shepard v. Railroad Co.*, 35 N. Y. 641, was decided upon facts arising before the railroad law was passed which bound railroad companies to fence their track. In *Spnner v. Railroad Co.*, 67 N. Y. 153, the defendant had adopted a private crossing, and was accustomed to shut the gate at night, early or late, as its business necessities required. The company, therefore, left the gate open, and was responsible for an accident to the owner's cattle. If the gate was shut by the defendant a few hours before the accident, there was no proof of any negligence of the defendant. The judgment should be reversed, and a new trial granted, costs to abide event. All concur.

FITZSIMMONS v. McCONNELL et al.

(Supreme Court, General Term, Second Department. December 10, 1889.)

1. COLLISION—NEGLECTANCE.

In an action for personal injuries caused by a collision of defendants' steam-tug with plaintiff's row-boat, evidence that plaintiff, on looking around, saw the tug and a canal-boat tied to a dock about half a mile ahead of him; that, after proceeding about a hundred feet further, on again looking around, he found himself between the tug and canal-boat, which were coming down the river at full speed; that plaintiff immediately gave alarm to the tug by loud shouting, which was joined in by other persons near by on the river; that the tug showed no response, but kept right on until plaintiff's boat was struck; and that it was light at the time, so that those in charge of the tug could see half a mile down the river,—is sufficient to take the case to the jury on the question of defendants' negligence.

2. SAME—CONTRIBUTORY NEGLIGENCE.

Where there is evidence that plaintiff, as soon as he saw the tug, commenced backing his boat; that he had time to back his boat half a dozen or a dozen strokes, and was going rapidly back at the time of the collision; and that the tug could stop in 800 feet by merely shutting off the power without reversing,—it is for the jury to pass on the question of plaintiff's contributory negligence.

Appeal from circuit court, Kings county.

Action by Thomas A. Fitzsimmon against James McConnell and another for personal injuries and the loss of his shell row-boat, caused by a collision with defendants' steam-tug. Plaintiff had a verdict and judgment thereon; and, from an order denying defendants' motion for a new trial, they appeal.

Argued before BARNARD, P. J., and PRATT, J.

Hyland & Zabriskie, for appellants. *Tighe & Molloy*, (T. J. Molloy, of counsel,) for respondent.

BARNARD, P. J. The evidence was sufficient to take the case to the jury as to the question of the negligence of the defendants. The plaintiff was in a shell-boat, going up the Harlem river, at about sunset, on the 10th of September, 1889. When the plaintiff arrived within half a mile of McComb's dock, he looked over his shoulder, and saw a tug and canal-boat tied to the dock ahead of him. He proceeded on his course up the river about a hundred feet, when, on again looking around, he found himself between the tug and canal-boat, which were coming down the river at full speed. The plaintiff imme-

¹2 Rev. St. N. Y. (7th Ed.) p. 1604, § 2.

diately gave the alarm to the tug by loud shouting, which was joined in by other persons near by, on the river. The tug showed no response, but kept right on, until the plaintiff's boat was struck,—cut in two,—and the plaintiff thrown into the river, and under the canal-boat and tug. It was light at the time, so that those in charge of the tug could see a half mile down the river. The first notice of the plaintiff's danger was given by a deck hand on the canal-boat, and then it was too late to avoid the collision. There is but one inference possible from this testimony. The tug was not under proper lookout and control. It seems as if there was no one in the wheel-house, and that the pilot was upon the deck engaged in other duties. It is not necessary to find this to be the fact, because if he was in the wheel-house he did not look ahead in anticipation of danger to others, and he did not heed the cries of warning so as to save the happening of the accident. The plaintiff made out a case for the jury, under *Cooper v. Transportation Co.*, 75 N. Y. 116.

The question of the plaintiff's negligence (if any) which contributed to the accident was also one for the jury. The plaintiff saw the tug a hundred feet away, and at once commenced backing his boat. He had time to back for a half dozen to a dozen strokes, and was going rapidly back at the time of the collision. The tug could stop in 300 feet by merely shutting off the power, and without reversing. Under this evidence, it was for the jury to pass upon the contributory negligence of the plaintiff. *Bills v. Railroad Co.*, 84 N. Y. 5. The judgment should therefore be affirmed, with costs.

COCKS v. HAVILAND *et al.*

(Supreme Court, General Term, Second Department. December 10, 1889.)

APPEAL—WAIVER OF RIGHT.

The right to appeal from that portion of a surrogate's decree which reduces an annuity is not lost by a subsequent petition to direct the investment of securities to produce the annuity under the decree, and the acceptance of benefits under a decree entered on such petition, the petitioner's right to the reduced annuity not being questioned in the latter proceedings.

Appeal from surrogate's court, Westchester county.

Petition by Adelia Cocks against Daniel E. Haviland and others. From the decree rendered petitioner appeals. Respondent's motion to dismiss the appeal was denied at a special term of the supreme court, and is renewed here. For former report see 1 N. Y. Supp. 904.

Argued before BARNARD, P. J., and DYKMAN, J.

James A. Hudson, for appellant. Thomas Nelson, for respondents.

BARNARD, P. J. The facts, so far as pertinent to this motion, are brief. John Cocks died in 1868, and left a will, by which he directed that a sufficient sum be invested in lands in Westchester county, to produce an annuity of \$1,000 a year for his widow. The widow and five children and two sons-in-law of testator, were made executors, and all qualified. The executors did not do their duty, but invested \$10,000 at 10 per cent. on lands in Wisconsin, and substantially divided up the rest of the estate among the children. The western investment did not produce the amount of the annuity, and the arrears thereof became large. On the 6th of July, 1887, Haviland, a son-in-law, his wife a child of testator, and Mrs. Varney, another child, paid the widow \$1,800, and she gave them a full release from all liability for the annuity. In February, 1882, the surrogate of Westchester county decreed that this release was good, and that the annuity was thereby reduced to the amount of \$777.03 per annum. In November, 1886, the widow petitioned the surrogate to direct an investment of securities under the decree. Mrs.

Haviland asked for an accounting. This was ordered, and the parties were brought in for that purpose. The remnant of the estate was settled, and an investment ordered for the widow on the basis of the reduced annuity, and certain costs were allowed to the widow. This decree was made in 1887. The widow appealed from a portion of the decree, (1 N. Y. Supp. 904,) and that case is still pending. The widow now appeals from that portion of the decree of 1882 which reduced the annuity. This motion to dismiss the appeal is based upon the fact that the widow has accepted benefits under this decree, and cannot, therefore, appeal from the decree which is adverse to her, and accept the portion in her favor, and receive money under it. The motion to dismiss should be denied. The relief which the widow got under the decree of 1882, by the decree of 1887, was not controverted. The only questions disposed of by the last decree were as to the remnant of the estate, and, while the method of investment was questioned, the widow's right was not questioned as to the reduced annuity. *Alexander v. Alexander*, 104 N. Y. 648, 10 N. E. Rep. 87. The question presented on the appeal from the 1882 decree will not require a return of anything received under the decree of 1887. The motion, therefore, should be denied, with \$10 costs.

COCKS v. HAVILAND *et al.*

(*Supreme Court, General Term, Second Department. December 10, 1886.*)

ANNUITY—RELEASE.

Where a will directs the investment of a sum sufficient to produce a certain annuity, which the executors are to pay to testator's widow, a release executed by the widow to part of the executors, from all claim on them either as executors or individuals on account of the annuity, past or future, does not operate to reduce the annuity, but only to discharge the released executors from liability.

Appeal from surrogate's court, Westchester county.

Petition by Adelia Cocks against Daniel E. Haviland and others, executors of the will of John Cocks, deceased, for an accounting, and for the payment to petitioner of an arrears of annuity. The surrogate rendered a decree finding that the amount of the annuity was reduced to a certain sum by a release executed by petitioner, and she appeals. Pending the appeal, David Cocks, one of the executors, died, and his widow and children were made parties respondent.

Argued before BARNARD, P. J., and DYKMAN, J.

James A. Hudson, for appellant. *Thomas Nelson*, for respondents.

BARNARD, P. J. The case is very voluminous. So far as the facts contained therein are material to the determination of the point presented, they may be very briefly stated: John Cocks, a resident of the county of Westchester, died in 1868, and directed that a sum of money sufficient to produce a net annuity of \$1,000 should be invested in Westchester county. The executors were directed to pay this annuity to the testator's widow so long as she remained his widow. This direction in the will was wholly neglected, except that the executors put \$10,000 at interest on bond and mortgage in Wisconsin at 10 per cent. This mortgage was not good. The widow was one of the executors, but seems to have had nothing to do with the estate, although she qualified as one. When the Wisconsin mortgage failed to produce the annuity, the widow was pacified by a guaranty given by some of the children to pay the sum personally. Irregular payments were made on it. In July, 1877, there was \$1,300 due for back payments, and Haviland and his wife and Mrs. Varney, three of the executors, paid the widow \$1,800, and she gave them a release as executors and as individuals from all claims against them, not only for the back and future annuities, but also for Mrs. Haviland's and Mrs. Varney's share in the estate of John Cocks, which had been

divided between the children on the supposition that the Wisconsin mortgage was all which the widow needed for her annuity. The surrogate held that these payments operated to reduce the annuity to one of \$777.03. This does not seem to be just. The annuity remained entire, and was reduced by the payment of this sum of \$1,800, so as to pay all arrears due and \$500 on future ones. The wreck of the estate was bound to pay the annuity in full, so far as it was sufficient for that purpose. The only result of the release was that the widow had no personal claim to make against the three co-executors discharged from liability under its provisions. The case shows no fraud upon their part by which the release was procured. That part of the decree which reduces the annuity should be reversed, with costs to appellant out of the estate.

In re MAPES' ESTATE.

(*Supreme Court, General Term, Second Department. December 10, 1889.*)

WILLS—RESIDUARY CLAUSE.

Under a will giving certain specific legacies, with a residuary clause giving all the residue of testator's property to his daughter, property bequeathed to a son for life, with remainder to the son's surviving children, passes, under the residuary clause, on the son's death without issue after the daughter's death.

Appeal from surrogate's court, Orange county.

Petition by Oscar Druland and George H. Mapes, executors of the last will of George Mapes, deceased, for distribution of property in their hands and for their discharge. From the decree rendered various interested parties appeal.

Argued before BARNARD, P. J., and PRATT, J.

F. V. Sanford, (*Lewis E. Carr*, of counsel,) for appellants Andrew J. Mapes and others. *W. D. Mills*, for appellants Hannah Mapes and George H. Mapes. *John F. Bradner*, for respondent the Ladies Home Society of Orange county. *B. R. Champion*, for respondents executors of George Mapes, deceased, and executors of Sarah J. Mapes, deceased. *Bangs, Stetson, Tracy & MacVeagh*, for respondent the American Bible Society.

BARNARD, P. J. The testator intended to dispose of all his property. He made certain specific legacies and bequests, and then made a very comprehensive residuary disposition of all the residue of his property to his daughter, Sarah Mapes. There was a bequest of a life-estate in \$4,000 to his son, with remainder to the children of this son who survived him. It is this clause which occasions the question to be adjudged. The son died after his sister, and left no children. Did the testator keep back a possible estate to revert to him in case the son died childless? It seems very clear that he did not. He provided for the life-estate and for the remainder, and, if there was anything beyond that, he bequeathed it by the residuary clause. The intention to include in the residuary clause all the testator's property and interests is preserved, and the intention to exclude from its operation must appear by words limiting the effect of the clause, or by an intention to exclude from the whole will taken together. *Riker v. Cornwell*, 118 N. Y. 115, 20 N. E. Rep. 602; *Floyd v. Carow*, 88 N. Y. 560. The judgment should therefore be affirmed, with costs to respondent out of the estate.

GERNSHEIM et al. v. OLCOTT et al.

(*Supreme Court, Special Term, New York County. December 27, 1889.*)

1. RAILROAD COMPANIES—REORGANIZATION—NEW STOCK—INJUNCTION.

Where there is an agreement between the stockholders of a corporation and its creditors for reorganization of the company, and the issue of new stock in lieu of the old, on condition that the old stockholders pay an assessment sufficient to discharge the floating debt, and another corporation is designated to make the assess-

ment and distribute the stock, it has no arbitrary power to fix the assessment, but is charged with a trust duty, and the stockholders may enjoin the distribution of the stock until the determination of their rights under the agreement.

2. SAME—FEDERAL AND STATE COURTS.

A state court is without jurisdiction or power to interfere with a decree of foreclosure, made by the circuit court of the United States against a railroad company, where the railroad was within the jurisdiction of the court making the decree, and all the parties in interest were before it.

At chambers. On motion to continue injunction.

Action by Michael Gernsheim, Eugene A. Loeb, and Albert Loeb, suing on behalf of themselves and all others similarly situated who may desire to come in and contribute to the expenses of the action, against Frederic P. Olcott, the Houston & Texas Central Railway Company, Collins P. Huntington, and others, to reduce an assessment levied on the stockholders, and to enjoin defendants from disposing of any stock of the new or reorganized Houston & Texas Central Railway Company. For former litigation, see *Development Co. v. Railway Co.*, 27 Fed. Rep. 344; also, *Steam-Ship Co. v. Railway Co.*, and *Trust Co. v. Same*, 32 Fed. Rep. 525.

Dittenhoefer & Gerber, (*Frederick R. Coudert*, *A. J. Dittenhoefer*, and *Jefferson Chandler*, of counsel,) for plaintiffs. *Butler, Stillman & Hubbard*, (*Almon Goodwin* and *Adrian H. Joline*, of counsel,) for defendants Olcott and Central Trust Company. *Herbert B. Turner*, of counsel, for the Farmers Loan & Trust Company. *Charles H. Tweed*, of counsel, for defendant Huntington.

PATTERSON, J. On the 26th of September, 1889, one of the justices of this court granted an injunction in this action by which the defendants, their agents, servants, etc., are enjoined and restrained from executing, delivering, selling, hypothecating, giving away, or in any manner or form issuing, alienating, or parting with any shares of stock of the new or reorganized Houston & Texas Central Railway Company No. 2, or any bonds secured by mortgage upon the property of that company, or any stock or bonds issued, or intended to be issued, pursuant to an agreement dated December 20, 1887, between the several classes of mortgage bondholders of the Houston & Texas Railway Company No. 1, and the Southern Pacific Company and the Central Trust Company; and from executing or delivering any mortgage or deed of trust upon the property of said corporation, or otherwise incumbering, selling, or disposing of or alienating the property or franchises of said company, or from recording, filing, or causing, permitting, or suffering to be recorded or filed in any register's office or clerk's office, or deposited with any register or prothonotary, any mortgage or deed of trust upon the property of said corporation. This injunction was granted upon a complaint filed by the plaintiffs Gernsheim and Loeb, suing on behalf of themselves and others similarly situated who may come in and contribute to the expenses of the suit, and upon an affidavit of Gernsheim. The ground of restraint is that the defendants during the pendency of the suit are doing, or are about to do, certain things which would render ineffectual any judgment that might be obtained. Leave was given in the order of injunction to the plaintiffs to serve additional affidavits, and the defendants were required to show cause why the restraint should not be continued until the final hearing of the cause. On the return of the order to show cause, the motion now before the court to continue the injunction was argued. The plaintiffs named upon the record were stockholders of the Houston & Texas Central Railway Company, called "No. 1," and which will be spoken of as the "old corporation." The defendant the Central Trust Company becomes a principal defendant because it is the trustee for distribution of all the securities to be issued under the reconstruction agreement hereinafter to be referred to, and is charged with the execution of all the important details of that agreement. It appears in an affidavit used on the argu-

ment of this motion that other stockholders, who are said to be similarly situated with the plaintiffs named in this action, have put themselves in a position, if not to take advantage of this suit, at least as protesting against the method of carrying out the reconstruction agreement; but their particular attitude to the matters under consideration will be commented upon hereafter. The plaintiffs make an attack upon the reorganization of the railroad above named, and they claim that in that reorganization they have been wronged by the parties controlling it. The accusation they make reaches back several years, and they have endeavored to show a systematic and continuous effort by those parties to get possession of this railroad, to use it for their own purposes, and to destroy the interest of a minority of the stockholders of that corporation. The material facts upon which this contention is made may be stated as follows: The Houston and Texas Central Railway Company No. 1 was a corporation organized under the laws of the state of Texas, and it owned and operated three lines of railway,—one being the main line, extending from Houston to Dennison, a distance of 345 miles; another, extending from the main line, at a place called Hempstead, to the city of Austin, in Texas, a distance of about 118 miles; and a third line, 57 miles long, known as the "Waco & Southwestern Division." In addition to these lines of railway, the company owned a very large amount of land which had been public lands of the state, and which the railway company had acquired by grant from the state of Texas. They amounted to about 10,240 acres of land for each mile of its road. At certain times, between June, 1866, and April, 1881, the railway corporation referred to executed certain mortgages as collateral security for bonds upon its railway and lands, and these mortgages were—*First*, one upon the main line, dated July 1, 1866; *second*, a mortgage on the Western Division, dated December 21, 1870; *third*, a mortgage on the Waco & Southwestern Division, made in June, 1873; *fourth*, a mortgage known as the "Main Line & Western Division Consolidated Mortgage" made in October, 1872; *fifth*, a mortgage known as the "Waco & Southwestern Division Mortgage," made in May, 1875; *sixth*, a mortgage made in May, 1877, known as the "Income Indemnity Mortgage," covering certain parts of the road therein named, and certain land grants; and, *seventh*, a mortgage made in April, 1881, called a "General Mortgage," covering all the railways of the company and its franchises, including all its real and personal property acquired or to be acquired in the state of Texas, and all the lands covered by the land grants. Sixteen million eight hundred and twenty-three thousand dollars of bonds to be issued under this mortgage were to be reserved by the trustees, and not issued, except for the purpose of exchanging and retiring bonds, then outstanding, issued by that railway company.

The history of this particular litigation begins about the year 1883, and it is set forth in the motion papers that in and prior to that year the greater part of the stock of the Houston & Texas Railway Company, and the controlling interest in that company was owned by Morgan's Louisiana & Texas Railroad & Steam-Ship Company, a corporation; and that the defendant Huntington and his associates, interested in another corporation called the "Southern Development Company," sought to obtain the control of the Morgan Company, and thereby to acquire the ownership or the majority influence in the Houston & Texas Central Railway Company; and that the Southern Development Company and another company, called the "Southern Pacific Company," in which Huntington was interested, acquired the interest of the Southern Development Company in the railroad referred to, and thus, in the name of the "Southern Pacific Company," obtained that control, and became dominant in the Houston & Texas Central Railway Company; and that, immediately upon getting such control, there was begun a series of machinations with a view to acquiring complete possession of this Houston & Texas Central Railway, to the exclusion of the minority owners, and in such a way as to destroy the in-

terests of those minority owners in that railroad corporation. It is suggested in the moving papers that the first step taken to accomplish this purpose was that the Southern Development Company, in January, 1885, acquired, by purchase from holders thereof, the coupons of the first mortgage bonds on the main line and branches, such coupons not having been paid by the railway company, and that after the Southern Development Company got possession of those coupons they began a suit in Texas against the Houston & Texas Central Railway Company; claimed therein that that company was indebted to it (the Southern Development Company) in the sum of \$600,000 for money loaned, and in that suit had a receiver appointed of the Houston & Texas Railway Company. The order appointing this receiver was made, with the consent of the railway company, in 1885. Thereafter, in January, 1886, the trustees of certain of the mortgages filed bills for the foreclosure of such mortgages, and these actions were pending in May, 1886, as was also another action, brought by the Farmers' Loan & Trust Company, as trustee of certain other of the mortgages above referred to; and all the suits for the foreclosure of mortgages were consolidated by an order of the United States circuit court for the eastern district of Texas, in which all such actions were pending, such order being made at the May term, 1886. It further appears by the moving papers that the suit of the Southern Development Company against the railway company was dismissed by the court, and in the consolidated mortgage foreclosure cause receivers were appointed by the United States circuit court; and to the appointment of those receivers of the Houston & Texas Central Railway Company that company consented, through its attorneys representing it. In all these suits, and in the consolidated suit, the first mortgage of the Waco and Southwestern Division was not included.

What is called an important fact is now made prominent in the record; and that is that at the time of the commencement of these foreclosure suits, and at the time of the consolidation of those suits, none of the bonds had matured, and no part of the principal of the mortgages, or either of them, was due. It is apparent, upon reading these mortgages, that none of them were by their express terms liable to be foreclosed for the non-payment of interest. Provision was made in them for what should be done to protect the bondholders in case of non-payment of interest; that is to say, the trustees of the mortgages were to take possession of the road, and operate it and its branches, or those parts of the road and branches covered by the mortgages, of which they were the trustees respectively, in the interest of the bondholders. The consolidated foreclosure suit went to a decree; but before that decree was entered there had been much negotiation between committees representing the holders of various classes of mortgage securities and the railroad company and the trustees of the mortgages with reference to what should be done to protect their interests, and as to what arrangement should be made respecting a decree to bring about that result. In some of the foreclosure suits preceding the consolidation of the actions in May, 1886, defenses had been interposed setting up that by the terms of the mortgages the principal was not due, and hence decrees of foreclosure could not be made, and that the lands should be sold before the railway or its franchises were resorted to. On the agreement which was entered into between all the parties to the suits for a decree in the consolidated suit, these defenses, to which allusion has been made, were withdrawn, and a decree was entered for the foreclosure and sale of all the lines of railway and the lands, the Waco Division to be sold subject to the first mortgage thereon; and this arrangement was made in view of, and to carry out the agreement of reconstruction, which agreement of reconstruction is undoubtedly the particular thing which is meant to be assailed in this action. But it is urged by the plaintiffs that the first stage in the accomplishment of the scheme by which certain of the defendants attempted to destroy the interests of the stockholders of the railway company was attained

when the answers above referred to were withdrawn, and the consolidated suit was allowed to proceed, on the basis that all the mortgages might be foreclosed for non-payment of interest. The agreement of reconstruction was made December 20, 1887, and provides, in substance, that a new corporation, by the same name, is to be created under the laws of the state of Texas, and it is known in this action as the "Houston & Texas Railroad Company No. 2;" but I shall call it the "new corporation;" that the Central Trust Company of the City of New York, of which the defendant Olcott is president, shall be the purchaser at the foreclosure sale of all the lines of railway and lands, except the Waco Division, which was bought in by Mr. Downs, and that upon such purchase the reconstruction agreement should be carried out by the creation and distribution of various securities among the mortgage bondholders who were interested under the mortgages that were foreclosed in the consolidated suit, and it provides for a material decrease in the rate of interest such securities are to bear. It also provides for the payment of a bonus of \$50 per bond to holders of the old first mortgage bonds on interest account. In this reconstruction agreement, provision is also made for the benefit of the stockholders of the old corporation. They may participate in, and become entitled to, such an equal part of the shares in the new corporation as were held by them in the old corporation, provided they pay an assessment on the shares to be taken by them of stock in the new corporation. Such assessment to be for the purpose of paying off the floating debt of the old corporation, and certain expenses of the nature and character therein stated. The provision respecting stockholders of the old corporation also recites that if those stockholders do not avail themselves of the privilege of taking shares, then the Southern Pacific Company may take them on very different and much more advantageous terms. The decree in the consolidated suit was entered May 4, 1888, and under it a sale was had, the property bought in as required by the agreement, and the reorganization has been proceeded with.

This general statement of the principal facts in the case is sufficient as a basis for the consideration of the claims now advanced by the plaintiffs on the record in maintenance of the injunction, and they stand upon these propositions: That it is apparent from the history of the transaction as spread upon the papers, and as generally indicated here, that Mr. Huntington and his associates, through the corporations in which they were interested or which they controlled, undertook to acquire the ownership of the Houston & Texas Central Railway Company in order to make it tributary to, and a part of, certain interests and enterprises of their own; that, in order to accomplish that purpose, they first acquired a controlling interest in the stock of the railway company, then advanced money to pay coupons on first mortgage bonds, and took an assignment to themselves of such coupons, and then devised the scheme by which the road should be put in the hands of a receiver, and that certain foreclosure suits, which were resisted by the trustees of the mortgage, should all be consolidated in one suit, which they could control; that then an agreement should be made among the representatives of the various securities, other than stockholders, for a decree and sale of the railway under foreclosure, although the mortgages were not yet due; that on such sale the property should be bid in by some one named as trustee to carry out the provisions of a reconstruction agreement, under which agreement terms were to be made which would leave it in the hands of Huntington and his associates to so manipulate the accounts and indebtedness of the road, and put so large an obligation upon the stockholders as necessarily would prevent their taking stock in the new corporation, and would induce them to forfeit their right to come in under that agreement, and thus leave the whole of the stock in such a situation that it would be issued, according to the terms of the reconstruction agreement, substantially to the Southern Pacific Company, which was to ultimately reap the benefit of the scheme. It appears, further, in the plain-

tiffs' papers that at the time the reconstruction agreement was entered into the directors of the old corporation were the same persons who were interested in what are called the "Huntington corporations," and that, therefore, those who were charged with the protection of the stockholders of the old Houston & Texas Railway Company were the same persons whose interest it was to acquire the property and franchises of that corporation in order that they might extinguish the minority interest of the stockholders of that corporation, and thus accomplish the intent ascribed to them, or to Mr. Huntington, which has been referred to. In opposition to the motion, the answers of the Central Trust Company and of Huntington, and various affidavits, have been read, and the charges of fraud and collusion have been fully denied; and from these denials, under oath, sustained by facts recited, and the explanations stated in the affidavit of the president of the Farmers' Loan & Trust Company and of Mr. Turner, it sufficiently appears that the foreclosure suits were conducted and carried to decree solely in the interest of the incumbrancers, and without any design to aid in a scheme to injure stockholders of the railroad corporation. All that is alleged respecting the initiation and accomplishment of a purpose to destroy the minority interest lacks proof upon which a court would be justified in holding this injunction in force in its broad terms. Something more than a patchwork of suspicions is required to keep suspended and in confusion the interests of those who are entitled to bonds under the reorganization agreement. But, further, it is so apparent as to be self-evident that this court has neither jurisdiction nor power to interfere with the decree which was made by the circuit court of the United States in the consolidated suit for the foreclosure of these mortgages. The railroad was within the jurisdiction of the court. All the parties in interest were before it. The stockholders were represented by the corporation which was a party to the action, and appeared by counsel. It was entirely within the jurisdiction of that court to make the decree which it did make; and that decree is not subject in any way to review or revision by this court. If the stockholders are aggrieved by any of the provisions of that decree, their remedy is to apply in that forum for relief. All the defenses that are suggested as applicable to the mortgages were before that court, actually interposed and subject to its cognizance; and, although it is said that those defenses were withdrawn by consent, which is undoubtedly the fact, yet it is obvious from the record that the court considered those matters of defense, and made a finding that a foreclosure should be decreed for non-payment of interest. But, whether it did or did not consider them, it was competent to that court to make such a decree as seemed proper to it, under all the circumstances; and any attempt on the part of this court to interfere with that decree, or the proceedings had under it, would be a mere futility. It is obvious, therefore, that in this action, constructed as it is, the plaintiffs could not obtain any relief looking to the setting aside of that decree, or the sale made under it, or any arrangement made by the purchaser at the sale, or procure in this suit any radical or other change in the reconstruction agreement pursuant to which the property was bought in under the decree. All that is completely beyond the power and control of this court. Therefore, I am not called upon now to determine whether or not the mortgages could have been foreclosed until default was made in the payment of the principal sums, secured by them respectively, although, if the question were to arise as *res nova*, there would not be much difficulty in its solution. There certainly was a default in the payment of interest; and it may well have been considered by the court in which the decree was made that the provisions for trustees taking possession and operating the road on default in the payment of interest was not an exclusive remedy, but was merely one method of procedure on such default, and did not prevent the remedy of foreclosure for non-payment of that interest, which, while it would have led to a different form of decree,

and would have probably included a right of redemption on the payment of interest and expenses, would nevertheless have given to a purchaser under such a decree a title to be defeated only by a compliance with such conditions as might be annexed to such right of redemption. It is profitless, however, to speculate upon the possibilities of the case. It is sufficient that, with every interest before the court, and with undoubted jurisdiction to make precisely the decree that was entered, it has adjudicated upon all the matters which on this branch of the case are now challenged by the plaintiffs, and that this court is entirely without authority either to review that decree or to interfere with its execution, or to set aside and ignore the terms of the instrument under which the bidder and purchaser at the sale under that decree has undertaken to dispose of the property it has purchased.

But, even if this were not so, the case presented by the plaintiffs does not commend itself to the court as one indicating any right on the part of such plaintiffs to assail the foreclosure decree or the reconstruction agreement. The averments of the complaint are very general and vague respecting the attitude of the plaintiffs to this decree, and to the reconstruction agreement. They do not state in unqualified terms that these plaintiffs objected either to the decree or the agreement; and, while they say that they expected proper defenses to be interposed, and that, if a reconstruction of the road took place, their rights as stockholders would be protected, and that they were lulled into inaction because of that expectation, they nowhere distinctly and plainly show that they did not know that the decree of foreclosure was to be made by consent of all the parties to the suit, or that it was not for the best interest of the road and themselves, as stockholders, that the mortgages should be foreclosed, or that a reconstruction under the very agreement which is now drawn in question was not for the best interest of all concerned. Manifestly, if the reconstruction were carried out in good faith, and the rights of the stockholders were protected and preserved, they would have been benefited by the cutting down of interest and fixed charges; and it is not at all a gratuitous assumption that all stockholders would have willingly acquiesced in the reconstruction agreement, provided it was carried out in good faith, and without any effort to destroy their interest as such stockholders. It seems to me that it is the result, and not the method, which has induced this assault upon the proceedings antedating the levying of the assessment on the stockholders. The reconstruction agreement was made on the 20th December, 1887. This suit was not brought until September, 1889. It is nowhere explained in the moving papers why these plaintiffs remained quiescent for nearly two years without making any demonstration against the reconstruction agreement or the proceedings in the United States court which eventuated in the decree of foreclosure, except as above stated; and it is almost apparent that they were willing to take their chances under that agreement, and to acquiesce in all the proceedings that were had pursuant to it until they ascertained that the heavy assessment of 73 per cent. of which they complain was levied upon them, to enable them to take stock in the new corporation. This view is sustained by a document which the plaintiffs have introduced respecting other stockholders of the old company, who protest against the assessment on the stock. It is contained in the affidavit of M. Gernsheim, sworn to on November 20, 1889. He states that stockholders of the old company, holding shares of about \$1,000,000 par value, have served a protest on the Central Trust Company, relating to the matters connected with this litigation. In this protest there is not one word relating to anything else than the reconstruction agreement; and it is a protest merely against the action of the Central Trust Company in fixing the amount determined by that company as the sum to be paid by the shareholders of the old company in order to entitle them to take stock in the new company, and the grounds are stated as follows: *First*, that the amounts fixed are not in accordance with the terms of the articles of agreement of re-

organization; *second*, as embodying claims not a legitimate part of the floating debt of the company, and which are illegal and invalid and unauthorized under the terms of that agreement, and they give notice to the trust company "that they will contest the delivery of the stock as unauthorized under the terms of the reorganization agreement."

As I understand the case, after a minute examination of all these papers, and of all the facts which are presented upon this application, I am forced to the conclusion that these plaintiffs are not in a position to assail in this action either the decree of the United States circuit court in Texas, above referred to, or the reconstruction agreement, or the acts of the Central Trust Company under that agreement, so far as they relate to anything but stock in the new corporation, or to prevent the distribution of any of the securities by the Central Trust Company under that agreement which are to be handed over to the bondholders of the old corporation in exchange or substitution for the securities held by them, and that the only ground upon which they can ask the interposition of this court is in relation to the distribution of the stock in the new corporation; and I will now proceed to the consideration of that subject which presents the only question upon which this court, in my judgment, can assume to act. The power of this court to entertain that subject is based upon the fact that the Central Trust Company is a corporation of this state; and, under the reconstruction agreement, has become charged with a trust duty as to the distribution of that stock, and the plaintiffs are beneficiaries under the reconstruction agreement. They have rights under that agreement, and, as before intimated, those rights were conceded to them as part of the general scheme of compromise, by which the affairs of this railway company were to be adjusted, and the reorganization to go forward. All the stockholders are bound by that agreement, if they are to accept its advantages, so far as this cause is concerned. If they are to take stock in the new company, they must pay a proper assessment. It was to be fixed by the Central Trust Company; but I do not understand that this gave to the trust company any arbitrary power in fixing that assessment. It was bound to investigate, and ascertain the actual floating debt; for the assessment was to cover the floating debt and other charges named in the agreement. The stockholders have a right to know what the floating debt was or is for which they are to be charged, and they have a right to a fair and open account of that indebtedness, unless it is to be held that they came into the reconstruction agreement as a mere matter of grace, a view I am not able to adopt. At this point I think the injunction is proper until this subject is determined, and I have reached this conclusion in view of the following circumstances: It is alleged in the complaint that "the said assessment was made unnecessarily high, and, as plaintiffs verily believe and charge, in bad faith, by said Huntington and his associates, to bar out the present stockholders, and to enable, under the said plan of reorganization, the Southern Pacific Company to acquire the entire stock on the payment simply of the amount required to be paid to the first mortgage bondholders for interest and bonus, and the expenses of the reorganization." It is clear that the amount of the assessment, 73 per cent., or \$5,640,637 on the \$7,726,900 issued capital stock of the old corporation, is a very heavy sum with which the shares are weighted at the very birth of the new corporation; and it is also clear that the stockholders of the old corporation alone are to bear that burden, and that the Southern Pacific Company, which may take the shares if the old stockholders do not take them, will get them on much easier terms, (about 24 per cent.,) and that it is confessed that the Southern Pacific Company is interested in acquiring this line of railway to operate in connection with its own system. It is true, however, that since 1884 the road has not been administered by Huntington or his associates, although its board of directors was principally composed of persons likewise directors in the so-called "Huntington roads," but by receivers appointed by

the United States circuit court, and that by the terms of the reconstruction agreement the Central Trust Company was to fix the assessment to pay the floating debt and expenses alluded to. That company has shown what amounts of particular indebtedness it has adopted as making up the gross sum of \$5,640,637. Among them are two very large amounts, viz., Morgan's Louisiana & Texas Railroad and Steam-Ship Company, \$1,702,364.14, and Southern Development Company, \$366,302.93. There is nothing to show that the trust company has done anything to verify any of this indebtedness. The two claims seem to have been put in judgment in May, 1889, but both the debtor and creditor corporations were substantially managed by the same persons; and the plaintiffs here are entitled to full knowledge, and a disclosure of all the details of this indebtedness. I do not mean to express any opinion whatever adverse to the entire good faith of the trust company. The only question is whether the stockholders of the old company, under the reconstruction agreement, have a right to inquire into the indebtedness with which they are sought to be charged. I think they have such right; and, in order to make effectual any judgment they may obtain reducing the assessment, the injunction should be maintained prohibiting the distribution of the shares in the new company until the trial of the action. To that extent the injunction will be continued; but in all other respects it will be discharged.

TAYLOR v. TAYLOR.

(*Supreme Court, General Term, Second Department. December 10, 1890.*)

JUDGMENT—CORRECTION.

Defendant in ejectment alleged that he and plaintiff's grantor had agreed to purchase the land, and that plaintiff's grantor was to take the title; that each should pay part of the purchase money; and that, on repaying to plaintiff's grantor the amount paid by him, defendant should be entitled to a deed. He further alleged that he entered on the land under the agreement, and that he had since the purchase performed labor and services for plaintiff's grantor in full payment of the purchase money paid by the latter. The case was tried solely on the agreement, and no evidence was given as to the state of the account between the parties. The jury were told to find only as to the agreement, since, if that was proven as alleged by defendant, plaintiff's grantor could subsequently bring an action for the purchase money, wherein the account between the parties could be litigated. *Held*, that a judgment in defendant's favor on "the issues in the action" should be modified by giving defendant judgment only on the issues that were actually tried.

Appeal from special term, Westchester county.

Valerie P. Taylor brought ejectment against Francis A. Taylor. Defendant answered that on January 1, 1877, he and one Oliver D. Taylor, plaintiff's grantor, purchased the land under an agreement that the title should be taken in the name of Oliver, but that each should pay a portion of the purchase price; that the portion paid by Oliver should afterwards be repaid; that defendant should take possession of the land, and hold it as his own; and that, on being repaid, Oliver should execute a deed to defendant. Defendant further answered that he took possession of the land under the agreement; and that since the purchase he had performed work, labor, and services for Oliver in full payment of the purchase money. No testimony was offered at the trial as to this allegation, nor was the question whether or not defendant had repaid Oliver for the portion of the purchase money paid by him submitted to the jury. The only issues that the court permitted to go to the jury were whether the alleged agreement was ever made, and whether plaintiff, who was Oliver's wife, knew of it when she purchased the property. The court also instructed the jury that it appears that various mortgages on the land have been paid off, and that plaintiff has a large investment in the property, but these facts are not important; for, if the agreement is established, then Oliver may bring suit on the agreement, and have the courts declare that defendant shall fulfill the agreement by the payment of all the money within

a certain time; and, if he then should not pay it, defendant would have to give up possession of the property. There was a verdict in defendant's favor, and judgment was entered thereon "that the defendant have judgment against the plaintiff upon the issues in this action." Plaintiff then brought a new action for the purchase money, and defendant set up this judgment as a bar to her action. On plaintiff's motion an order was made modifying the judgment by giving defendant judgment against the plaintiff only on the issues that were actually tried. From this order defendant appeals.

Argued before BARNARD, P. J., and PRATT, J.

E. B. & C. P. Cowles, for appellant. *Thomas H. Barowsky*, (*Wm. A. Abbott*, of counsel,) for respondent.

BARNARD, P. J. The plaintiff sought to recover the possession of the lands in question by ejectment. The complaint is in the usual form. The defendant answered, among other things, that the defendant and the plaintiff's grantor made an agreement, prior to the purchase of the property at foreclosure sale, by which the plaintiff's grantor was to take the title; that each should pay a portion of the purchase money; and that the defendant should repay the plaintiff's grantor the amount paid by him, and be entitled to a deed. The case was tried solely upon this agreement. The jury were told that if there was proven such an agreement, and the defendant entered into and was in possession under it, they must find for the defendant. The right, by plaintiff's grantor, in case the agreement was found by the jury, to bring an action for the purchase money paid, was stated to the jury as a reason why they should not consider the state of the accounts between the parties. The order appealed from merely corrects the judgment so as to conform to the facts hereby tried and decided in this action.

It would be inequitable and unjust to permit a finding of the agreement to decide that there was nothing due to the plaintiff's grantor on account of the joint purchase, and where no evidence was given on the subject. The order should be affirmed, with costs and disbursements.

ROGERS v. EDMONDS.

(*Supreme Court, General Term, Second Department. December 10, 1889.*)

1. JUSTICES OF THE PEACE—PROCEDURE—ADJOURNMENTS.

Code Civil Proc. N. Y. § 2969, provides that at the time of the return of a summons, or the joinder of issue without process, but at no other time, a justice may adjourn the trial of an action not more than eight days, unless defendant has been arrested; and section 2960 provides that at such time the justice must, on plaintiff's application, adjourn the trial not more than eight days, but not unless on plaintiff's oath, if required by defendant, that it cannot be safely proceeded with for want of some material testimony. On the return-day of a summons, which had been personally served on defendant, the court on its own motion adjourned the trial five days for defendant's failure to appear. On the adjourned day, defendant again failing to appear, and plaintiff's attorney having produced satisfactory evidence of plaintiff's illness, the trial was again adjourned for five days, at the expiration of which judgment was rendered for plaintiff on defendant's failure to appear. *Held*, that the adjournments were regular.

2. SAME—ENTRY OF JUDGMENT.

A clerical error in the transcript, which shows the judgment to have been rendered on the return-day of the summons, is not prejudicial, but may be amended.

Appeal from Westchester county court.

In an action by Jane Rogers against Henry Edmonds before a justice of the peace, to recover the amount of a debt, the summons was personally served on defendant, and was returnable on March 11, 1889. A paper purporting to be a transcript of a judgment for plaintiff, rendered in the action on March 11th, was subsequently filed with the clerk of the county court. Execution was issued thereon, and returned unsatisfied; whereupon an order was made

in supplementary proceedings for the examination of Caroline E. Edmonds, who it was claimed was indebted to defendant. Defendant moved for an order to show cause why the judgment should not be vacated, because, among other things, the court had lost jurisdiction by irregular adjournments. This motion was based on the affidavits of the justice and others that on March 11th, the return-day of the summons, the defendant failed to appear, and the case was adjourned to March 21st, which was the true date of the rendering of judgment. On the granting of such motion the justice, and constable who served the summons, made affidavit that on the return-day the case, on the court's own motion, was adjourned to March 16th, for defendant's failure to appear, on which day plaintiff's attorney produced satisfactory evidence of plaintiff's illness, and, defendant failing to appear, the case was adjourned to March 21st, when, defendant still failing to appear, judgment was rendered for plaintiff on her evidence. Code Civil Proc. N. Y. § 2959, provides that at the time of the return of a summons, or the joinder of issue without process, but at no other time, the justice may adjourn the trial of the action not more than eight days, unless defendant has been arrested; and section 2960 provides that at such time the justice must, upon plaintiff's application, adjourn the trial not more than eight days, but not unless upon oath, if required by defendant, that the trial cannot be safely proceeded with for want of some material testimony. From an order denying a motion to set aside the order in supplementary proceedings, Caroline E. Edmonds and defendant appeal.

Argued before DYKMAN and PRATT, JJ.

George C. Andrews, for appellants. *J. S. Millard*, for respondent.

PRATT, J. The defendant was personally served, and failed to appear. The justice had jurisdiction of the person and subject-matter of the action. The defendant claims that because the justice made a mistake in a date in the transcript that all the proceedings are void. This contention cannot prevail. It was an error which was clearly amendable, and was duly amended. The adjournment was not irregular, and judgment was properly rendered on the adjourned day. The mistake was a clerical error on the part of the justice, and did not affect the judgment nor prejudice the defendant. We think no right of the defendant has been prejudiced, and that there is no merit in the appeal. Order affirmed, with costs.

DYKMAN, J., (*concurring.*) This is an appeal from an order of the county judge of Westchester county. The motion was made upon the theory that the justice of the peace in whose court the judgment was made had lost jurisdiction of the action by an irregular adjournment of the cause on the return-day of the summons. It was abundantly proved, by the answering affidavits to which the county judge gave credit, that the adjournments were regular, and that the justice of the peace did not lose jurisdiction. The order should be affirmed, with costs.

DAGGETT v. CITY OF COHOES.

(*Supreme Court, General Term, Third Department. December 11, 1889.*)

1. MUNICIPAL CORPORATIONS—DEFECTIVE SEWERS.

In an action for injuries to plaintiff's premises, caused by the discharge thereon of water and filth from an alleged defective sewer, evidence that when the sewer was built it was connected with another sewer, so that the bottom of one was on the same level with that of the other, and that there were six inches of stagnant water and sand in the old sewer; that a surface well had been constructed, which turned more surface water into the sewer in question than its capacity would warrant, and that the surface well had been removed some time before the trial; that there was an obstruction in the sewer which impeded the flow of the water, and caused an accumulation of solid substance, which obstruction had also been removed before the trial; that plaintiff's building, which was connected with the

sewer, had been injured; and that she had repeatedly complained to the city authorities that water was running into her cellar,—is sufficient to warrant the submission to the jury of the question whether the water from the sewer caused the alleged injury to plaintiff's property, and whether the filth came from the sewer.

2. SAME—NOTICE OF DEFECTS.

Notice to defendant's street superintendent and mayor that water was running into plaintiff's cellar, followed by evidence that the superintendent thought that defendant should clean out the cellar, is sufficient to warrant a finding that defendant had notice of the obstructed condition of the sewer; the court having charged the jury that defendant need exercise only ordinary care to ascertain the existence of the obstruction.

3. SAME—INADEQUATE SEWER.

Defendant is liable for the throwing of water and filth on plaintiff's premises, caused by the construction of a surface well which turned a large amount of surface water that had previously run in other directions into the sewer in question, causing its overflow. Following *Siefert v. City of Brooklyn*, 4 N. E. Rep. 321.

4. SAME—DAMAGES—EVIDENCE.

Where plaintiff's building has been put out of repair by an obstruction in the sewer, she may prove the decreased value of the property owing to its impaired condition; the injury being permanent, and defendant having objected to plaintiff's offer to prove how much it would cost to restore the building.

5. SAME—VOLUNTARY CONNECTION WITH SEWER.

The fact that plaintiff has voluntarily connected her premises with a public sewer of defendant is no bar to her recovery for injuries caused by defendant's negligence in permitting it to be out of repair.

Appeal from circuit court, Albany county.

This is an action to recover for damages occasioned to plaintiff's premises by the discharge thereon of water and other contents of a sewer constructed by defendant in Hart street, in the year 1871. This street runs east and west, and the sewer discharges into a sewer in Main street, which street runs north and south. The plaintiff claims that for a part of its length this Hart-Street sewer was without descent. She also claims that, by the construction in 1877 of a surface well or cess-pool at the north-west corner of Congress and Hart streets, a large amount of surface water which had previously run in other directions was turned into the Hart-Street sewer, and was more than its capacity; and that from this cause, among others, plaintiff's premises, on the south-west corner of those streets, were injured. This surface well was removed in 1884. The plaintiff also claims that an obstruction was in the Hart-Street sewer for a long time, which also caused the discharge on plaintiff's premises of water and foul contents of that sewer; and that the defendant was negligent in not discovering and removing that obstruction until after much injury had been done. The injury claimed is twofold,—an injury to the building by a settling of the walls, and an injury of loss of rent by the deposit of filth on the cellar floor. The cause was tried at circuit, and the jury found a verdict for the plaintiff. From the judgment thereon, and the usual order denying a motion for a new trial, the defendant appeals.

Argued before LEARNED, P. J., and LANDON and PUTNAM, JJ.

P. D. Niver, for appellant. *Doyle & Fitts*, for respondent.

LEARNED, P. J. The first point made is that the plaintiff should have been nonsuited. Defendant claims that there is no proof that the water from the sewer caused the alleged injury to the house, and that there is no proof that the filth came from the sewer. There is evidence that when the Hart-Street sewer was built it was connected with the Main-Street sewer, so that the bottom of one was on the same level with that of the other, and also that at that time there were six inches of stagnant water and sand in the Main-Street sewer. There is evidence, also, of the construction of the surface well, and its removal in 1884. It is shown, also, that there was at a certain time an obstruction in the Hart-Street sewer, which arose from the fact that a sewer-pipe from some premises, having been connected at the top instead of the side of the Hart-Street sewer, had dropped in, and had thus obstructed the flow of

water, and caused an accumulation of solid substance. This was removed some time in 1884. There is evidence that the superintendent of streets was several times, in 1882 and 1883, notified that the water came into the cellar of the plaintiff's premises, and that the same notice was given to the mayor of the city once in 1882 or 1883. This was subsequent to the time when plaintiff became owner of the premises. There was evidence given of injury to the building. The defendant claims that this injury was of such a character that it could not be caused by the water which came from the sewer; but it seems to us that this was a question of fact, which the court could not decide. What the exact effect would be of water which came into a cellar is not a matter for a court to determine. Nor could the court decide that the foul substances such as are carried in sewers, and such as were deposited in the cellar, came, as the defendant claims, from the occupants of the house themselves. All these were matters for the jury.

The defendant claims that plaintiff should have been nonsuited because no notice of the obstructed condition of the Hart-Street sewer had been shown. *Smith v. Mayor*, 66 N. Y. 295. Now, it appears that the superintendent and the mayor had received notice of the water in the cellar, and that the superintendent thought that the city ought to clean out the cellar. This indicates that he suspected that the filth in the cellar was due to some defect in the city sewer. Of course, the city is not bound to more than reasonable care. The city could not, without some indication of a defect in the sewers, be expected to dig them up, to examine whether any defect existed; and we think that the charge of the learned judge was in accordance with this view. He only stated that it was the duty of the city to inspect the sewer, as often as might be necessary, to ascertain obstructions, and he had previously explained this point as requiring only such duty as would be consistent with the conduct of a person of ordinary care.

So far as the water and filth were thrown upon plaintiff's premises by the effect of the surface well bringing water there which would otherwise have flowed elsewhere, this case is within the doctrine of *Seifert v. Brooklyn*, 101 N. Y. 186, 4 N. E. Rep. 321; *Noonan v. Albany*, 79 N. Y. 475; *Byrnes v. Cohoes*, 67 N. Y. 204.

The defendant claims that evidence was improperly admitted of the decreased value of the property, owing to the injury done to the building, under the rule in *Uline v. Railroad Co.*, 101 N. Y. 98, 4 N. E. Rep. 536. That was an action for a nuisance by an unlawful construction of a railroad in a street. If the railroad were to be removed, the nuisance would cease, and there would be no longer any injury to the plaintiff's property. But in the present case the plaintiff's property had been put out of repair. If the city removed the obstruction, still the injury had been done, and the property would continue to be so much less valuable. The plaintiff offered to prove how much it would cost to restore the building, and that was objected to. She then proved the decrease in value owing to the impaired condition.

We are referred by defendant to the case of *Kosmak v. Mayor, etc.*, 6 N. Y. Supp. 458, as an authority to show that, because the plaintiff has voluntarily connected her premises with the public sewer of the city, she cannot recover for the neglect of the city. But that case is entirely different from the present. In that case the plaintiff connected his premises with a private drain, which he knew to be such. He was also informed that the private drain was from property which had been taken for the Brooklyn bridge, and, further, that if he went in there he went at his own risk, as the city officials knew nothing about it, and had nothing to do with it, (the private drain.) But, further, it will be seen that the defendant had a verdict; and the court had charged that, if the drain in Chatham street (the private drain) was obstructed, the city was not responsible, but that if the obstruction were in the Frankfort-Street sewer (the public sewer with which the private drain con-

nected) then the city was responsible. So that the charge of the court was contrary to the present defendant's views; and, of course, there was no review of that part of the charge, as it was in plaintiff's favor, and the plaintiff was appellant. It seems to us, then, that this case was fairly submitted to the jury, and that there is no ground for reversing the judgment. Judgment and order affirmed, with costs.

CITY OF COHOES v. DELAWARE & H. CANAL CO., (two cases.)

(Supreme Court, General Term, Third Department. December 11, 1889.)

1. DEDICATION—EXTENT OF RIGHT.

In an action to restrain defendant from laying railroad tracks in an alleged street of plaintiff, it appeared that a map made by the town-site company, which originally owned the land, showed, along the west side of the street, an open canal, 80 feet wide, which was to be used for private purposes. The canal was never made, and the town-site company subsequently conveyed all its interest in the street to defendant. *Held*, that as plaintiff acquired no rights except such as the town-site company had given the public, and as no adverse user had been shown to modify the terms of the dedication, plaintiff could not restrain defendant's occupation of the 80 feet designated as a canal.

2. SAME—ABANDONMENT.

In April, 1851, the town-site company authorized its president and agent to agree with defendant's grantor in respect to the location of a railroad. In 1853, with the consent of the town-site company, railroad tracks were laid on the street in question, occupying 50 feet thereof, and they have been maintained there ever since. Since that time, also, a freight-house has entirely blocked the so-called street at one point. The railroad tracks and the reserved 80 feet for a canal take up the whole width of the street. *Held*, none of the grantees of the town-site company complaining, and no acceptance of the highway by the officers of plaintiff city being shown until 20 years after the occupation of the street for railroad purposes, that this amounted to a revocation of the dedication made by the town-site company by the designation of the street on its map.

3. HIGHWAYS—FAILURE TO WORK.

The street, which originally was a country highway, had never been opened or worked. On its incorporation, the city never assumed any care or responsibility over it. *Held*, that the street had ceased to be a public highway, under Laws N. Y. 1861, c. 811, providing that a highway not opened and worked within six years shall cease to be a road.

Appeal from special term, Albany county.

The first action was brought to restrain defendant from laying tracks in certain portions of an alleged Van Rensselaer street, in Cohoes. The second was brought to restrain the construction of a freight-house in said alleged street. The two actions were tried before the court without a jury, and a decision in each action was rendered for the defendant. The plaintiff appeals. The facts are substantially the same in each action, and, as found by the court, are briefly as follows: In 1833 the Cohoes Company became the owner of a considerable tract of land, within which is the alleged street. A map, known as the "Olmstead Map," purporting to be a map of the village of Cohoes, has been kept in the office of said company since 1857. A similar map is on file in the county clerk's office of Albany county, having on the margin, "July, 1835." The Index-Book of Maps in said office indicates that to be the date of making the map. In that map the land known as "Van Rensselaer Street" was designated as such street. In 1847 the Cohoes Company sold a lot bounded, "Beginning at the north-west corner of Ontario and Van Rensselaer streets," etc., and referring to a map, which is the aforesaid map on file. Another map, called the "Frost Map," made by Frost, the civil engineer of said company, dated 1845, has been in the office of the company since 1857, which map lays down said Van Rensselaer street as one of the streets of said village. Each of said maps lays down an open canal, about 80 feet wide, extending most of the way from Ontario to Onida street, on the west side of and within the alleged Van Rensselaer street. Said canal was never opened or used. The strip designated as "Van Rensselaer Street" is 80 feet wide from Mohawk

street to the Mohawk river, intersected nearly at right angles by Oneida, Ontario, and Pine streets. In 1858 the Cohoes Company conveyed a lot described as bounded by the west line of Van Rensselaer street; and so, also, another lot, in 1861. The Albany Northern Railroad Company, to whose rights defendant has succeeded, filed a railroad map in 1853, which designates Van Rensselaer street in the same manner as the other maps; and in that year said company constructed its railroad the whole length of Van Rensselaer street. It is about 50 feet wide, as at present occupied, and is along the easterly side of the street, except the so-called "Plaisdell Side Track." About that year said company constructed a freight-house near the corner of Oneida street and partly in Van Rensselaer street, about 52 feet long, extending in width entirely across that part of the alleged Van Rensselaer street not occupied by the tracks; the northerly end being about 30 feet south of Oneida street. This was continuously occupied for railroad purposes till 1887. From 1845, people having occasion to travel that way passed with teams and vehicles over the line of said alleged street, about where the tracks afterwards were. After the tracks were laid, people in like manner passed over the street west of the tracks. After the freight-house was constructed, they passed around that house through a vacant lot, and so back to the street. They drove to and from the freight-house, in delivering and receiving freight, on the west side of the tracks in said street. In June, 1874, the common council of Cohoes passed a resolution that Van Rensselaer street, from Oneida to Mohawk street, be declared a public street, and graded. It is not shown that any work has been done by the plaintiff on the street between Oneida and Ontario; and the work between Ontario and Pine is but trifling. No real attempt to grade is shown to have been made. It is found in the first action that in November, 1886, the defendant attempted to lay down an additional track between the present tracks and the west line of Van Rensselaer street, north of Pine; and in December, 1886, the defendant attempted to lay a similar track north of Ontario. No part of Van Rensselaer street had ever been worked, within the meaning of chapter 311, Laws 1861, prior to June 4, 1880, or within six years after the resolution aforesaid. The court further found in both actions that the Cohoes Company, by its acts aforesaid, expressed an equivocal and qualified intent to permit the use of the said strip of land as a public highway, subject to the right of revocation; that the action of the company in permitting defendant, or the Albany Northern Company, to lay its tracks and build its freight-house expressed an intent to revoke such dedication; that there had been no such public uses as to constitute the strip of land on public highway. It was also found in the second action that in December, 1887, the defendant began to excavate for the foundations of a new freight-house, extending 34 feet further south and 30 feet further north than the old. In 1883 the Cohoes Company conveyed to defendant all its interest in Van Rensselaer street.

Argued before LEARNED, P. J., and LANDON and PUTNAM, JJ.

E. Countryman, for appellant. *Edwin Young*, for respondent.

LEARNED, P. J. It is not important to inquire what rights the grantees of lots bounded on the alleged street may have acquired thereto. *Bridge Co. v. Bachman*, 66 N. Y., at 267. Such grantees are not before us. The question is, what are the rights of the city of Cohoes, claiming to act for the public? Many cases are cited by the plaintiff, such as *Bissell v. Railroad Co.*, 23 N. Y. 62; *Wiggins v. McCleary*, 49 N. Y. 346; *Cox v. James*, 45 N. Y. 557, —showing that where a grantor has conveyed land, bounding the same upon a street laid out by him on some map, the grantee acquires a right to the use of such street. Such cases, however, only show the individual right of the grantee, not the right of the public. The grantee pays a consideration, and for that he acquires a right over the street laid out on the map. But the public have paid no consideration, and are no parties to the transaction. Hence

it is that, as to the public, the acts and declarations of the owner must be unmistakable in their purpose and decisive in their character, (*Washb. Easem.* 182;) for, as to the public, the owner is not selling, but, as claimed, is making a gift.

Now, in the present case, the maps made by the company showed, along the west side of the street, an open canal of 30 feet wide. Evidently, then, that part of the street was not dedicated as a public highway; for that canal was to be used to supply water to mills, not for purposes of navigation. The public could take only what the owner gave; and, as the owner showed that this strip of 30 feet was to be, or might be, used as a canal, the public could not take that part as a highway. The case is similar to the *Bachman Case*, above cited. In that case, there was a note upon the maps reserving a discretionary power to say how much and what part of the streets should be used for canals. It was held that this negatived the intention of absolute and irrevocable dedication. In the present case, the owner did not reserve a right to be exercised in the future, but on the very map itself it showed that 30 feet of the so-called street was reserved for a canal. Whether or not the canal was afterwards built is immaterial on the question of the effect of the maps; for the public could claim nothing more under the maps than the maps gave. The plaintiff urges that the omission to build the canal does not authorize defendant to lay its track on the 30 feet. But that is a question between the defendant and the Cohoes Company. The plaintiff, to succeed, must show that the 30-foot strip is land over which the public have the right to travel; and the first step necessary is to show dedication by the Cohoes Company. In the *Bachman Case* no canal had been actually constructed; but the right to construct took away the claim of the public that there had been an absolute dedication. In 1883 the Cohoes Company conveyed all its rights in Van Rensselaer street to defendant. Let us suppose that before that date the Cohoes Company (or, after that date, the defendant) had commenced to construct a canal on this strip of 30 feet. On what ground could the plaintiff have objected? If it appealed to the maps for its right, the maps would have shown that the dedication, such as it was, was qualified by the canal shown on the maps; and the plaintiff has never acquired any rights, except such as the Cohoes Company had given to the public. No user by the public, or formal acceptance by the city, would modify the terms of the dedication. Certainly not, unless the user could be shown to be adverse to the right reserved in the dedication. That is not shown here. *Burbank v. Fay*, 65 N. Y. 65.

Further, on the question of dedication, it appears by a resolution of the Cohoes Company in April, 1851, that the president and agent were authorized to agree with the Albany Northern Railroad Company in respect to the location of the railroad, and the damages; and that in 1853 the tracks of the company were laid as they have ever since been, and now are. And from the same time the freight-house has entirely blocked the so-called street at one point. These acts, it is just to conclude, were done with the consent of the Cohoes Company. The railroad tracks of 50 feet wide, and the reserved 30 feet for a canal, take the whole width of the street; and the construction of the tracks and freight-house show that at that time, at least, there was no intention on the part of the Cohoes Company to dedicate this street to public travel. Even then, if we assume that by the maps the Cohoes Company dedicated the so-called Van Rensselaer street as a highway, reserving the 30 feet for a canal, still the dedication must be deemed to have been revoked in 1853, if revocation was possible. It is evident, on principle, that the owner of land, by laying out a street thereon upon a map, and even by opening and working such street, cannot make it a public highway; for, if it is a public highway, a duty lies on the public authorities to take care of it, and such duty cannot be imposed on them by the mere act of the owner. There must be an acceptance. *Holdane v. Trustees*, 21 N. Y. 474. Such acceptance may be

formally made by the public authorities; and in the present case a formal acceptance was made by the plaintiff, June 3, 1874. At that time, however, the defendant and its predecessor had been for more than 20 years in possession of the tracks and the freight-house; and the defendant could not, by that acceptance, be deprived of any rights it had acquired by the consent of the Cohoes Company. The plaintiff did not assume to declare only the 30 feet west of the railroad track a public highway, but declared the whole street such, and directed that it be graded. This resolution of the common council declaring Van Rensselaer street a public highway might be considered an acknowledgment by the plaintiff that up to that time the street had not been a public highway. Certainly, there had been no acceptance by the public authorities prior to that time.

But the plaintiff relies on user by the public as showing an acceptance. It will be seen, on examining the case, that prior to 1853 there is very little proved which can be called a public use. A few persons drew manure from private property. After 1853, any user was restricted to such part as was not occupied by the tracks and the freight-house. Persons passed along at the side of the tracks, and then back of the freight-house, upon private property, and then returned to the alleged street, so that a part of such travel was over land where it was not claimed that any street existed. Much, too, of the travel was to the freight-house, for the purpose of delivering and receiving freight; and this would not necessarily show use as a public highway. It might show only such access to the freight-house as the defendant would naturally permit for its own good.

Before considering the question of the length of time which user must continue in order to give the public right to a highway, we notice one position taken by plaintiff, resting upon language used in *Holdans v. Trustees*, 23 Barb., at 119. That is that there is a difference between a public right of passage over lands and a highway which the public authorities are bound to keep in order. That case was afterwards heard in the court of appeals, (21 N. Y. 474,) and nothing is there decided to sustain this view. The doctrine there was that the land in question was not charged with a perpetual public burden, although the public had enjoyed free and indiscriminate passage over it. And, while an owner of land, by opening a street and selling lots bounded thereon, may thereby give to the owner of said lots the right of access thereto over the street for themselves, and all persons having business with them, yet the street does not thereby become, in the true sense, public. Nor do we think that there can be a full right of passage for all the public, with teams and vehicles, over a piece of land which is not a highway, with the care of which the public authorities are charged. In the case of *In re Bridge*, 100 N. Y. 642,¹ the report of a referee had held the town of Crawford liable to rebuild one-half of the bridge across the Shawangunk kill, a boundary between the towns of Crawford and Shawangunk. The road which crossed the stream at the bridge was opened, and the bridge built at private expense. The general term reversed the order entered on the report. The question was whether there had been an acceptance by the town; and the court of appeals, in affirming the order of the general term, said: "Here the use of the road by the public was only for about four years; and, if mere user by the public, without any action of the town authorities laying out or recording or improving or accepting the road can make a highway, (a point we do not determine,) such user must continue at least twenty years." This case came up under chapter 639, Laws 1857. It was not a matter for a jury. It was for the court to determine whether the town was liable. The referee and the special term had held that the town was liable. It therefore was necessary for the court of appeals to decide this point; and, in saying that 20 years was necessary, it

¹ 18 N. E. Rep. 679.

gave the reason why 4 years was not enough. We cannot consider this remark to be *obiter*. In *People v. Loehfelm*, 102 N. Y. 1, 5 N. E. Rep. 783, the court, speaking on this matter, say, "long public use," which is not inconsistent with the case just cited. The same expression, "long public use," is found in *Cook v. Harris*, 61 N. Y. 454. In *Wiggins v. Tallmadge*, 11 Barb. 457, there was over 20 years' user; but it was said that authorities differed as to the requisite time. So in *McMannis v. Butler*, 51 Barb. 436. In *Wilrick v. Hager*, 10 N. Y. St. Rep. 768, the road had been opened and worked by the public authorities. The *Hunter Case*, 6 Hill, 407, was where a burial-ground had been dedicated, and had been used for 36 years. The peculiar uses of the land might well justify the holding that much less than 36 years would have been an acceptance. With the recent case in our highest court above cited to control us, it does not seem profitable to examine the decisions of other states, or of other countries. There is very little use in reporting the decisions of the court of appeals, unless they are to be held decisive of the law, at least until that court shall reverse them.

The dedication under which the plaintiff claims must have been made in 1835 or 1845. If 20 years' user by the public is needed to show acceptance, the street could not become a highway until 1855 or 1865. By chapter 311, Laws 1861, a highway not opened and worked within six years shall cease to be a road. In *Ludlow v. Oswego*, 25 Hun, 260, this is held applicable to dedicated highways. This would require the working and opening of the road by 1861 or 1871. It is stated, and we may take notice of the fact, that the plaintiff was incorporated in 1869. In the case last cited, and in *Horey v. Haverstraw*, 47 Hun, 356, it was held that this statute was applicable to "streets," strictly so called. The contrary was held in *Vanderbeek v. Rochester*, 46 Hun, 87. Without considering whether or not the statute would apply to a street laid out or dedicated in a city, we must notice that when this street, as claimed, was dedicated the city did not exist. It is stated in plaintiff's brief that the village was organized in 1847 or 1848, but no evidence of this is given. At any rate, the so-called street was originally a mere country highway. The city, when organized, did not take this street by any proceeding for that purpose, nor did the city proceed to have the street opened and worked before the six years had elapsed. And, certainly, the city could not, without some action on its part, be required to assume the care and responsibility of every disused highway within the city limits. In *Beckwith v. Whalen*, 70 N. Y. 430, it was said that, to be worked and opened, the highway must be passable for its entire length. It does not appear that this street was ever worked during the time in question, and it was completely obstructed by the freight-house.

The defendant, as has been already seen, is now the owner of the fee. It has the right, therefore, to use the land as it chooses, unless the plaintiff can assert for the public a highway over the part west of the tracks. Of the part occupied by the tracks and by the freight-house, the defendant has had for many years undisputed possession. There is nothing to indicate that its obstruction of the whole street was limited by anything but its own convenience. Travel along the side of the tracks did not interfere with its business, and was to a great extent connected with it. The plaintiff does not put itself in the position of having purchased, or taken by proceedings *in invitum*, this street, or of having expended labor or money upon it; nor does it show that it, or any one whom it represents, ever accepted the gift tendered by the Cohoes Company. We are of opinion that the judgments should be affirmed, with costs.

PEOPLE v. DELAWARE & H. CANAL CO.

(Supreme Court, General Term, Third Department. December 11, 1889.)

CORPORATIONS—TAXATION—VALUE OF STOCK.

Laws N. Y. 1880, c. 542, § 3, as amended by Laws 1881, c. 861, provides that if a corporation, during any year, makes dividends amounting to 6 per cent. or more on the par of its capital, then it is to pay a tax of one-quarter mill on the capital stock for each 1 per cent. of dividends; but if there are no dividends, or the dividends are less than 6 per cent., then the tax shall be at the rate of $1\frac{1}{4}$ mills on each dollar of the value of the stock. *Held*, that it was the clear intention of the statute, where the dividend was less than 6 per cent. on the par value of the stock, that the tax should be $1\frac{1}{4}$ mills on the actual value of the stock, though the aggregate tax would be greater than a tax computed on a dividend of 6 per cent.

Case submitted on agreed statement.

Argued before LEARNED, P. J., and LONDON and PUTNAM, JJ.

Chas. F. Tabor, Atty. Gen., and *Wm. A. Poste*, Dep. Atty. Gen., for the People. *Bristow, Peet & Opdyke*, (*David Wilcox*, of counsel.) for defendant.

LEARNED, P. J. This is a case agreed upon and submitted. The question to be determined is the proper construction of section 3, c. 542, Laws 1880, as amended by chapter 861, Laws 1881; and the point in dispute is the rate of taxation to which, under that law as so amended, the defendant is liable. If a corporation, during any year ending November 1st, makes dividends amounting to 6 per cent. or more on the par of its capital, then it is to pay one-quarter mill upon the capital stock for each 1 per centum of dividends so made. If there were no dividends, or were dividends less than 6 per cent., then the tax shall be at the rate of one and one-half mills on each dollar of the value of the stock. The mode of ascertaining that value is provided for in the first section. It is not necessary to state it, since no dispute arises as to value. By chapter 501, Laws 1885, the tax is to be only upon the amount of capital stock employed in this state. No dispute arises as to what that amount is in this case. During the year ending November 1, 1888, the dividends of defendant in the aggregate were $5\frac{1}{2}$ per cent. on the par value of the capital stock. It was therefore not to be taxed under the first of the aforesaid provisions, but was to be taxed under the second. The actual value of the stock, however, as established under the provisions of this act, was \$110.16 per cent. Now, it will be seen that a tax of one and one-half mills on each dollar of the actual value of the stock, when that stock is above par, is greater than a tax of one-quarter mill on the capital stock for each 1 per centum of dividends, when the dividends are 6 per cent. in the aggregate. That is to say, if the defendant had made during the year, in the aggregate, 6 per cent. dividend, it would have paid a certain sum. But as it has made only $5\frac{1}{2}$ per cent., while each share of its stock is worth \$110.16, it is required to pay a larger sum. This the defendant says is unjust, and not according to the meaning of the legislature, however consonant it may be with the words. The defendant, therefore, claims that it should pay only the same tax which it would have paid had it made dividends amounting to 6 per cent. The defendant claims then, to ignore the second provision above stated of the act, in all cases where the actual value of the stock shall be found to be above par, or to add to it a provision that, if the actual value of the stock shall be found to be above par, then the corporation shall pay such tax as it would have paid if it had made dividends amounting in the aggregate to 6 per cent. during the year. The very able argument for making this judicial amendment to the distinct and clear language of the statute is based upon the position that it must have been the intent of the legislature that corporations paying less than 6 per cent. dividends for the year should not be taxed at a greater rate than those which paid 6 per cent. and more.

Any one who knows how statutes are passed, must be aware that the in-

tention of the legislature would be extremely difficult to ascertain, if, indeed, in the minds of many of the legislators, any such thing existed at all. We have really nothing to guide us but the words of the statute, in connection with existing circumstances. The defendant urges the fact that in 1880, when this system of taxation was established, the rate of interest had just been reduced from 7 to 6 per cent.; and it claims that corporations paying 6 per cent. stood at par, and that those paying less stood below par. Hence it argues that the provision for taxing on the actual value could have been intended to apply only to cases where such actual value was below par. But, whatever force this might have had, (assuming its truth,) all is lost when we observe that this statute of 1880 has been amended in some particulars in 1881, 1882, and in 1885, and at the same time the provisions now under consideration have remained unchanged. During that time the actual rate of interest had so decreased that in 1885 a 5 per cent. security would sell for more than par, and a 6 per cent. for still more. Yet the legislature made no change in the provisions for determining the tax, while it was a well-known fact that a good 6 per cent. security was worth above par. The amount of the dividends made by a corporation in any year is not the sole evidence of the productiveness of the business. Sometimes a corporation expends a part of its profits in making new and additional improvements which increase the value of its property, and thus its price in the market. Hence the statute may have been wisely contrived, so that, if a corporation reduced its dividends below 6 per cent., and used its profits to increase the value of its property, it should still pay a tax on its productiveness, measured, not solely by its dividends, but sometimes by its increased value. Sometimes, too, a corporation may make no dividends in order to increase its surplus funds. This has notably been done by banks, but might be done by corporations subject to the tax under consideration. Doing this, a corporation would increase the value of its capital stock. For instance, a certain corporation in existence for 14 years has never made any dividends, and its stock is worth over 1,000 per cent. The assumption, then, by the defendant, that the rate of dividend is the sole evidence of the productiveness of a corporation, is not tenable.

The question here involved was not in any way under consideration in *People v. Insurance Co.*, 92 N. Y. 328. The passage cited by the defendant from the opinion at page 347 was quite true in regard to the case then before the court. In that case the prosperity was shown by the profits voluntarily distributed. But the court had previously said: "There was no valid reason why the value of the capital stock may not be used as an element for determining the amount of tax;" and, further, that the plan adopted by this law is fair and equitable. In speaking, also, of the provision for determining the tax by value, and that for determining it by dividends, the court said: "There is no inconsistency in these modes of estimating." And it was further remarked: "Absolute equality in laying the burdens of taxation, as shown by experience, is impossible of attainment." The defendant cites *People v. Davenport*, 91 N. Y. 574, to illustrate and establish the power of courts to limit the operation of statutes when the literal sense would lead to absurdity or injustice. Now, in that case the language of the act of 1880 in its literal reading exempted the capital stock and personal property of the corporation from any amount of taxation, except as is provided in that act. It was held that this did not exempt such capital and property from taxation for municipal purposes. The court considered that the title and whole spirit of the act referred to taxation for state purposes, and that such must be the application of this exemption. The court was somewhat influenced by the principle that exemptions from taxation were not favored, and must be clearly shown. But neither that decision, nor the rule which was there applied, affords any support to the defendant's claim. Nothing in

the title or in the spirit of the act is in conflict with the plain language of the provisions under discussion.

There is no unequal or unjust taxation imposed, when effect is given to the literal meaning of these provisions, as has been already shown. Indeed, the argument of the defendant, intended to show the injustice of the claim of the people, might be reversed. For instance, the defendant, since the year in question, has paid a 7 per cent. dividend. Its stock has gone up to 154. Now, it might be urged by the people that it was unjust that a corporation of which the stock was worth 154 should pay a tax on the basis of a 7 per cent. dividend only. The people might say that, therefore, the clause of the act should be disregarded which provides that corporations paying 6 per cent. or more dividends should be taxed at a certain rate, calculated on their dividends, and that the other clause should be applied, and the defendant should be taxed upon the actual value of its capital; that is, that the defendant should be taxed 23.1 cents on every share of its capital, instead of 17.5 cents, which would be the tax based on a 7 per cent. dividend; for the defendant proportionately pays a less rate of tax on the value of its property than does some corporation that pays no dividend, and the stock of which is below par. We see no reason why the court might not seek to rectify the alleged injustice on which defendant relies, by disregarding one provision of the section as well as by disregarding another. The defendant urges that all the court need do is to say that the second provision in the section is impliedly limited by a condition that the actual value shall never be considered to exceed par. We might as well say that the first provision is impliedly limited by a condition that, if the dividend is less than 6 per cent. on the actual value, the tax shall be computed on actual value. We might as properly assume to amend the law in one way as in another. It must be seen that there are no words in the rest of the statute with which the construction claimed by the people is inconsistent. The defendant's argument is simply that when its property is worth more than par it ought not to be taxed on such value, if it does not make 6 per cent. dividends. We think the argument is not sound. We think that the amount of dividends is not the sole evidence of the productiveness of the road, and that the actual value of the stock is some evidence on that point. And if the legislature in some cases determine the rate of tax by the dividend, and in others by the actual value of the stock, we see no such injustice as requires us to modify by construction the clear language of the statute. We have not thought it necessary to argue that the literal meaning is in favor of the people's claim. That can hardly be disputed. As it has rested with the defendant to show grounds for changing that literal meaning by what is called "construction," it has seemed to us enough to answer those grounds. That a court is justified in making sense out of inconsistent language, and even of implying a meaning not apparent in the letter, is undoubted. But after all, when the language is plain, and not inconsistent with other parts of the statute, and when it violates no principles of natural justice, its literal meaning should stand. And this is especially true of a statute which in several years has been under the consideration of the legislature, over which there has been much litigation, the requirements of which have been contested by many corporations, and yet which has, as to the provisions in question, never been modified. The people should have judgment for the amount claimed, with costs. All concur.

TRAQY v. TROY & L. R. Co.

(*Supreme Court, General Term, Third Department. December 11, 1889.*)

TEMPORARY INJUNCTIONS.

A temporary injunction should not be granted, in an action to restrain defendant from erecting poles on a street opposite plaintiff's property, to form part of an electric motor system, when it does not appear that the injury to plaintiff, if any, caused

by allowing defendant to proceed until the trial will be irreparable, as a public improvement, which may finally be allowed, will thereby be obstructed, and plaintiff will have no inducement to press his action.

Appeal from special term, Rensselaer county.

Action by Edward Tracy against the Troy & Lansingburgh Railroad Company, to restrain defendant from erecting poles, to form part of an electric motor system, on a street in the village of Lansingburgh, and opposite plaintiff's property. A temporary injunction was granted, which, on defendant's application, was vacated, and plaintiff appeals. Following is the opinion of EDWARDS, J.:

"Since 1861, the defendant has owned and operated a horse railroad for the transportation of passengers, extending from the southerly part of the city of Troy through the village of Lansingburgh. It purposes to substitute electricity as a motive power for the propulsion of its cars, and has adopted what is known as the system of overhanging wires, which requires the erection of poles on each side of the line of its track. The poles are to be placed immediately inside of the curb line of the sidewalks, to be 120 feet apart, 8 inches square at the surface of the sidewalk, tapering to the top, 20 feet in height from the surface, and to be smoothed and painted. Consent of the local authorities of Troy and Lansingburgh has been obtained to such change of motive power, and the work of substitution is rapidly progressing to completion. There is no proposed alteration in the grade of the streets, nor increase in the number of tracks. The plaintiff is the owner of real estate adjoining a public street in the village of Lansingburgh, known as 'Second Avenue,' through which the defendant's road runs. Opposite this land of the plaintiff, and immediately within the curb line of the sidewalk, the defendant intends to erect two poles, in the manner and of the kind described. The plaintiff has brought this action to perpetually enjoin the defendant from the erection of these poles, mainly on the ground that he is the owner of the land to the center of the street in front of his premises, subject to the public easement, and that the contemplated structures thereon without his authority, or without compensation to him therefor, are an illegal interference with his property, which will work irreparable injury to him. At the commencement of the action, on an *ex parte* application, he procured a temporary injunction against the defendant, on which, and on accompanying affidavits, it now moves for a dissolution of the injunction. The legal rights and the equities of the plaintiff are controverted by the defendant. Upon the argument, several important questions, growing out of these, were discussed by the learned counsel; but, if I am correct in the application of the principles which, in my judgment, must control the disposition of this motion, any expression of opinion by me on such questions in the present condition of the action will be unnecessary. A marked distinction obtains between a final and a temporary injunction, and the principles on which they are granted. The former is the determination made after a trial on the merits, and is a matter of absolute right, depending upon the settled rules of equity; while the latter is discretionary, does not determine any questions of right, and largely depends upon the exigencies of the particular case. It is not necessary to discuss here the principles which should govern a court of equity in granting or withholding a final injunction. We are concerned only with the rules which apply on an application for a preliminary or temporary injunction, and these I deem to be well settled. On such an application the injunction should not be granted except upon a showing of irreparable injury,—such injury as does not admit of pecuniary compensation. Indeed, the main, if not the sole, ground on which a temporary injunction can be sought is that there is on the part of the defendant an actual or threatened invasion of a clear right, and, unless he is enjoined during the pendency of the action, injurious consequences will result to the plaintiff, for which a compensatory judgment in damages will be inadequate. There is the further rule, on an application for a preliminary injunction, that the court

will have regard to the relative convenience or inconvenience that will result to the parties from the granting of the order. These principles are too familiar to require the citation of any authorities. A concise expression of them by the general term of this department, is contained in *Power v. Village of Athens*, 19 Hun, 167, in which the court say: 'We have had occasion to remark more than once that an injunction *pendente lite* should not be granted, unless the court could clearly see it was needed to prevent irreparable injury,—that is, injury which could not be compensated in damages; or that the injunction itself could do no serious harm to the party enjoined. The merits of the case should be heard at a regular trial. And, if the plaintiff be there successful, and a permanent injunction is needed to protect him, he should have it. But, generally, the merits of the case should not, if possible, be disposed of on an application for an injunction *pendente lite*.' Applying these rules to the facts of this case, I think the defendant should prevail on this motion. There is no evidence before me that the erection of the two poles would work an irreparable injury to the plaintiff during the pendency of the action. There is an allegation to that effect in the complaint, but no specific fact is set forth therein, nor in the accompanying affidavits, from which such injury could be inferred, and the allegation is denied by the defendant. Furthermore, it is highly improbable that such injury would be irreparable, or one for which money damages would not be an adequate compensation. If the threatened act is an invasion of the plaintiff's property rights, it is clearly a trespass, and the defendant, who is conceded to be of undoubted responsibility, can be compelled to respond to the plaintiff in damages. It is unlike the case of a threatened nuisance, which may be offensive to the senses, or detrimental to health, and so attended by consequences for which money cannot compensate. If, upon the trial, the plaintiff shall succeed in establishing his legal rights, as contended for by him, the court can then exercise its preventive power, if it should be deemed a proper case therefor, by its final injunction against the continuance of the erection. The defendant will also be liable to make pecuniary compensation to the plaintiff for any trespass committed. I suspect that in no event can the injury to the plaintiff be serious, nor can he be subjected to any considerable inconvenience during the pendency of the action. On the other hand, if the temporary injunction is not vacated, an improvement in the means of transit believed to be of public utility will be obstructed; the work of erecting the poles and substituting the new motive power, already quite far advanced, will be suspended for many months; and, if the defendant should ultimately succeed on the trial, it would doubtless have sustained damages difficult, at least, if not impracticable, to estimate. Besides, in this case the action is brought for a final judgment restraining the defendant from doing the very act which he is enjoined from doing by this preliminary or temporary injunction. The plaintiff has thus summarily obtained his relief without a trial, and is not concerned with the further prosecution of his action. This but furnishes another reason why courts should proceed with great caution in the exercise of this almost arbitrary power. In such a case, the plaintiff's legal rights should be plain and clear, and the violation of them undoubted. For these reasons, and without expressing or intimating any opinion on the question of legal rights involved in the action, I am of opinion that the motion to vacate the temporary injunction should be granted."

Argued before LEARNED, P. J., and FISH and PUTNAM, JJ.

Warren, Patterson & Gambell, (Charles E. Patterson and P. A. McManus, of counsel,) for appellant. Smith & Fursman, (Edgar L. Fursman and R. A. Parmenter, of counsel,) for respondent.

LEARNED, P. J. This is an appeal from an order of Mr. Justice EDWARDS, vacating, on a hearing of both sides, an *ex parte* order granted by Judge NOTT. The order of Judge NOTT restrained the defendant from erecting

upon Second avenue, in the village of Lansingburgh, opposite the plaintiff's lot described in the complaint, or opposite any other lots of plaintiff in the said village, any poles for the sustaining or forming part of an electric motor system for furnishing power for propelling cars. The learned justice who vacated the order, without passing upon the important questions which might arise on a trial of the action, placed the reversal of the order, in his opinion, on the ground that this was not a case where an injunction pending the action should be granted. He held that there was no evidence that, if the defendant's work was allowed to proceed until the trial of the action, any irreparable injury would be done, or any injury which could not be compensated by a pecuniary payment; and he further said that if the injunction were allowed to stand a public improvement, believed to be of utility, would be obstructed for many months, which in the end might be allowed to proceed. And, further, that by this temporary injunction the plaintiff had, without a trial, accomplished the object of his action, and had no longer any inducement to press forward the case. With these views, for a fuller statement of which we refer to his opinion, we concur. They are in harmony with the decision of this court in *Power v. Village of Athens*, 19 Hun, 167. We therefore affirm the order, without expressing any opinion as to right of the plaintiff on a trial to have a perpetual injunction, as prayed for. Order affirmed, with \$10 costs and printing disbursements. All concur.

TALLMADGE v. PRESS PUB. CO.

(*Supreme Court, General Term, Second Department. December 10, 1899.*)

LIBEL AND SLANDER—PLEADING—BILL OF PARTICULARS.

In an action for libel, where the answer does not sufficiently state the facts relied on as a defense, an order may be made requiring defendant to furnish a bill of particulars of the matters he intends to prove on trial.

Appeal from special term, Kings county.

Action by Daniel W. Tallmadge against the Press Publishing Company for libel. After the filing of the answer, an order was made, on the motion of plaintiff, requiring defendant to file "a bill of particulars of the several matters upon which it proposes to offer proof in justification and in mitigation of damages," from which order defendant appeals.

Argued before BARNARD, P. J., and DYKMAN and PRATT, JJ.

De Lancey Nicoll, for appellant. *Dailey & Bell*, for respondent.

PRATT, J. It is now well settled that a defendant may be compelled to furnish a bill of particulars of the matters set up for defense in a suit for libel. *Ball v. Publishing Co.*, 38 Hun, 11. This case is decisive of the merits of this motion. The plaintiff by waiting did not waive his right to make the motion, and the defendant was in no way prejudiced by the delay. The notice of motion sufficiently apprised the defendant of the relief desired, and the affidavits were ample to sustain the relief granted.

The point that the order goes too far in that it requires particulars of matters not charged in the amended answer is not well taken. The object of a bill of particulars is to limit the proofs, and it is only necessary that the defendant should furnish particulars of those matters he intends to prove upon the trial. This was a case pre-eminently proper for requiring a bill of particulars, and the order seems to be right, and should be affirmed, with costs.

CANDA *et al.* v. ROBBINS.

(*Supreme Court, General Term, Second Department. December 10, 1899.*)

REFERENCE—LONG ACCOUNTS.

In an action for goods sold and delivered, plaintiffs' bill of particulars contained 51 items, some of them comprising several deliveries, all of which would have to

be proved on trial by their books, as they were put in issue by the answer. *Held*, that an order of reference was properly granted, under Code Civil Proc. § 1012, authorizing a reference in cases involving a long account.

Appeal from special term, Kings county.

Action by John M. Canda and John P. Kane against Thomas H. Robbins, for goods and merchandise sold and delivered. Defendant appeals from an order granting plaintiffs' motion for an order of reference, under Code Civil Proc. § 1012, on the ground that the trial of the issues herein involved the examination of a long account.

Argued before BARNARD, P. J., and DYKMAN and PRATT, JJ.

Brandt & Robbins, for appellant. *J. W. Shepard*, for respondents.

PRATT, J. It is difficult to understand how the defendant even can think there is any merit in this appeal. The plaintiffs' bill of particulars contains 51 items, and some of these comprise several deliveries, which would require an examination of the plaintiffs' books of account, and oblige a jury, in order to do justice, to keep notes of the dates, amounts, and prices of the articles delivered. Every item of plaintiffs' account is put in issue by the answer, and will have to be proved upon the trial by reference to their books. It requires the citation of no authorities to show that this order falls directly within the provision of the Code of Civil Procedure authorizing a reference.

Order affirmed, with costs. All concur.

CANDA *et al.* v. ROBBINS.

(*Supreme Court, General Term, Second Department. December 10, 1889.*)

ATTACHMENT—GROUNDS—NON-RESIDENCE.

An attachment on the ground of defendant's non-residence will not be set aside, where it appears that he lives with his wife in New Jersey, which he stated was his place of residence; that he is registered and votes in that state; that he is assessed for personalty and has his business letters sent there; and that he is neither registered as a voter nor assessed for personalty in this state.

Appeal from special term, Kings county.

Action by John M. Canda and John P. Kane against Thomas H. Robbins. Defendant appeals from an order denying his motion to vacate and set aside the warrant of attachment against his property, obtained on the allegation that defendant was a non-resident of the state.

Argued before BARNARD, P. J., and DYKMAN and PRATT, JJ.

Brandt & Robbins, for appellant. *J. W. Shepard*, for respondents.

BARNARD, P. J. The fact of non-residence is fully established by the paper. The defendant owns a house, with the furniture, in Brooklyn. William A. Robbins, his son, resided in it. The defendant is a brick-maker, residing in Keyport, N. J. The proof of this is made up by a variety of circumstances. He lives with his wife in a house upon the brick-yard premises. He is proven to have stated that his place of residence was in New Jersey. He is not assessed for personal property in Brooklyn. He is not registered as a voter there. He is registered as a voter in New Jersey, and voted there in November, 1888. He is assessed for personal taxes in New Jersey. He has his business letters sent to New Jersey. The point taken that the affidavit made by the voting clerk, as to defendant's voting in New Jersey, is not authenticated by a certificate, as required for record, is not controlling. There is proof that defendant's name is on the poll-list of the voters who voted at the November election, and the fact is not denied by defendant. The order should be affirmed, with costs and disbursements.

TEFFT v. EPSTEIN.

(City Court of New York, Special Term. August 6, 1889.)

EXECUTION—SUPPLEMENTARY PROCEEDINGS—AFFIDAVIT.

An affidavit for an examination in supplementary proceedings is sufficient, though the allegation that the person to be examined has possession of the debtor's property is on information and belief. Following *Miller v. Adams*, 52 N. Y. 409.

Motion to vacate an order for an examination in supplementary proceedings. *David Leventritt*, for Rachel Epstein. *Palmer & Boothby*, for judgment creditors.

NEHRBAS, J. The affidavit upon which the order for the examination of a third person was granted states that Rachel Epstein, as deponent is informed and believes, has personal property of Simon Epstein, the said judgment debtor, exceeding \$10 in value. A motion is made to vacate the order, for the reason that the sources of the deponent's information are not stated. The cases of *People v. Jones*, 1 Abb. N. C. 172, and *Day v. Lee*, 52 How. Pr. 95, hold this to be jurisdictional and necessary. But *Miller v. Adams*, 52 N. Y. 409, decides that an affidavit on information and belief merely, similar to this one, is sufficient. The latter authority being controlling, the motion to vacate will be denied, without costs. Let the party appear on the 7th inst. for examination.

OTTOMAN v. DALY.

(City Court of New York, Special Term. January 21, 1889.)

1. WRITS—SUBSTITUTED SERVICE OF SUMMONS.

Under Code Civil Proc. N. Y. § 435, providing that an order for the service of a summons on a defendant residing within the state may be made on satisfactory proof that proper and diligent effort has been made to serve the summons on the defendant, and that the place of his sojourn cannot be ascertained, or that, if he is within the state, he avoids service, so that personal service cannot be made, such substituted service cannot be had on a defendant who is absent as a theatrical manager, and whose location at any time can be ascertained, and who is attending to his business without any attempt to avoid service.

2. SAME—TO AVOID LIMITATION.

It can make no difference that if such service is not allowed the statute of limitations will run against the action.

Motion by defendant to vacate order.

George W. De Lano, for plaintiff. *Olin, Rives & Montgomery*, for defendant.

MCADAM, C. J. The plaintiff fails to show "that the place of his [the defendant's] sojourn cannot be ascertained," as required by Code, § 435.¹ This is a substantial, and not a mere formal, requirement, the importance of which is exemplified by the facts of this case. The defendant, a well-known theatrical manager, is on the road with his company, which has dates for the summer season in the principal cities of the Union. The defendant of necessity sojourns in these different cities while his company performs there. He is not seeking to avoid service of process, but is attending to his legitimate business. The act in reference to substituted service was never intended to include such a case. *Jones v. Derby*, 1 Abb. Pr. 458; *Collins v. Campfield*, 9 How. Pr. 519.

¹ Code Civil Proc. N. Y. § 435, provides that "where a summons is issued in any court of record, an order for the service thereof, upon a defendant residing within the state, may be made * * * upon satisfactory proof * * * that proper and diligent effort has been made to serve the summons upon the defendant, and that the place of his sojourn cannot be ascertained, or, if he is within the state, that he avoids service, so that personal service cannot be made."

The fact that the statute of limitations may run if the service is set aside cannot alter the construction of the act, which is too plain to admit of doubt. It is special in its nature, and intended only as a means of reaching runaway debtors, whose places of sojourn cannot be located, and those who remain at home, but avoid service of process. It was never intended to reach debtors temporarily absent on business at a known place, or those sojourning at a known summer watering resort, in good faith and without evil intent. It was intended that if the place of "sojourn" could be ascertained, and the defendant did not avoid service, that this extraordinary method of procedure should not be allowed. Creditors were to have this special method of reaching defendants, in cases where the customary remedies failed, and then only upon satisfactory proof that the debtor's place of sojourn was unknown. It follows that the motion to vacate the order for substituted service must therefore be granted, but without costs.

WYNKOOP v. MYERS.

(City Court of New York, Special Term. September 23, 1889.)

1. CONTEMPT—VIOLATION OF INJUNCTION.

On an examination of a judgment debtor in supplementary proceedings, it appeared that, as next of kin, he had obtained letters of administration on his son's estate, and had, under Code Civil Proc. N. Y. § 1902, instituted proceedings against a railroad company for the killing of his son. An order was made enjoining the judgment debtor from transferring his property, which order was to continue "until further order in the premises." *Held*, that the judgment debtor was guilty of a contempt in afterwards assigning "all his interest of, in, and to the estate of his deceased son," as the necessary effect of the transfer was to impair and prejudice the remedies of the creditor.

2. SAME—AMOUNT OF FINE.

Where there has been no settlement of the son's estate in the surrogate's court, and the amount which the judgment debtor would receive therefrom is uncertain, but a substantial injury has been done the creditor by the assignment, the court will, in the absence of a certain measure of damages, adopt the course allowed by Code Civil Proc. N. Y. § 2284, and impose a fine of \$250, and costs.

On proceedings for contempt.

Action by Gerardus Wynkoop against Henry Myers. On July 9, 1885, an order was made in supplementary proceedings requiring the defendant (the judgment debtor) to appear before a referee, and submit to an examination concerning his property. He attended, and upon the examination it appeared that his son had met his death on the Long Island Railroad, and that under the statute (Code, § 1902) the defendant, as the next of kin, had, in 1884, obtained letters of administration (with limited power) from the surrogate, and had, as such administrator, commenced an action against the railroad company to recover \$5,000 damages in consequence of the son's death. The letters so obtained were granted to enable the defendant to commence the action just referred to. Judgment was finally recovered therein against the railroad company, and the defendant about April 1, 1889, obtained full letters of administration upon giving a bond with two sureties in the penal sum of \$7,000. Upon receiving full letters, the defendant, as administrator, compromised the judgment against the railroad company for \$3,600, and, after paying the fees and expenses of the litigation, he received and now has to the credit of the estate about \$2,000. On October 13, 1887, the defendant transferred to one Hirschfield "all his interest of, in, and to the estate of his deceased son;" and the making of this transfer is the foundation of the present proceeding to punish the defendant for violation of the injunction contained in the supplemental order.

Code Civil Proc. N. Y. § 2284, provides that, in punishment for contempt, where the actual loss or injury is not shown, "a fine must be imposed not exceeding the amount of complainant's costs and expenses, and \$250 in addition thereto."

Johnes & Wilcox, for plaintiff. *Louis Levy*, for defendant.

MCADAM, C. J. The defendant, at the time the order was served upon him, had a contingent interest in the action against the railroad company; and the injunction order, which was to continue "until further order in the premises," was sufficiently broad to enjoin any transfer of such interest. The proceeding was concluded, but not in consequence abandoned, discontinued, or dismissed. Code, § 2454. The new proceeding attempted to be commenced was therefore properly set aside by the special term judge. The transfer to Hirshfield effectually passed to him whatever interest, actual, contingent, or expectant, which the defendant had or might become entitled to in or from his son's estate. See cases collated in 2 Bliss, Code, Pl. p. 250, subd. b, tit. "Expectant Estates;" Story, Eq. Jur. § 1040 *et seq.* It was executed while the injunction was in force, and before the attempt to commence the new proceeding was made. It had not been superseded at the time, as was the case in *People v. Randall*, 78 N. Y. 416, which is in consequence inapplicable. The effect of the transfer was to impede, impair, and prejudice the remedies of the creditor. It could not operate otherwise. It prevents the defendant and his judgment creditor from realizing anything from the son's estate, and makes the assignee the sole beneficiary thereof. The making of the transfer, as a necessary consequence, constitutes a violation of the injunction, and its result a contempt of court. The amount of the fine to be imposed must next be determined. The damages collected by the defendant, although declared by statute to be exclusively for his benefit as the next of kin, are not exempted from his creditors. His right thereto is subject, however, to the payment of "all debts" of the deceased and the expenses of administration. Code, § 1903. Although, conditionally, the property of the defendant, it does not become absolutely his until the surrogate has ascertained what the debts of the decedent and the expenses of administration are, and until he, by the decree to be made on the final accounting, determines how much the defendant is to retain as his own property. The decrees cannot be obtained until some time next year, and the questions to be determined by the surrogate must remain undisposed of until then. They cannot be determined here. At common law no recovery could be had by anyone for injuries resulting in death, and the statute gives the only remedy in respect thereto the next of kin have. This right could be enforced by the defendant, as the next of kin, only after procuring letters of administration, and then in his representative, not in his individual, character. The fund collected must be held by him in his representative capacity until he has accounted, and the surrogate, after passing on the amount of the debts and expenses of administration, has specifically decreed that the balance is his. His representative character then ceases, and the right to the money decreed to be his becomes for the first time judicially established. The right of his assignee becomes fixed, and effect may then be given to the assignment by directing the moneys coming to the assignor to be paid to his assignee. The rule in regard to subsequently acquired property does not apply, because the right to the fund accrued in 1884, when the letters of administration were first issued. The compromise of the judgment against the railroad company was merely the formal discharge of a prior obligation existing at the time the injunction was served. This court cannot decide, in advance of the surrogate's decree, what the debts presented or expenses incurred will amount to, nor what sum will be finally awarded to the defendant, and paid to his assignee. It will probably exceed the plaintiff's judgment, which is for \$621.57, and it may possibly be less, so that the amount of the judgment does not necessarily furnish the correct measure of damages to be applied in disposing of this motion. See *Gallagher v. O'Neill*, 3 N. Y. Supp. 126. They cannot be definitely fixed or accurately assessed at the present time. The probability that the sum which will eventually go to the defendant or his as-

signee will exceed the amount of the plaintiff's judgment does not warrant the imposition of a fine based on mere conjecture. This is a sort of *quasi* criminal proceeding, on which the defendant may be deprived of his liberty, and he is entitled to the benefit of every reasonable doubt. It was in view of these facts that the court suggested that the plaintiff had better wait until the matter in the surrogate's court was determined before pressing his motion. He declined to delay the proceeding, and the motion must be determined upon the present state of facts. A substantial injury has been done to the plaintiff, and, there being no certain measure of the damage, the court will adopt the course allowed by section 2284 of the Code, and impose upon the defendant a fine of \$250, with \$30 costs of the supplementary proceedings and \$10 costs of motion. Unless the fine is paid within 10 days, it may be enforced by warrant of commitment, according to law.

CLARK v. LICHTENBERG *et al.*

(City Court of New York, General Term. October 31, 1889.)

PLEADING—AMENDMENT—DISCRETION OF COURT.

It is a proper exercise of the discretionary power of the court to allow plaintiff, before trial, to withdraw her cause of action on the "first" undertaking on appeal and continue it on the "second" undertaking, both undertakings having been given to secure the same judgment, and the parties thereto being the same in each.

Appeal from special term.

Action by Lizzie H. Clark against Moses J. Lichtenberg and others. An order was entered allowing plaintiff to amend her complaint on terms, from which defendants appeal.

Argued before MOADAM, C. J., and HOLME, J.

Wilder and Wilder & Lynch, for appellants. *Wakeman & Latting*, for respondent.

PER CURIAM. The court may, before trial, in furtherance of justice, permit a plaintiff to amend his complaint by abandoning the cause of action alleged, and including in the amended pleading one or more causes of action of a different class, subject only to the restriction that they all belong to the same class, and are narrated by the summons. *Brown v. Leigh*, 49 N. Y. 78. The plaintiff herein obtained leave to withdraw the cause of action on what is called the "first" undertaking on appeal, and to continue it on what is denominated the "second" undertaking on appeal. Both causes of action were on contract; were given to secure the same judgment; and the parties thereto were the same on each obligation. The court had power to grant the amendment; and, as the discretion was not abused, the order appealed from must be affirmed. As the terms imposed as a condition, \$15, were light, the affirmation will be without costs.

MURRAY v. BROOKLYN CITY R. Co.

(City Court of Brooklyn, General Term. November 26, 1889.)

1. HORSE AND STREET RAILROADS—NEGLIGENCE OF DRIVER.

In an action against a street railroad company for personal injuries, there was testimony, which was contradicted, that while defendant's car was going down hill, at the rate of seven miles an hour, the driver, without any apparent reason, applied the brake with such force as to give the car a sharp, quick jerk, which hurled the plaintiff from the front platform. Held, that the question of negligence was properly submitted to the jury.

2. SAME—INSTRUCTIONS.

Defendant cannot complain of an instruction that "negligence could not be predicated upon the mere question of speed, unless speed was one of the elements that helped to cause the accident," as speed might be an element of negligence, in connection with the sudden stopping of the car.

3. DAMAGES—WHEN NOT EXCESSIVE.

A verdict for \$18,000 for injuries to a man in the prime of life, resulting in the amputation of a leg and the loss of the use of an arm, is not excessive, or such as to suggest prejudice, partiality, or corruption of the jury.

4. EVIDENCE—EXPERT TESTIMONY.

Medical testimony on the condition of plaintiff's left arm was properly admitted, where it was shown that, in attempting to keep on the car, plaintiff caught hold of the rail with his left hand, and that his arm was soon after afflicted with paralysis, though nothing was the matter with it before.

5. WITNESS—CROSS-EXAMINATION.

Where the driver had testified for defendant that he was taking his car down as he usually did, plaintiff was properly allowed to ask him if he usually walked his horses across J. street, and also to cross-examine him on his schedule time.

Appeal from trial term.

Action by Thomas Murray against the Brooklyn City Railroad Company for personal injuries. There was a verdict in plaintiff's favor for \$18,000, and from the judgment and an order denying a new trial defendant appeals.

Argued before CLEMENT, C. J., and VAN WYCK, J.

Morris & Whitehouse, for appellant. *Thomas B. Pearsall*, for respondent.

VAN WYCK, J. We have carefully read and scrutinized all the testimony in this case, and are of the opinion that the supposed errors relied upon by the appellant are largely built upon counsel's misapprehension of the proof, though we will review every question raised by him, in the order of his printed points.

There is testimony showing that the driver of this horse-car was going down grade at the rate of seven miles an hour, with the plaintiff and several other passengers on the front platform, when he, without any reason, such as avoiding a collision with another team or with a person crossing the street, suddenly applied his brake with such force as to give the car a sharp, quick jerk, which hurled the plaintiff off the platform into the street, though he tried to hold himself on the platform by catching the rail upon the dash-board. His leg and arm were injured, resulting in the amputation of the former above the knee, and in loss of the use of the latter. This testimony was contradicted. Such testimony certainly presented a question of negligence that ought to have been submitted to the jury. Their verdict for plaintiff for \$18,000 is too well supported thereby to be disturbed by this court, unless the damages are excessive, or there is some error in the admission or exclusion of testimony, or in the instructions given to the jury.

The loss of a leg and the use of an arm are very serious injuries to a man in the very prime of life; and we are unwilling to say that the sum awarded by the jury, who heard the evidence of his suffering and pain, and saw the condition of this unfortunate man, more than compensates him for such injuries. Many verdicts for approximate amounts for injuries not so aggravated have been upheld by our courts. *Ransom v. Railroad Co.*, 15 N. Y. 415; *Groves v. City of Rochester*, 39 Hun, 5; *Alberti v. Railroad Co.*, 43 Hun, 421; *Dyke v. Railway Co.*, 45 N. Y. 118; *Hickinbottom v. Railroad Co.*, 15 N. Y. St. Rep. 11; *Voss v. Railroad Co.*, 49 N. Y. Super. Ct. 535, affirmed 100 N. Y. 621. This amount does not suggest to us that either passion, prejudice, ignorance, mistake, corruption, or perverse disregard of justice has in any way influenced the jury. *Gray v. Railroad Co.*, 48 N. Y. Super. Ct. 125; *Hickinbottom v. Railroad Co.*, 15 N. Y. St. Rep. 5; 2 Sedg. Dam. (2d Ed.) 652.

It was no error that the defendant can complain of to charge that negligence could not be predicated upon the mere question of speed, unless speed was one of the elements that helped to cause the accident. It is a well-known law of mechanics that the stoppage of a rapidly-moving car will produce a more violent jerk than that of a slow-moving car. Though the speed alone might not be negligence, still it might be an element thereof, in connection with the sudden and violent application of the brake of the car.

Appellant next insists that the medical testimony upon the condition of plaintiff's left arm ought to have been excluded, on the contention that there was no evidence that the arm had been injured in the accident. This contention seems to be based upon a misapprehension of the testimony, for it certainly tends to show that he caught hold of the rail of the dash-board with his left hand, in his attempt to keep upon the car, which must have wrenched it severely, and that his arm was soon after afflicted with paralysis, though nothing was the matter with it before the accident.

Appellant next urges that the witness Short should not have been allowed to tell the speed of the car in crossing Jay street, on the ground that it was uncontradicted that the car stopped, after crossing, before it reached the point where the accident occurred. This is another misconception of the testimony; for Short says he saw the car coming across that street at the rate of seven miles an hour, and, as it reached the second house beyond, the jerk took place which threw plaintiff off, and the testimony of the plaintiff and his other witnesses tends to show the same.

It was proper to allow plaintiff, on cross-examination of the driver, to ask him if he usually walked his horses across Jay street, after he had testified on the direct that he was taking his car down as he usually did, and also to cross-examine him on his schedule time. We think the case is free from error.

Judgment and order appealed from must be affirmed, with costs.

DALY v. WISE.

(Common Pleas of New York City and County, General Term. December 30, 1889.)

LANDLORD AND TENANT—UNFURNISHED BUILDING—DEFECTIVE PLUMBING.

On a covenant to pay rent for an unfurnished house, the landlord may recover where the tenant, after occupying the premises some time, quits on account of defective plumbing of which the landlord had no knowledge.

Appeal from district court.

Action by Maria L. Daly against John S. Wise, to recover rent. On trial in the district court, judgment was rendered for defendant, from which plaintiff appeals.

Argued before VAN HOESEN and BOOKSTAVER, JJ.

Daly, Hoyt & Mason, for appellant. *J. Seargent Cram*, for appellee.

PER CURIAM. No objection was made to the admission in evidence of the report made by the sanitary inspector to the board of health, and therefore we are not called on to express any opinion as to the right of the defendant to use documents of that description in maintaining his defense. That this case was wrongly decided by the justice admits of no doubt whatever. The landlord was not bound to repair. No fraud or deceit is charged. It is conceded that the defects in the plumbing, whatever they were, were not known to the landlord. The defendant was told before the lease was made that "the landlord was very stiff, and was determined not to put in anything new." It is clear that the defects were not patent, for it is proved that the olfactories of the defendant and his family were not unpleasantly assailed till some time after they had become occupants of the house. If a foul smell had been perceptible to any one who entered the building, the defendant must have discovered it in making his examination of the house with a view to hiring. The case, therefore, is a simple and familiar one. A tenant hires an unfurnished house, and soon after moving in discovers that the plumbing is defective. Thereupon he quits the house, and declares the lease to be null and void. Can he lawfully do so? The justice decided that he may. That decision is in violation of the well-settled law of this state. Such a decision would never have been dreamed of if the defect in the house had been anywhere else than in the plumbing. The two words "sewer gas" have not

yet entirely upset the law of landlord and tenant, notwithstanding the repeated efforts that have been made to bring about such a result. The law of New York is that there is no implied warranty that demised premises are tenable. *Mayer v. Moller*, 1 Hilt. 491; *Cleves v. Willoughby*, 7 Hill, 83. A recovery may be had upon the covenant to pay rent, unless the tenant has been evicted, or has rescinded the contract of letting because of the landlord's fraud. Of course, fraud cannot be charged where an intent to deceive does not exist. The *scienter*, *i. e.*, a guilty knowledge and a deceitful intent, must be alleged and proved, wherever fraud is relied on as a ground of action or of defense. The defense in this case is not fraud, for the innocence of the landlord is conceded.

Nor is there any reason for the contention that the tenant was evicted, either actually or constructively. He left of his own free will, though no act of the landlord interfered with his enjoyment of the premises. The landlord, instead of preventing him from the full enjoyment of the dwelling, went beyond the line of duty marked out by the law, and volunteered to remove the defects in the plumbing. No delay or procrastination could be complained of, for such was the promptitude of the landlord's action that the tenant's wife pleaded for delay. It is not pretended that the landlord in any way invaded the demised premises, and excluded the tenant from the possession or enjoyment of any part of the thing demised. It is plain, therefore, that there was no actual eviction. It is quite as clear that there was no constructive eviction. It has been held that there is a constructive eviction where the landlord maintains, upon his own premises, a nuisance that seriously interferes with the tenant's enjoyment of the demised premises, when all are under the same roof. The entertainment of prostitutes upon his own premises by the landlord, (*Dyett v. Pendleton*, 8 Cow. 727,) and the keeping of the wastepipes in the landlord's premises in so defective a condition that foul odors from them penetrated the tenant's apartments, and made them uninhabitable, (*Bradley v. De Goicouria*, 12 Daly, 397,) were cases in which the act charged upon the landlord was the maintenance of a nuisance on his own premises that deprived the tenant of the enjoyment of the demised premises. This case is not of that description. Here there is no complaint that the maintenance by the landlord of a nuisance interfered with the tenant's possession, but it was the landlord's nuisance that led to the decision in *Bradley v. De Goicouria*, *supra*, a case that seems to have been greatly misunderstood, though the point decided is clearly stated in the opinion of the chief justice, from which we quote: "If a tenant is deprived, by the wrongful act of the landlord, of the beneficial use of the premises, and is compelled thereby to quit and abandon them, it amounts to what has been called a 'constructive eviction.'" What wrongful act of this landlord deprived this tenant of the beneficial use of these premises. Evidently, *Bradley v. De Goicouria* gives no support to the defense. The case of *Laurence v. Burrell*, 17 Abb. N. C. 312, was decided in the city court, and is so palpably erroneous that no time need be spent in exposing its errors. The case of *Wilson v. Finch-Hatton*, L. R. 2 Exch. Div. 336, upon which the tenant relies, has no bearing upon the point in controversy. That case was decided with special reference to its own peculiar circumstances, and it was not intended to disturb the settled rules of law governing demises of real property. Sir FITZROY KELLY, C. B., said: "The question we have to determine is whether, on an agreement of this nature, which is an agreement for the letting and hiring of a house in what is considered a fashionable district, at a high rent, for three months at the height of the season, if the house prove not merely not habitable, and not reasonably fit for occupation, but in some respects so unsuitable for the accommodation of those who intend to occupy it that they could not reside in it, even for one night, without danger to their health, * * * the hirer of that house is at liberty to consider the agreement at an end, * * *

and resist all demands for rent." The drains in the house were bad, and under the rooms in the basement a deposit of fecal substance was found. The landlord was willing to repair the drains, but it would have taken a considerable part of the term of the demise to do the work, and the tenant refused to retain possession or to pay the rent. The turning point of the case was that the house was a furnished house. Said Chief Baron KELLY: "The circumstances in which furnished houses are, and those in which real property is, demised differ very greatly. Where real property, such as a house and lands, is taken by a tenant in a state so dilapidated as to require a large expenditure of money to put it into repair, to hold that the contract contained an implied condition that the lessor should put such premises into repair would be clearly contrary to the intention of the parties. When, however, a person takes a furnished house for a brief period of time, it is clear that he expects to find it reasonably fit for occupation from the very day on which he intends to enter, and the lessor is well aware that this is the view entertained by the tenant." Again he says: "There is an implied condition that a furnished house shall be in a good and tenantable condition * * * from the very day on which the tenancy is dated to begin." Baron POLLOCK said: Looking at the subject-matter, it is clear that such a contract does not come within the rules laid down in the judgment in *Jones v. Just*, L. R. 3 Q. B. 202; "but although, in the case of a furnished house, many of the incidents which attach to a demise of realty may be applicable, inasmuch as the rent does, in a sense, issue out of the realty, still the rent paid for a furnished house, such as this, is not merely rent for the use of the realty, but a sum paid for the accommodation afforded by the use of the house, with all its appurtenances and contents, during the particular period of three months for which it is taken." Baron HUDDLESTON said: "I think there is an implied condition that the furnished house * * * shall be reasonably and decently fit for occupation;" and he cited the opinion of SHAW, C. J., in *Dutton v. Gerrish*, 9 Cush. 94, to the effect that there is an implied warranty that furnished lodgings in a lodging-house are fit for such use. It is evident that the case of *Wilson v. Finch-Hatton* is not applicable to this case, and that it was not intended to disturb the law of real property, or to hold that there is an implied covenant that a dwelling, unfurnished, is fit for occupation. By our law, the right of the plaintiff to a judgment is incontestable. We have looked at the cases cited by the justice in his opinion, and none of them, save those we have commented upon, have any bearing upon the question in controversy. The judgment of the district court must be reversed.

PRICE v. GRANT, Sheriff.

(Common Pleas of New York City and County, General Term. December 30, 1889.)

1. DISTRICT COURTS—JURISDICTION—ACTIONS AGAINST SHERIFF.

In the absence of any statute depriving district courts of jurisdiction in cases where the sheriff is a party, they have jurisdiction in an action against him for the recovery of a chattel; the same being expressly conferred by Code Civil Proc. N. Y. § 3215, providing that each district court of the city of New York has jurisdiction of an action in which a justice of the peace has jurisdiction, as prescribed in sections 1737, 2861-2863, as subdivision 7 of section 2862 gives justices jurisdiction of actions for the recovery of chattels where the value does not exceed \$200.

2. SAME—CONSTRUCTION OF STATUTE.

The fact that section 2865, which gives justices' courts jurisdiction in actions against county officers, is not made applicable to district courts, does not deprive the latter of jurisdiction in actions of replevin where a sheriff is a party.

Appeal from district court.

Action by Moses Price against Hugh J. Grant, sheriff of the city and county of New York, to recover possession of certain personal property. Defendant interposed a demurrer that the court had no jurisdiction of the ac-

tion, for that it was against a county officer. From the judgment of the court sustaining the demurrer and dismissing the complaint plaintiff appeals.

Code Civil Proc. N. Y. § 3215, provides that each district court of the city of New York has jurisdiction of an action in which a justice of the peace has jurisdiction, "as prescribed in sections 1787, 2861-2863, of this act," except that subdivision 3 of section 2862, giving justices jurisdiction of an action for a fine or penalty not exceeding \$200, and subdivisions 1 and 4 of section 2863, denying to justices jurisdiction where the people of the state are a party, (unless for fines or penalties within \$200,) and in actions on mutual accounts where the total amount proven shall exceed \$400, shall not apply to actions brought in either of such district courts. Section 2865 confers on justices' courts jurisdiction in actions against county officers, but is not made applicable to district courts.

Argued before VAN HOESEN and BOOKSTAVEN, JJ.

Solomon, Kantrowitz & Esberg, for appellant. *W. Bourke Cockran*, for respondent.

PER CURIAM. An action to recover a chattel falls within the denomination of actions cognizable in a district court, and therefore the court below had jurisdiction of this action unless some statute deprives district courts of jurisdiction in cases in which the sheriff is a party. It was the duty of the defendant to point out the statute that thus limits the jurisdiction of those courts in actions for a chattel. There is no doubt that a district court has only such jurisdiction as is conferred by statute, (section 3215, Code Civil Proc.) nor is there any doubt that there are certain classes of cases over which the law forbids those courts to exercise jurisdiction, (section 1286, Consolidation Act.) The only persons whom the statute expressly exempts from amenability to the district courts are executors, administrators, and the municipal corporation of the city of New York. Section 1286, just cited. There is no pretense that there is any statute which declares that a district court shall not have jurisdiction of an action against a sheriff. It is said, however, that jurisdiction is not expressly conferred. That, we think, is a mistake. As was said by the supreme court in *Jansen v. Stoutenbergh*, 9 Johns. 369, which was an action brought in a justice's court against a sheriff, where the action falls within the denomination of actions cognizable by a justice it may be maintained as well against a sheriff as against any other person, where there is nothing to take away the justice's jurisdiction.

But it is argued that section 2865 of the Code, which expressly confers upon justices' courts jurisdiction of actions against county officers, is not made applicable to district courts; and that, if justices' courts derive their jurisdiction over county officers from that section, then, inasmuch as it does not apply to district courts, there is no provision of law that vests those courts with jurisdiction of actions against those officials. The answer to that argument is plain. It is not by virtue of section 2865 that justices' courts possess jurisdiction in actions against county officers. Why that section was ever inserted in the Code is a mystery, for Mr. Throop, the codifier, says in his note: "This section is probably unnecessary." Section 2863 enumerates the cases in which a justice shall not have jurisdiction, and except in those specified cases he has jurisdiction of all causes of action embraced within the terms of section 2862. Sections 2862 and 2863, taken together, fix the limits of a justice's jurisdiction. Those two sections, coupled with sections 1285 and 1286 of the consolidation act, define the jurisdiction of the district courts; and, as we have already said, there is not in any of them a word that takes a case against the sheriff out of the jurisdiction of a justice's court, or out of the jurisdiction of a district court. The fallacy of the defendant's argument will be clearly seen by taking the following extract from section 2865: "An action cognizable by a justice of the peace may be brought by or against a natural person in his

own right." If the argument of the defendant be sound, then a justice has jurisdiction of an action by or against a natural person because section 2865 confers it upon him; but a district court cannot entertain any action whatever by or against a natural person because the section referred to does not apply to district courts. The futility of that contention is palpable. The judgment must be reversed, and a new trial ordered, with costs to the plaintiff and appellant. In other words, the defendant, conformably to the usual practice in cases of demurrer, may answer over on payment of costs.

SLAVIN v. MAYOR, ETC., OF THE CITY OF NEW YORK.

(*Superior Court of New York City, General Term. June, 1883.*)

DEFECTIVE SIDEWALKS—EVIDENCE.

In an action for injuries alleged to have been caused by slipping on ice negligently allowed to remain on an unsafely graded sidewalk, where there is no evidence as to the cause of plaintiff's slipping, a judgment for defendant is proper.

Appeal from jury term.

Action by Ann Slavin against the mayor, aldermen, and commonalty of the city of New York, for personal injuries. Judgment on verdict for defendant, plaintiff's motion for new trial denied, and she appeals.

Argued before SEDGWICK, C. J., and FREEDMAN, J.

Thomas Nolan, for appellant. *Thomas P. Wickes*, for respondent.

SEDGWICK, J. The action is for damages to the plaintiff from her slipping upon ice that had been negligently suffered to remain upon a sidewalk of unsafe grading. The plaintiff gave no testimony to show that her slipping, she testifying that she did slip, was caused by the ice upon the sidewalk, or the grading of the sidewalk. She testified that she slipped and fell on the sidewalk, and that there was ice between the stones that formed the pavement. The cause of her slipping she does not allude to, and she does not say that she slipped upon ice. Perhaps upon the trial she testified to other things. On this appeal the case is the only resort for the testimony. There are other reasons for the appellant's having no right to a reversal of the judgment. It appears, however, that she had no cause of action upon the merits. Judgment and order appealed from affirmed, with costs. All concur.

LANE et al. v. ROSENBERG et al.

(*Superior Court of New York City, General Term. June, 1883.*)

CONVERSION—EVIDENCE.

In an action for conversion of goods in which plaintiffs claimed a special property as factors, plaintiffs admitted that they had notified their consignors that they had sold the goods, but showed that their consignors refused to ratify the sale. But it appeared that plaintiffs persisted in claiming that the sale was *bona fide* and irrevocable; that the sale was a formal one, an account of it appearing on plaintiffs' books; that they permitted their vendee to sell and deliver the goods; that defendants, in good faith, bought the goods of plaintiffs' vendee, and paid him for them; and, though plaintiffs attempted to show that the sale was rescinded as between them and their vendee, no actual rescission was shown. Plaintiffs did not request submission to the jury. *Held*, that the trial court properly directed a verdict for defendants as it did not appear that plaintiffs had not parted with their special property, and the fact that their vendee made false reports to them after his sale to defendants was immaterial.

Appeal from jury term.

Action for conversion of personalty by Jonas H. Lane and another against Charles Rosenberg and another. Judgment on a verdict directed by the court for defendants, and plaintiffs appeal.

Argued before SEDGWICK, C. J., and FREEDMAN, J.

M. W. Divine, for appellants. *Richard T. Newcombe*, for respondents.

FREEDMAN, J. No error constituting ground for reversal appears to have been committed in the admission or exclusion of evidence, and the only remaining question is whether, upon the whole case, the verdict which was directed for the defendants was properly directed. The action was for conversion. To maintain it, the plaintiffs, under the circumstances of the case, were bound to show that they had not parted with their special property in the goods. The defendants denied the conversion, and claimed to have purchased the goods, in the regular course of their business, from one Charles D. Stearns. The goods had been consigned by the Shaw Glove Company to the plaintiffs for sale, and the plaintiffs, as factors, claimed a special property in them, for advances made by them. Upon the trial the plaintiffs admitted that they had notified the Shaw Glove Company, their consignors, that the goods had been sold by them to said Stearns; and they sought to overcome the force of that fact by showing that the company had refused to ratify the transaction. But it further appeared that notwithstanding such refusal the plaintiffs persisted in claiming, as against the company, that the sale had been a *bona fide* and irrevocable one, and that the company, if desirous to redeem, must redeem from Stearns, who would permit redemption upon certain conditions, which had been made part of the contract of sale. It also appeared that a formal sale was made by the plaintiffs to Stearns, who was a salesman in their employ; that the books of the plaintiffs contained an account showing such sale; that thereafter the plaintiffs permitted Stearns to sell and deliver the goods; that the defendants bought them from Stearns without knowledge of any claim thereto by the plaintiffs; that they paid for them to Stearns; and that they were led to believe, and had reason to believe, that the goods actually were the property of Stearns. One of the circumstances inducing such belief was a statement made to them by a stockholder in the Shaw Glove Company, who had been sent on by the company to endeavor to sell all the goods remaining in plaintiffs' hands for enough to pay the amount of the plaintiffs' claims for advances, and all commissions and charges, that Stearns had become the owner. To surmount the difficulties standing in the way of a recovery by reason of the facts stated, the plaintiffs then attempted to show that in consequence of the refusal of the company to ratify the transaction the sale was, as between themselves and Stearns, rescinded; but the testimony was insufficient to establish actual rescission. Upon the whole case, the evidence preponderated so much in favor of the defendants that if the case had been submitted to the jury, and their verdict had been in favor of the plaintiffs, such verdict would not be permitted to stand. Under these circumstances, the trial judge was justified in directing a verdict for the defendants, especially as the plaintiffs made no request to be allowed to go to the jury. For the reasons already stated, the additional fact that after the sale by Stearns to the defendants, and the payment made by them, Stearns made false reports to the plaintiffs, could not change the result. The judgment should be affirmed, with costs. All concur.

COCHRANE v. HAWVER *et al.*

(Supreme Court, General Term, Third Department. December 11, 1889.)

RIGHTS OF DEVISEES—MORTGAGES ON LANDS DEVISED.

Rev. St. N. Y. p. 749, § 4, (8 Rev. St., 7th Ed., p. 2205) providing that, whenever any real estate subject to a mortgage executed by a testator shall pass to a devisee, the latter shall satisfy the mortgage out of his own property, in the absence of a contrary express direction in the will, does not apply to a mortgage executed by a testator to indemnify the mortgagee from liability for accommodation indorsements to be made by him; and a note on which the mortgagee becomes indorser and which the mortgage is assigned to secure, is payable out of the testator's personality.

Appeal from special term, Columbia county.

Action to foreclose a mortgage by Aaron V. S. Cochrane against Chancellor Hawver, executor of James E. McClure, deceased, Clara V. McClure, and others. The mortgage was executed by decedent during his life-time to one Lucius Moore to secure him from liability as indorser on notes thereafter made. He thereafter indorsed a note for decedent, and this note and the mortgage were assigned to plaintiff. A judgment was rendered directing that the mortgage be paid out of the decedent's personal estate, and the executor appeals. 3 Rev. St. N. Y. (7th Ed.) 2205, referred to in the opinion, provides that whenever any real estate, subject to a mortgage executed by a testator, shall pass to a devisee, the latter shall discharge and satisfy the mortgage out of his own property, unless there is an express direction to the contrary in the will.

Argued before LEARNED, P. J., and LANDON and INGALLS, JJ.

Chancellor Hawver, pro se. Burgess Speed, (A. Frank B. Chace, of counsel,) for respondent Clara V. McClure.

LEARNED, P. J. The deceased, some 16 years before making the note in question, executed a mortgage to Moore, to secure him against liability for accommodation indorsements to be made. After making the note, he obtained the indorsement of Moore, and had the note discounted at a bank. Subsequently, he married Clara V., one of defendants. After his marriage, he died, leaving his widow surviving, and having made a will by which he gave his property in trust for his child. The note has not been paid by the maker, or his estate; but the note and the mortgage have been assigned to the plaintiff. It therefore becomes important to the widow that the note should be paid by the executor, out of the personal estate, which is ample.

No question has been made whether Moore could maintain an action of foreclosure until he had been obliged to pay and had paid the note. If he could not, then, of course, neither could the plaintiff. But we do not pass on this.

Of course, there are cases in which the creditor, in order to collect his debt, is entitled to the benefit of securities held by the surety. But this right of the creditor is for his benefit. It is not for the purpose of controlling the question of marshaling the assets of the principal debtor. Therefore, this right of the creditor is of no consequence in this case. The old rule was that a debt, though secured by a mortgage, was to be paid by the executor out of personal property. That rule is changed by Rev. St. p. 749, § 4, (3 Rev. St. N. Y., 7th Ed., p. 2205;) and the only question here is whether that statutory provision applies to this case. The reason of the statute was undoubtedly that, though legally the mortgage is collateral to the debt, yet it is ordinarily thought of as the principal thing. The legislature saw that a testator, devising property which was subject to a mortgage, would usually intend that the devisee should take the land with the burden, and would not intend, unless he so expressly stated, that his personal property should be used to relieve the land. The legislature thus gave to a will the effect which the testator undoubtedly would intend. So, also, as to an intestate. But a mortgage of the kind in this case is very different. The mortgagor does not intend to permanently burden his estate. He only desires to secure his surety. He intends to perform to his surety the duty of paying the debt, and does not desire that the surety shall pay, and then foreclose. The mortgage is not given to the creditor as security for the debt. It is a collateral affair, intended merely to keep safe the surety. It is conditioned on the event that the surety suffer loss. The land is not specifically appropriated to the payment of the debt. It is appropriated only to the indemnity of the surety. The reason, therefore, of the statute fails; and though, as urged, the language may be broad, yet we are confident that this case is not within the intent of the statute. We think, therefore, that the learned justice was right that the widow

is entitled to the marshaling of assets which was provided for by the decree; that is, that the debt is to be paid, if possible, out of the personal estate. Judgment affirmed, with costs against the executor, to be paid out of the estate. All concur.

In re GILLIES' WILL.

(*Supreme Court, General Term, Second Department. December 10, 1888.*)

WILLS—PROBATE AND CONTEST—VACATING DECREE.

A decree admitting a will to probate on default of contestant will not be vacated on contestant's application, where there is no allegation of testamentary incapacity of decedent, and the ground of contest is simply that the widow and children were insufficiently provided for by the will.

Appeal from surrogate's court, Rockland county.

Sarah E. Gillies and others moved to open a decree admitting the will of John W. Gillies, deceased, to probate. The decree was entered on default of applicants, who were contestants. The motion was denied, and the applicants appeal.

Argued before BARNARD, P. J., and PRATT, J.

E. T. Lovatt, for appellants. *Irving Brown*, for respondents.

BARNARD, P. J. The proceedings by proponents were regular. The citation to prove the will was returnable October 31, 1888. The hearing was adjourned from time to time until the 5th of January, 1889, when, no one appearing to oppose, the will was admitted to probate. The witnesses to the will had been examined, in the presence of the contestants, at one of the previous hearings, and on this day the investigation was closed by proof on the part of proponents as to the custody of the will. The fifth of January hearing was agreed to by the proponents, and by the attorney representing the contestant, for the purpose of procuring an adjournment. The regular attorney for contestants says he told his representative to adjourn the case to 9th July, 1889. The contestants' attorney's representative says he at once sent a letter to his principal, stating the real day fixed by the court. As against the respondents, the appellants' case rests upon the receipt by the appellants' attorney of this notice. The question of opening the default is not to be determined by the power of the court to open the probate, but by some injury to appellant which will result by letting the decree stand. No such injury is claimed. The contest on the probate seems to rest upon an allegation that the widow and children are insufficiently provided for by the will. There is no allegation that testator was incompetent, or was defrauded, or forced to make the will. The surrogate, who had heard the witnesses to the will, was likely to know what real cause for contest there was; and, in the absence of any proof or allegation in the affidavits of lack of testamentary power in deceased, the order should stand. Order affirmed, with costs. All concur.

LAWYER V. FRITCHER.

(*Supreme Court, General Term, Third Department. December 11, 1889.*)

1. SEDUCTION—LOSS OF SERVICE—EVIDENCE.

In an action for seduction of plaintiff's minor daughter, evidence that defendant by fraud obtained plaintiff's consent to take away the daughter; that he then seduced her; and that, after she was informed that he could not marry her, she took poison, said she did not want to live, and died four days after having left home,—is sufficient to submit to the jury the question whether plaintiff was damaged by the seduction, as it authorizes an inference that the daughter was ill, and unable to render service at the time she took poison, and that this condition was caused by the seduction. *LEARNED, P. J.*, dissenting.

2. SAME.

The fact that the daughter was not, at the time she took the poison, in plaintiff's house and actual service is immaterial.

3. **SAME.**

Where defendant alleges that plaintiff consented to his taking the daughter away, evidence of circumstances at that time and preceding it is admissible to show that such consent was obtained by fraud; it being, in that case, no defense.

Appeal from circuit court, Schoharie county.

Action by Peter Lawyer against Peter G. Fritcher, for the alleged abduction and seduction of plaintiff's minor daughter. Verdict and judgment for plaintiff, defendant's motion for new trial denied, and he appeals.

Argued before LEARNED, P. J., and LANDON and PUTNAM, JJ.

A. B. Coons, for appellant. Albert C. Baker, (Wm. C. Lamont, of counsel,) for respondent.

PUTNAM, J. This action is brought by plaintiff to recover for loss of services on account of the alleged abduction and seduction of his daughter Edith, in May, 1886. Defendant had at the time a wife living, and could not marry. When he took Edith away, defendant said: "I am just as clear from my wife as though I never had married her." Plaintiff believed the statement, and was induced thereby to sign a written consent to the marriage of his daughter with the defendant. Defendant took Edith from her father's house on May 17, 1886, under the pretense that he would marry her, but, as he was unable to do so, no marriage was attempted between them. They were proved to have occupied the same bedroom and the same bed for two nights. On the 20th she died by poison, administered by herself. The defendant called out, on the examination of Julia Lawyer, the fact that Edith stated that she had taken poison. That she said: "I have took poison, Julia." "What did you do that for?" I [Julia] said. She said: "Because I didn't want to live; I don't want to see anybody." It appeared that when defendant brought Edith home, and said that she was his little wife, and after they had occupied the same bed and bedroom one night, Julia Lawyer told Edith that Fritcher could not get married, because he did not have a bill from his wife.

There is no doubt that the relation of master and servant existed between plaintiff and his daughter Edith at the time in question. She was 17 years of age, living with him, and he was entitled to her services. The jury have found, on competent evidence, that the consent of plaintiff to the defendant's taking away his daughter on a promise of marriage was given in the belief that defendant had a legal right to marry, and that such consent was obtained of plaintiff by fraud. It is held in *Reg. v. Hopkins*, Car. & M. 254, cited and approved in *People v. De Leon*, 109 N. Y. 229, 16 N. E. Rep. 46, that a consent obtained of the parent by fraud is no defense to an indictment for abduction, nor is it in an action for seduction by the parent. The fact that when the daughter was ill and died she was not at her father's house, and in his actual service, but at defendant's, does not prevent a recovery. *Furman v. Van Sise*, 56 N. Y. 435; *Certwell v. Hoyt*, 6 Hun, 575.

The proof is sufficient that the defendant had carnal intercourse with the daughter of plaintiff. They occupied the same bed and bedroom for at least two nights. This evidence was sufficient to justify a verdict, and it is well settled that the jury were not bound to believe the evidence of defendant in the matter. Hence plaintiff showed the relation of master and servant between himself and his daughter; that he was entitled to her services; and that she was seduced by defendant without his consent. The most serious question in the case is whether there was sufficient evidence of damage to submit to the jury, assuming that the plaintiff is not entitled to recover on account of the death of his daughter, as held by the trial judge. In such actions it is necessary to show some actual damage resulting from the seduction. But the loss of service is often merely nominal, though the damages recovered are very large. The slightest proof of damage is sufficient. See *Lipe v. Eisenlerd*, 32 N. Y. 236, 237; *Badgley v. Decker*, 44 Barb. 577; *Damon v.*

Moore, 5 Lans. 459. Therefore showing that a slight illness was caused is sufficient. In *Knight v. Wilcox*, 18 Barb. 212, it was held not necessary to show pregnancy and the birth of a child; that illness of the daughter was sufficient. The judgment was reversed by the court of appeals, upon the ground only that the illness of the daughter in that case was not the direct and necessary result of the seduction. See 14 N. Y. 413. In *Manvell v. Thomson*, 2 Car. & P. 303, the damage resulting from a seduction was a mental illness, threatening the overthrow of the physical system. The authority of the case was questioned by WRIGHT, J., delivering the opinion of the court of appeals in 14 N. Y. 417, but the case was afterwards cited with approval in *White v. Nellis*, 31 N. Y. 408, and *Lipe v. Eisenlerd*, 32 N. Y. 234. See, also, *Gray v. Durland*, 51 N. Y. 429. In *White v. Nellis*, 31 N. Y. 405, it was held that plaintiff could recover in such an action whenever the wrongful act, by immediate and direct consequence, deprived the master of his servant, or injuriously affected his rights to such services; citing the case of *Manvell v. Thomson*, *supra*.

Is this such a case? As stated, where the relation of master and servant exists, and the seduction is shown, proof of an actual loss is rather a legal fiction than a reality; the slightest proof is sufficient. In this case the jury have found, on competent evidence, that defendant, a man of 60 years, by gross fraud obtained plaintiff's consent to take away his child, 17 years old, and seduced and debauched her, well knowing that he was unable to marry her. It is to be inferred that she was well when she left home. She was a bright, cheerful, good-tempered child. She thus left home on the 17th of May. When she was brought to defendant's house she was informed that he could not marry her, as he had no divorce from his wife. The fact was drawn out by defendant that she took poison, and stated that she "didn't want to live; did not wish to see anybody." She died on the 20th, four days after she left home. Is there any evidence in the case from which the jury could legitimately conclude that the child, between the 17th, and the time she took the poison which caused her death, was ill? If ill in any way, however slight, her father, who was entitled to her services, was damaged. The jury might properly infer from what she said and the circumstances shown that when she took the drug she did so under a feeling of shame and mortification at finding that she was seduced and ruined, which feeling was the direct and natural result of the seduction shown. When she took the poison the jury were authorized to find that she was mentally ill, and that such illness was caused by the seduction. In *Manvell v. Thomson*, 2 Car. & P. 303, a cousin of the girl proved that when she returned to her uncle's house, after she had been seduced and abandoned, she was in a state of very great agitation, and continued so for some time; that she received medical attendance, and was obliged to be watched lest she should do herself some injury. This was taken as evidence raising a presumption of loss of service by the uncle, and he had a verdict of £400. This case having been cited and approved in several cases in the court of appeals, may be deemed an authority. It was properly decided. A person when in a state of great and continued agitation, and who has to be watched for fear she will harm herself, is not only mentally, but physically, ill. On the authority of that case, we think the judge correctly submitted to the jury the question whether the plaintiff sustained damages by the seduction proved in this case. There was evidence to justify the finding that the child, as a result of her seduction, had taken poison; that she was thrown into that state of semi-insanity that induced her to take her own life. Such evidence proved that she was mentally and physically ill, and was such slight evidence of damage to plaintiff that the judge could properly submit the case to the jury. If, in *Manvell v. Thomson*, the fact that the niece was thrown into a state of agitation, so that she had to be watched, raised a presumption of loss of service by the uncle, here, where the act of the defendant threw

the daughter into such a state of agitation and mental distress that she actually did take her own life, the presumption of loss of service is equally strong. She should have been watched. Her condition was such that she required care and attendance, and, although while in this condition she was not in her father's house, he is just as much presumed to have suffered damage as though she had been at his home.

It was no error to show the circumstances, including the conversation between the parties, occurring at the time and preceding the time that defendant took away the child, although the conversation called out showed a promise of marriage. The defendant had set up that plaintiff consented to whatever was done. One of the issues in the case was whether or not Edith was taken away with her father's consent. Plaintiff could properly prove all the facts and circumstances to prove that his consent was obtained by fraud. In this case whatever took place between the parties, and what was said, was necessarily shown on the question whether the girl was seduced or not. We do not think that the authorities cited by the defendant apply to such a case as this. The charge of the learned judge seems to have been favorable to the defendant, and we do not discover any errors, either in his charge or in his rulings, upon the trial. The judgment should be affirmed, with costs.

LONDON, J., (*concurring*.) Seduction accomplished, implies consent. This consent is at common law a bar to an action against her seducer by the female seduced. As no physical violence was done the father, the common law could afford him no remedy except by resort to the fiction that his daughter is his servant, and therefore owes him service; that if she is seduced, and thus rendered incapable of rendering service, he loses the service she owed him; and he therefore may recover against the seducer who causes such loss of service. This artifice is properly termed a "legal fiction," the real ground of recovery being for damages for the outrage perpetrated. In this case all the requirements of the fiction are made made out, except, possibly, the inability to render service consequent upon the seduction. Why is proof of this consequent inability required? Simply to complete the logical consistency of the fiction. Justice does not require it. Justice examines to ascertain whether the alleged outrage is really such, and of what degree of aggravation. The outrage proven, a *scintilla* of evidence of the consequent inability to render service will suffice, and ought to suffice. Liberal presumptions may be indulged, if the justice of the case requires it, to establish this member of a series of fictional requirements. Here the seduction was proved, and the daughter's subsequent suicide. The jury could infer that before she took the poison there were some moments—a single one would be enough—in which she was not so capable of rendering service as she would have been if her seduction had not been effected. I concur with my Brother Putnam.

LEARNED, P. J., (*dissenting*.) The defendant, a married man over 60 years of age, took plaintiff's daughter Edith, about 17 years old, from her father's house, on Monday, May 17th. He did this with the consent of the parents. But the verdict of the jury establishes that he obtained this consent by fraud. That night he stayed with her at a hotel, and occupied the same bed with her, saying to the landlady that Edith was his wife. The next day he arrived with her at his own house. They occupied the same bed, and he made a similar statement *viz.*, that he had been married to her the day before. When there Edith's sister (who had been living at defendant's) told Edith that defendant could not get married; he had not been divorced. The next day, after dinner, Edith became sick. She had taken poison. The day following, Thursday, the 20th, she died from the effects of the poison. Before death she told her sister that she took poison because she did not want to live, and that she did not want to see anybody. There was evidence that Edith

had recovered from her usual monthly courses a week before she went away with defendant, and that before her death her underclothes were spotted with blood, which a physician supposed to be the menstrual flow.

The important point in this case is whether, on these facts, the court could properly submit to the jury the question whether the plaintiff sustained damage, other than that of death, for loss of service by reason of the seduction. It will be seen that there is no evidence of seduction before Monday night; no evidence of Edith's condition from Monday night till Wednesday noon, when she took the poison; and, of course, no evidence of pregnancy. The court charged the jury that her death was not a direct result of the sexual intercourse. Hence the question must be whether the jury were justified in finding that between Monday night and Wednesday noon Edith's condition was such, owing to the seduction, that she was unable to render the service which her father was entitled to demand from her. In *Hewitt v. Prime*, 21 Wend. 79, this court charged that "no loss, expense, or damage prior to the suit need be shown; it is enough to prove the seduction." This was held not to be error. And the court said that "the loss sustained by the parent from the corruption of her [the daughter's] mind and the defilement of her person by the guilty seducer is considered ground for damages consistent even with the first principles of the action." But such was not the charge of the court in the present case, since the court rested the right of recovery on actual damages. Therefore we must consider whether there was such actual damage. If the court had charged that no damage need be shown, the defendant might have excepted, and brought up the point for review. And we must notice that in the case just cited the seduction was in July; the daughter became pregnant; the action was commenced in September; and a child was born in April, before the trial. So that there was evidence from which the jury could have found inability to work. And the trial court probably intended that no other proof was needed. The cases of *Clark v. Fitch*, 2 Wend. 459, and *Martin v. Payne*, 9 Johns. 387, cited in the opinion, do not sustain the point that no proof of damage need be given. See especially the remarks of Justice SPENCER in the latter case. In *Ingerson v. Miller*, 47 Barb. 47, the daughter had been pregnant over three months, and consulted a physician for relief. He refused. She fainted, and died. The defendant asked the court to charge that there was no proof of loss of service. The trial court refused, and this was held correct. The court said, in substance, that if the daughter was pregnant she must have been disqualified to render such service as she would owe. But the doctrine was still asserted that mere seduction, without pregnancy, consequent ill health, or injury to the servant, would not give the right of action. It is so stated in *Whitney v. Elmer*, 60 Barb. 269. In the case of *Badgley v. Decker*, 44 Barb. 578, the court say the rule is still adhered to with us that loss of service is the legal *gravamen* of the action. There the daughter became pregnant, and then lived with plaintiff till the birth of the child. The doctrine is also stated in the same way in *Bartley v. Richtmyer*, 4 N. Y. 38. In *Lipe v. Eisenlerd*, 32 N. Y. 236, while the court say that damages are given "to redress a moral outrage and punish libertinism," they reaffirm the doctrine that there must be a loss of service or the action will fail. So in the brief memorandum in *Laurence v. Spence*, 99 N. Y. 669, 2 N. E. Rep. 145, it is stated, in affirming the recovery, that the result of the seduction was a loss to the father of his daughter's services. We find no later authority than these. It is true that it has been said that the service owing may be a fiction, as, for instance, in case of a wealthy father, whose daughter renders no actual service. Courts have held that the relation of master and servant in such cases was enough, although no real service was rendered. While this may be sufficient to show that service was owing, there must be proof that there has been a loss to the plaintiff.

Now, since the learned justice took from the jury every consideration of the

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death of Edith as being too remote, we are limited, in considering the loss of service, to the time prior to her taking poison. Her sister was on the stand, and could have testified to Edith's physical condition. But no such testimony was given. The sister herself also took poison about the same time, and probably from the same package, but recovered from the effects. And there is no reason to suppose that her act was occasioned by any seduction, or that she had been incapacitated from working. If it should be said that the taking of Edith from her home caused damage to the father, the answer is that this action is for the seduction. It is only for seduction that punitive damages may be given. Actual damages only could be recovered for the mere carrying away. The same rule seems to prevail in other states, as to the necessity of showing a loss of service. In *Abrahams v. Kidney*, 104 Mass. 222, it was said that if the proximate effect of the seduction was mental distress, impairing health and ability to labor, this was sufficient; but if the loss of health was caused by mental suffering, produced by shame resulting from exposure, it was not sufficient. The seduction was not the proximate cause. Again, the fact of service must be proved. *Sutton v. Huffman*, 32 N. J. Law. 58. See *Humble v. Shoemaker*, 70 Iowa, 223, 80 N. W. Rep. 492. It would seem that by statute in Virginia, Michigan, and Kentucky it is not necessary to aver or prove loss of service; and the enactment of such statutes shows that without them it would be necessary to prove a loss of service. We find no case in which not only the service, but the loss, was fictitious also. In every case cited there has been evidence from which might justly be inferred inability, partial at least, to render service. But in this case the jury must have inferred from the fact of suicide that, during the day and a half previous, Edith was distressed in mind, and that such distress was occasioned by the seduction, and then must have inferred that such distress rendered her incapable of work. Of all this we see no evidence. We may test this question in another way. Suppose that in this action no exemplary or punitive damages could be granted. Could there possibly have been a recovery of any amount whatever for actual damages? Would not a court have said unhesitatingly that on this evidence no verdict for any amount of actual damages could stand? But there must be actual, before there can be punitive, damages. The defendant denies the seduction. But, if the verdict of the jury is correct, he committed a grievous wrong, more inexcusable on account of his age and his evident influence over the plaintiff and his family. The result has been very lamentable. We have no sympathy for him, if he is guilty. We may even wish that the legislature would say that "a father whose daughter has been seduced shall maintain an action for the injury done to his wounded honor and parental feelings." But such is not the law. *Clark v. Fitch*, *ut supra*. It is not for us to legislate or to violate legal principles under the stress of a case like the present. We must adhere to rules, whatever our sympathies may be. Nothing leads to more incorrect decisions than an effort to do what is thought to be just in a special case by a little evasion of well-settled law. Hence comes the worst of evils, uncertainty in the law, and judgment "according to the size of the chancellor's foot." For these reasons we think the judgment should be reversed, and a new trial granted, costs to abide the event.

PEOPLE *ex rel.* FLOWER v. BLECKWENN, Treasurer.

(*Supreme Court, General Term, Second Department.* December 10, 1889.)

TAXATION—VOID ASSESSMENT—RELEVY BY LEGISLATURE.

The legislature, in ratifying and relevying, by Laws N. Y. 1886, c. 656, the void tax assessed in 1880, in Long Island City, had the power to levy interest on the same from the date of the void assessment.

Appeal from special term, Queens county.

Application by Roswell P. Flower, for *mandamus* to compel Frederick W. Bleckwenn, as treasurer and receiver of taxes of Long Island City, to accept the taxes of 1880, without interest. Defendant appeals from a judgment allowing the writ.

Argued before BARNARD, P. J., and PRATT, J.

W. J. Foster, for appellant. J. Ralph Burnett, (*Eliphalet Nott Anable*, of counsel,) for respondent.

BARNARD, P. J. The relator is the owner of certain lands in Long Island City. In 1880, the assessors, in making up the assessment roll, failed to annex thereto the sworn statement as required by law. The tax was void for this omission, but the legislature, by chapter 656, Laws 1886, ratified and confirmed the tax, and levied the same, with interest, upon the several pieces of land and premises upon which the same was originally assessed or levied. The relator claims that the legislature had no power to assess and aver the interest on the old tax, because it was invalid, and therefore did not draw interest. This objection is not well founded. The assessors had jurisdiction of the subject of taxation, and the omission to verify the roll was an omission which could be remedied by a healing act. The legislature could dispense with a certificate entirely, and still make a legal tax. *Ensign v. Barse*, 107 N. Y. 929, 14 N. E. Rep. 400, and 15 N. E. Rep. 401. The power to reliev the tax carried with it the power to levy the interest upon it. This alone would be just to those who paid the tax on the irregular assessment; and the point is clearly decided in *Spencer v. Merchant*, 100 N. Y. 585, 3 N. E. Rep. 682. The provision as to notice to be given to tax-payers when assessment roll is complete is not retroactive, but is to apply only to tax-rolls and levies subsequently made. The order should therefore be reversed, and the motion for a *mandamus* denied, with \$50 costs of appeal and upon denial of motion.

MURRAY v. HATHAWAY.

(*Supreme Court, General Term, Third Department. September 21, 1889.*)

APPEAL—DISMISSAL—FAILURE TO FILE BOND.

Where appellant is not moving his case, and the 60 days within which, under Code Civil Proc. N. Y. § 1341, he may perfect his appeal have not expired, a motion to dismiss the appeal, on the ground that no appeal-bond has been filed, will be denied.

Action by George W. Murray against Samuel W. Hathaway. Plaintiff moves to dismiss appeal.

Argued before LEARNED, P. J., and FISH and PUTNAM, JJ.

L. R. Patterson, for appellant. L. L. Davis, for respondent.

PUTNAM, J. We think the appeal should not be dismissed for the defendant's failure to file an undertaking. Although an undertaking seems to be required, (Code Civil Proc. §§ 1340, 1341, 2260,) yet as the defendant has 60 days to perfect his appeal, which time has not expired, and as he is not moving the case, his time to file the undertaking has not yet elapsed, and hence the motion on that ground is premature.

But section 1304 Code Civil Proc., provides that an appeal cannot be taken from an order made by a judge out of court unless entered in the clerk's office, and this order, it appears, was not so entered. Therefore, on this ground, the appeal should be dismissed. It seems, however, that the plaintiff has been irregular in proceeding under the order before its entry, and may, therefore, have misled the defendant as to its entry. We think the proper disposition of the case is to dismiss the appeal, without costs. This will not prevent the defendant, if he desires, from taking a new appeal, and giving the undertaking required by the Code. All concur.

BENEDICT v. COBB.

(Supreme Court, Special Term, New York County. June 4, 1889.)

REVIVAL OF ACTIONS—AGAINST WHOM REVIVABLE.

Code Civil Proc. N. Y. § 757, provides that in case of the death of a sole defendant, if the cause of action survives, the court must allow or compel the action to be continued against his representatives or successors in interest. Section 447 provides that any person may be made a defendant who has or claims an interest in the controversy adverse to plaintiff, or who is a necessary party defendant for a complete determination or settlement of the question involved therein. An equitable action for an accounting, and the recovery of land alleged to have been conveyed to a decedent in his life-time as security for a debt, was brought against his executrix, who was also his legatee, both individually and in her representative capacity. *Held*, that on her death pending the action it should be revived, not only against the administrator of decedent and the devisees of the portion of the land remaining unsold, but also against the personal representatives of the executrix.

Action by Mary A. Benedict against Ann A. B. Cobb. Defendant died pending the action, and Edward B. Cobb became the executor of her will, and also the administrator *de bonis non* of the estate of Theodore H. Benedict, of whose will Ann A. B. Cobb was the executrix. Plaintiff now moves to revive the action against Edward B. Cobb, and also against the devisees of Ann A. B. Cobb.

Enoch L. Fancher, for plaintiff. *George S. Hamden* and *Clute & Cobb*, for defendants.

INGRAM, J. By section 757 of the Code, it is provided that, in case of the death of a plaintiff or a sole defendant, if the cause of action survives or continues, the court must, upon motion, allow or compel the action to be continued by or against his representatives or successors in interest. Mrs. Cobb was a defendant individually, and also as executrix of Theodore H. Benedict. The action is an action in equity for an accounting, and the recovery of the property alleged to have been conveyed to Benedict during his life as security for a debt. It is conceded that the action should be revived against the administrator of Benedict, and also against the devisee of the portion of the land conveyed to Benedict which remains unsold. By section 447 of the Code it is provided that any person may be made a defendant who has or claims an interest in the controversy adverse to the plaintiff, or who is a necessary party defendant for a complete determination or settlement of the question involved therein. Under the original and supplemental complaint, I am inclined to think that the executors of Mrs. Cobb are proper parties defendant. She was the legatee as well as the executrix of Benedict, and the complaint alleges that the proceeds of the sale of the land were converted to his own use by Benedict in his life-time, and had, by reason of his decease and the will of Benedict, come into the hands and possession of Mrs. Cobb as the executrix and sole legatee and devisee as aforesaid. She therefore held such proceeds either as executrix of Benedict, or in her own right as legatee under his will, and, in an action to recover such proceeds, I think she was individually and her executors now are proper parties for a complete determination of the controversy. In an equity action of this kind, where the court may in its decree protect all parties, and may award costs to any party if on the trial it appears that the person made a party was not necessary to the determination of the action, all persons whose interests may be affected by the final determination of the question should be made parties to the action. Motion should therefore be granted, with \$10 costs to abide the event.

BLISS v. MURRAY *et al.**(Supreme Court, Special Term, New York County. July 8, 1889.)***INJUNCTION—TO STAY SUMMARY PROCEEDINGS.**

Under Code Civil Proc. N. Y. § 2265, providing that before final orders summary proceedings shall not be stayed by any court or judge, except in a case where an injunction would be granted to stay the proceedings in an action of ejectment, injunction should not be granted on the grounds that the petition was not properly verified, or did not describe the premises, or did not state the interest of the petitioner, or that the defense of another action pending was not allowed, as all these are legal defenses, available on the trial, and reviewable on appeal.

At chambers. Action by Alice Maud Bliss against Thomas E. Murray and another, before final order, to enjoin summary proceedings. A preliminary injunction was obtained, which defendants now move to dissolve.

S. F., P. H., & H. Cowdry, for plaintiff. *Kopper & Jenks*, for defendants.

O'BRIEN, J. Code Civil Proc. § 2265, provides that before final order summary proceedings shall not be stayed by any court or judge, "except in a case where an injunction would be granted to stay the proceedings in an action of ejectment." "Proceedings of the plaintiff in an action of ejectment will not be enjoined where the questions involved can be determined at law, or where the ground relied upon for an injunction would be equally available, if urged as a defense to the action." *Chadwick v. Spargur*, 1 Civ. Proc. R. 424; High, Inj. § 325. "If the questions raised by the answer in this proceeding are within the jurisdiction of the justice to decide, the question of the correctness of his rulings must be raised by appeal." *Chadwick v. Spargur*, *supra*; *Jessurun v. Markte*, 24 Hun, 624. There is no allegation that the proceedings before the justice were fraudulent or collusive,—the grounds relied upon being that, by reason of certain defects in the petition, the justice acquired no jurisdiction to entertain the proceedings; and the second ground relied upon is that the plaintiff was unable to avail herself of the defense of a former action pending. Upon authority, it is clear that an injunction should not be granted where the respondent has an opportunity of being heard, and the injunction is an irregular attempt to review the rulings of the magistrate. *Armstrong v. Cummings*, 20 Hun, 313. Where all the questions raised may properly be inquired into and determined by the magistrate before whom the summary proceedings have been instituted, an injunction will not be granted. *Bean v. Pettingill*, 2 Abb. Pr. (N. S.) 58; affirmed, 7 Rob. (N. Y.) 7. In *Cramer v. Amberg*, reported in Daily Register, November 8, 1888, in denying an application for a writ of prohibition, Mr. Justice BARRETT said: "The justice had jurisdiction of the parties and of the subject-matter. If he errs, the remedy is by appeal. At all events, prohibition will not lie where he proceeds regularly under the Code with regard to summary proceedings."

The preliminary objections raised before the justice—*First*, that the petition does not describe the premises; *second*, that the petition does not state the interest of the petitioner; *third*, that the petition is not verified according to law—were within his jurisdiction to pass upon, and, if any error had been committed, the remedy is by appeal. In other words, the justice, having jurisdiction of the parties and the subject-matter, could determine the validity of the objections raised, and his error, if any, in ruling thereon, should be remedied by appeal. The other ground relied upon, namely, that the plaintiff was unable to avail herself of the defense of a former action pending, is not sufficient to warrant the issuance of an injunction. This defense was raised by the answer, passed upon by the justice, and to the ruling made thereon an exception was taken. Applying the test fixed by the Code, would this be a sufficient ground for the granting of an injunction in an action of ejectment? The proceedings in such an action will not be enjoined when, as before stated, "the questions relied upon for an injunction will be equally

available if urged as a defense to the action." The defense of a former action pending is a legal, as distinguished from an equitable, defense. It was raised and available for what it was worth in the summary proceedings. If the justice erred, his ruling upon this, as upon the other grounds relied upon, must be reviewed by appeal. This, therefore, does not seem to me to be within the cases in which injunctions have been granted because the justice had no jurisdiction, or the proceedings were fraudulent or collusive, or where the defense was of an equitable nature, not cognizable by the justice. It is well settled that where there has been fraud or collusion, or where the justice has not obtained jurisdiction by want of the necessary preliminary steps or other cause, or where, from the peculiar circumstances of the case, one is precluded from setting up his defense before the justice, an injunction will issue. It appearing to me, therefore, that all the questions presented upon this motion might be properly raised before the justice, and any error committed by him should be remedied, as the law directs, by appeal, and as provision is made for a stay pending such an appeal, I do not think that the injunction should be continued; for, as stated, *Chadwick v. Spargur, supra*: "So long as the justice proceeds within his jurisdiction, an injunction cannot issue, however harsh may be the effect of the statute." Motion to dissolve preliminary injunction is therefore granted.

CHEEVER v. BROWN *et al.*

(Supreme Court, Special Term, New York County. June 13, 1889.)

1. **APPEAL—RESETTLEMENT OF CASE—TRIAL BEFORE REFEREE.**

Where a case on appeal has been settled by the referee before whom the trial was had, the court cannot resettle the case, but may send it back to the referee for that purpose, with proper instructions.

2. **SAME—PROVINCE OF GENERAL TERM.**

The referee being, for the purpose of the action, a special term judge, the motion to resettle should properly be made before the general term.

3. **SAME—REPORT OF REFEREE.**

It being denied by affidavit that concessions in regard to certain claims were made as stated in that part of a proposed case which was stricken out by amendment, and it appearing by the stenographer's minutes that objections to such claims had been stated to the referee, and were to be considered by him in making up his report, such claims will not be directed to be restored to the case.

Action by John H. Cheever against Avery T. Brown, assignee, and others. The cause was tried before a referee, who settled the case on appeal. Plaintiff now moves to resettle the case.

Clark Bell, for plaintiff. *Butler, Stillman & Hubbard, N. B. Sanford, A. W. Seaman, J. D. Flagler, Kopper & Jenks, and S. G. Williams*, for defendants.

ANDREWS, J. The court cannot itself resettle the case, but, if satisfied that the referee has failed to insert therein matter which properly belongs there, can send it back to him for resettlement, with proper instructions.

It seems to me, however, that the amendments of the proposed case which are complained of were properly allowed. Judge PATTERSON did not confirm the report of the referee, but sent it back to him. My recollection is that the so-called "opinion" of Judge PATTERSON was a brief memorandum, in which he stated that the case was sent back to the referee to obtain further information why certain claims had been disallowed. The opinion is not among the papers before me, and I may be mistaken in my recollection of it. At all events, as the report was not confirmed by Judge PATTERSON, there is no rule of the court which requires or authorizes the printing of an opinion given under such circumstances. The amendment striking out Schedule A was therefore properly made. With regard to Schedules B and D, the affidavit of Mr. Colgate, submitted on this motion, positively denies that any such conces-

sions were made in regard to the claim of William H. Guion as were stated in that part of the proposed case which was stricken out by amendment; and also states that said Colgate at all times supposed, and as was the fact, and as appears by the stenographer's minutes, that the claim of William H. Guion was objected to, and that the objections thereto had been stated to the referee, and were to be considered by him in making up his report, (as was done,) and for that reason said Colgate made no objections to the claim of said Guion other than those previously made, and the general objection that the proof was not sufficient to establish the claim. He also states that he made no objection to the claim of said Guion on the motion before Judge PATTERSON, and took no part in the proceeding at that time other than to appear, for the reason that all the objections were raised and argued by other parties whose interest for the purposes of that motion were the same as those of William H. Webb. In view of this affidavit, I should not be justified in directing that Schedules B and D be restored to the case.

Moreover, in regard to what occurred before the referee himself, assuming that the matters stated in said Schedules B and D are material to the appellant, the referee is best able to determine what happened, and it is well settled that the court will not undertake to instruct or overrule him in such matters. With regard to Schedule C, I think it is clear that the referee was right in striking it out of the case. The appeal papers in the case of *Abbott v. Thomas*¹ have been submitted to me upon this motion. They contain an opinion rendered by Mr. Justice BARTLETT upon an application similar to the present one. In the course of that opinion he says: "The true remedy of a party aggrieved by the refusal of a referee to insert matters in a proposed case on appeal is to apply, not for a resettlement of the case by the court itself, but for an order directing the referee, in the settlement thereof, to insert such matters as properly belonged there; and even an application of this sort, it seems to me, should be made to the general term, instead of the special term, inasmuch as a referee for the trial of issues is practically a special term judge for the purposes of the action in which he is appointed, and it would hardly seem becoming for a judge at a special term to direct another judge of equal powers how to settle a case which had been tried before him." It would seem, therefore, that, as a matter of propriety, the present application ought to have been made to the general term, and the motion might have been denied upon that ground. I have, however, in order to save the parties the trouble of a second application, expressed my opinion as above; but if the appellant thinks that my decision is erroneous, he may renew the application to the general term. Motion denied, without costs, and without prejudice to a renewal of the application to the general term.

FAGAN v. STRONG.

(*Supreme Court, Special Term, New York County. November, 1889.*)

PLEADING—SUFFICIENCY OF COMPLAINT—PLEADING STATUTE.

In an action for the alleged negligent killing of plaintiff's intestate, which occurred in New Jersey, the complaint alleged "that the laws of the state of New Jersey are similar to those of the state of New York, and give to the personal representatives of a deceased person a right of action in such cases, the same as provided for by the laws of this state." *Held*, that this was only an averment of plaintiff's conclusion that the statutes of the two states were similar, and therefore that her complaint did not state facts sufficient to constitute a cause of action, within the requirement of Code Civil Proc. N. Y. § 481.

On demurrer to the complaint.

W. W. Culver, for plaintiff. *F. F. Marbury*, for defendant.

¹Not reported.

LAWRENCE, J. Section 481 of the Code of Civil Procedure provides that the complaint must contain, among other things, a plain and concise statement of the facts constituting each cause of action, without unnecessary repetition. The existence of a statute of another state is a fact which must be pleaded and proved, and it must appear that under the statute, if proven, a good cause of action exists in favor of the plaintiff against the defendant. *Thompson v. Ketcham*, 8 Johns. 146. *Pomeroy v. Ainsworth*, 22 Barb. 118; *Dollfus v. Frosch*, 1 Denio, 367; *Monroe v. Douglass*, 5 N. Y. 417. And there is no presumption that the statutes of New York have been enacted in other states. *Abell v. Douglass*, 4 Denio, 305; *Throop v. Hatch*, 3 Abb. Pr. 23. It is now well established that an action is maintainable in this state by the personal representative of one whose death resulted from an injury received in another state, through the negligence of the defendant, where it appears that the laws of that state are similar to those of this state, giving to the personal representatives a right of action in such cases, and it is not essential that the statutes should be precisely the same. *Leonard v. Navigation Co.*, 84 N. Y. 48. In this case the action is brought by the administratrix of John P. Fagan, who is alleged to have been killed through the carelessness and negligence of the defendant at Seabright, in the state of New Jersey. The only allegation in the complaint as to the law of New Jersey is: "Third. That the laws of the state of New Jersey are similar to those of the state of New York, and give to the personal representatives of a deceased person a right of action in such cases, the same as provided for by the laws of this state." The defendant demurs to the complaint on the ground that it does not state facts sufficient to constitute a cause of action; the argument being that it is not sufficient for the plaintiff to state that the laws of the state of New Jersey are similar to those of this state, and give the same right of action to the personal representatives of a deceased person as is provided for by the laws of this state.

I think the demurrer is good. It is not necessary, under the Code, to set out evidentiary facts, but enough must be stated to show existence of the resultant facts upon which the cause of action depends. In this case the plaintiff does not state what the law of New Jersey is, except as a conclusion. She avers that it is the same as that of New York. It was her duty to go further, and state enough of the provisions of the statute of New Jersey to enable her adversary to take issue with her thereon, if necessary, and also to enable the court to determine whether the statutes of the two states are similar in purport and effect. As was said in the court of appeals in *Debevoise v. Railroad Co.*, 98 N. Y. 378, in a case where the death from the alleged negligence of the defendant had occurred in New Jersey: "This right of action depends entirely upon statute law. Such a right of action did not exist at common law. There was no proof that the common law of New Jersey had been changed, or that any statute existed there authorizing an action to be maintained to recover damages against one who has negligently caused the death of another. Our statute has no extraterritorial effect, and we cannot infer or presume that a similar statute exists in New Jersey. * * * The plaintiff was bound to show, both by his complaint and proofs, that he had the right, upon the law and the facts, to maintain his action; and this is a case, therefore, of the failure of facts to constitute a cause of action, both in the complaint and the proofs, and the defendant could take advantage thereof at the trial."

In that case it will be observed that there was no averment as to the law of New Jersey. Is the case stated in the complaint in this action any stronger? It is not, to my mind. There is, as above stated, only an averment of the plaintiff's conclusion that the statutes of the two states are similar. I regard the case of *Throop v. Hatch*, 3 Abb. Pr. 23, as conclusive on this point. In that case it was averred, in general terms, that certain trusts contained in a

declaration of trust, made for the benefit of the plaintiff and others, were, by the laws of the states of Ohio and Michigan, valid and subsisting trusts; but the general term of this department, ALLEN, J., delivering the opinion, held that, unless the trusts could be upheld without the aid of the laws of those states, the demurrer must be sustained, because the allegation of the complaint amounted to nothing more than an averment of the pleader, based—*First*, upon his knowledge of the existence of certain statutes; and, *second*, upon his construction of those statutes. There must be judgment for the defendant upon the demurrer, with leave to the plaintiff to amend on payment of costs.

KENNERLY v. TOMPKINS.

(*Supreme Court, Special Term, New York County. September 8, 1889.*)

BAIL—DEPOSIT—ASSIGNMENT—ACKNOWLEDGMENT.

Code Civil Proc. N. Y. § 586, provides that a defendant who has deposited money in court, in lieu of bail, may deliver to the sheriff a written direction to pay it to a third person in the event that defendant becomes entitled to a return thereof, which direction is "to be acknowledged * * * in like manner as a deed to be recorded." *Held* that, as the acknowledgment is required merely to note the substance of the direction in the clerk's books and on the certificate of payment into court, an insufficient acknowledgment may be amended *nunc pro tunc*.

Defendant, Tompkins, was arrested in an action brought by plaintiff, Kennerly. Code Civil Proc. N. Y. § 582, provides: "The defendant may, instead of giving bail, deposit with the sheriff the sum specified in the order. The sheriff must thereon give the defendant a certificate of the deposit, and discharge him from custody." Section 583 provides: "The sheriff must, within four days after the deposit, pay it into court." Section 586 is as follows: "At any time before the deposit is paid into court, the defendant may deliver to the sheriff a written direction to pay it to a third person, therein specified, in the event that the defendant becomes entitled to a return thereof, but without expressing any other contingency. The direction must be acknowledged or proved, and certified, in like manner as a deed to be recorded; and the sheriff must deliver it to the officer who receives the deposit, who must note the substance thereof, with the entries of the deposit, in his books, and upon the two certificates of payment into court. The money thus deposited is deemed the property of the third person, subject to plaintiff's interest therein, and subject to the rights of a creditor of the defendant, where the direction was given for the purpose of hindering, delaying, or defrauding creditors. The money, or the residue thereof, must be paid to the third person," where there is final judgment for defendant. Paul Wilcox had in good faith advanced the amount fixed as defendant's bail. The terms of section 586 had been fully complied with, except that the acknowledgment was defective. On the vacation of defendant's arrest, the court officers refused to refund the money, claiming that it had been attached in another action against defendant. The defendant then moved for an order to compel the officers to refund the money to Mr. Wilcox.

Henri Presprick, for plaintiff. *Wilcox & Goodman*, (*Paul Wilcox*, of counsel,) for defendant.

BARRETT, J. Section 586 was intended to obviate the hardship resulting from the law as laid down in *Hermann v. Aaronson*, 3 Abb. Pr. (N. S.) 389, and 8 Abb. Pr. (N. S.) 155, and kindred cases. Now a friend can safely lend a defendant who has been arrested the amount of bail fixed in the order, taking contemporaneously the written direction specified in this section. This was done in the present case, and the third person, who lent the money and took the written direction, is entitled to repayment, the order of arrest having been vacated. Upon these affidavits there is no possible question of fraud,

and the court is bound to hold that the direction was not given for the purpose of hindering, delaying, or defrauding creditors. The only question is as to failure to properly acknowledge the written direction. In my judgment, this is amendable. The third person's rights, under this new provision, depend upon the actual facts and the written directions. The acknowledgment is required for the purpose of noting the substance of such directions in the clerk's books and upon the certificate of payment into court. I cannot think that there is an analogy between such a case and that of an assignment which (under some statutes) is only to go into effect upon a particular form of acknowledgment. Nor do I think that a party fairly and justly entitled to money deposited for one specific purpose should have it impounded generally upon such a technicality. I will give the defendant leave to complete the acknowledgment *nunc pro tunc*, and thereupon direct the payment of the money to Mr. Wilcox; the operation of the order, however, to be suspended for two days, to give the opposing party an opportunity to apply for a stay, if an appeal be taken.

LAMPMAN v. SMITH.

(Supreme Court, Special Term, New York County. December 3, 1888.)

1. REFERENCE—HOW TERMINATED—FAILURE TO FILE REPORT.

Under Code Civil Proc. N. Y. § 1019, providing that a referee's report must be either filed with the clerk, or delivered to the attorney for one of the parties within 60 days after the cause is finally submitted, otherwise either party may, before it is filed or delivered, serve a notice on the attorney for the adverse party that he elects to end the reference; and in such case the action must thenceforth proceed as if the reference had not been directed,—a referee does not lose jurisdiction, though his report is not delivered until three years after final submission, there having been no notice given by either party of an election to end the reference.

2. ARREST IN CIVIL CASES—DISCHARGE.

Under Code Civil Proc. N. Y. § 572, as amended by Laws 1886, c. 672, providing that if a plaintiff neglects to enter judgment within 10 days after it is in his power to do so, or neglects to issue execution against the person of defendant within 10 days after the return of the execution against the property, or, in any event, neglects to issue the same within 8 months after the entry of the judgment, or delays the enforcement of his remedies by collusion, defendant must, on his application, be discharged from custody, relief from arrest cannot be granted a defendant where there is no evidence of collusion, and the report of the referee in the action was delivered July 16th, judgment entered July 23d, execution against the property returned unsatisfied September 20th, execution against the person issued September 23d, and arrest made October 25th.

At chambers. In an action for conversion defendant was arrested, and admitted to bail, but the order for arrest remained unchanged. After a continuance at defendant's request, the case was referred, and hearing immediately commenced before the referee, but it was not finally submitted until two years later. Sixty days were granted him from that time in which to make his report, but, though no further extension was granted, the report was not made until three years later, though the referee was requested by plaintiff to hasten it, when he delivered it to plaintiff's attorneys. Its findings were in favor of plaintiff. The date of the report was July 9th, but it was signed and delivered on July 16th. The report was filed and judgment entered for plaintiff on July 23d. On July 26th, execution was issued against defendant's property, and on September 20th returned wholly unsatisfied. On September 22d, execution was issued against defendant's person. The sheriff received it on September 24th, and on October 25th arrested the defendant, who now moves that the execution against his person be set aside, and that he be released from imprisonment, on the grounds that the report of the referee and the entry of judgment were not made within the time prescribed by statute. Code Civil Proc. N. Y. § 1019, provides that "upon trial by a referee * * * the referee's written report must be either filed with the clerk or delivered to the attorney for one of the parties within sixty days from the time when the

cause or matter is finally submitted, otherwise either party may, before it is filed or delivered, serve a notice upon the attorney for the adverse party that he elects to end the reference. In such a case the action must thenceforth proceed as if the reference had not been directed. * * * Section 572, as amended by Laws 1886, c. 672, provides that, "except in a case where an order of arrest can be granted only by the court, if the plaintiff unreasonably delays the trial of the action, or neglects to enter judgment therein within ten days after it is in his power to do so, or neglects to issue execution against the person of the defendant within ten days after the return of the execution against the property, and in any event neglects to issue the same within three months after the entry of the judgment, or whenever it shall appear to the satisfaction of the court that the plaintiff in an action, or a judgment creditor in a judgment, delays the enforcement of his remedies therein by collusion, or for the purpose of allowing the debtor to remain in prison under the mandate in any other action, before the issuing of the mandate in favor of such creditor, so as to produce a continued and extended imprisonment by virtue of the separate mandates in the different actions, the defendant must, upon his application, made upon notice to the plaintiff, be discharged from custody, if he has already been taken under the mandate against him in such action, or, if he has not yet been imprisoned therein, be relieved from imprisonment, by virtue of such mandate, by the court in which the action was commenced, unless reasonable cause is shown why the application should not be granted. A defendant discharged as prescribed in this section shall not be arrested upon an execution issued upon the judgment in the action."

Newkirk & Chase, for plaintiff. *Charles Steckler*, for defendant.

LAWRENCE, J. No notice, under section 1019 of the Code of Civil Procedure, was given by either of the parties to the adverse party of an election to end the reference. The case of *Little v. Lynch*, 99 N. Y. 112, 1 N. E. Rep. 312, and the case of *Phipps v. Carman*, 84 N. Y. 650, therefore, throw no light upon the question presented by this motion. The referee did not lose jurisdiction of the action, and, notwithstanding the great delay which intervened between the final submission of the cause and the delivery of the referee's report, I am constrained to say that the proceedings in the case have not been irregular.

Nor is the defendant entitled to relief under section 572 of the Code of Civil Procedure, as amended in 1886, because there is no evidence of collusion, nor was there any neglect to enter judgment within the time prescribed by that section, or in the issuing of the execution against the person of the defendant. Motion denied, with costs, and with leave to renew on further affidavits, if so advised.

ARGERSINGER v. LEVOR.

(*Supreme Court, General Term, Third Department. November, 1889.*)

PLEADING—AMENDMENT—TO MEET PROOF.

A complaint in justice's court charged an assault on plaintiff "by defendant and his dog," but the case was tried on the theory that defendant was liable for negligently keeping a vicious dog. *Held*, that on appeal to the county court an amendment of the complaint so as to charge that defendant's dog, being vicious and known to be so by defendant, bit plaintiff, was proper, as the amendment did not change the "claim" actually tried, but simply conformed the complaint to it, within the requirement of Code Civil Proc. N. Y. § 723.

Appeal from Fulton county court.

Action by Jacob Argersinger against Gustave Levor for personal injuries sustained from being bitten by defendant's dog. The action was originally brought in justice's court, where judgment was rendered in plaintiff's favor. Defendant appealed to the county court; and from an order permitting plain-

tiff to amend his complaint, and a judgment affirming the justice's judgment, defendant appeals. The complaint in the justice's court alleged that "while plaintiff was peaceably traveling in the public highway the defendant and his dog assaulted him, and inflicted on his hand and arm a grievous injury;" but the case was tried on the theory that defendant was liable for negligently keeping a vicious dog. Code Civil Proc. N. Y. § 723, provides that the court may, before or after judgment, in furtherance of justice, amend any pleading, where the amendment does not change substantially the claim or defense, by conforming it to the facts proved. Section 3347, subd. 6, extends this power to the county courts. The opinion of the county judge, on appeal from the justice of the peace, is as follows:

"KECK, J. The motion to amend the complaint will be first disposed of. In opposition to the allowance of this amendment, it is urged that by so doing the plaintiff would be allowed to set up a new and distinct cause of action from the one in the original complaint, and that this court has no power to grant such an amendment. It is provided by section 348 of the Code of Civil Procedure that 'where a county court has jurisdiction of an action, * * * it possesses the same jurisdiction, power, and authority in and over the same * * * which the supreme court possesses in a like case, and may render any judgment or grant either party any relief which the supreme court might render or grant in a like case.' And by section 2944 it is also provided that 'the court must, upon application, allow a pleading to be amended at any time before the trial, or during the trial, or upon appeal, if substantial justice will be promoted thereby.' These provisions are broad enough to embrace the necessary power of the county court to grant any amendment, in a case like this, which the supreme court could allow, of a pleading in an action pending therein, and the power of that court to allow amendments in an action or proceeding can be exercised almost without restriction, if substantial justice will be promoted thereby; and the power of the county court, in that respect, is as broad as is the power of the supreme court. It has an inherent power, which has been frequently exercised, to the extent of adding new causes of action, which had the effect of avoiding the statute of limitation. *Cramer v. Lovejoy*, 41 Hun, 581. The fact that the appeal is upon questions of law only does not limit or abridge the powers of this court to allow such an amendment. As to the propriety of allowing the amendment, it may be said that no objections were made to the insufficiency of the original complaint upon the trial of the cause, but, upon the contrary, the return discloses that the case was tried and the complaint treated as being entirely sufficient to justify the evidence given by the plaintiff to establish a cause of action for an injury to the person other than for an assault and battery, over which, had it been such an action as it is now claimed by appellant to be, the magistrate would have had no jurisdiction. In justices' courts the pleadings are not unfrequently of an informal nature, and much liberality has uniformly been extended in the construction and upholding of them, especially when they relate to a cause of action of which that court had jurisdiction, and are not objected to for insufficiency upon the trial of the case. Technical nicety and precision are not required in an action before a justice of the peace, unless the objection is raised at the time; and where the parties go to trial upon a complaint, however defective, without objection on account of the defect, if the plaintiff proves a good cause of action, a judgment in his favor will be good. *Hall v. McKechnie*, 22 Barb. 244; *Stafford v. Williams*, 4 Denio, 182. The action was not one for an assault and battery, but, as the evidence given upon the trial shows, for damages for injury inflicted by the biting of the plaintiff by the defendant's dog, done in the absence of the defendant; and of such an action, being for a personal injury, not for an assault and battery, the magistrate had jurisdiction. Code Civil Proc. § 2862, subd. 2; *Coulter v. Express Co.*, 56 N. Y. 585. No injustice can result to the de-

fendant from the amendment, which simply conforms the pleading to the proof given upon the trial of the case, and substantial justice will be promoted thereby; and it is therefore allowed, upon the following terms and conditions, viz., that the plaintiff pay to defendant \$10, to be offset against the judgment, and an order is directed accordingly.

"Now, as to the merits of this action. As stated above, it was brought to recover damages for injuries alleged to have been inflicted upon the plaintiff from being attacked and bitten by the defendant's dog. That the plaintiff was bitten by the dog belonging to the defendant is shown very clearly by the evidence in the return. It is urged by the appellant, however, that the plaintiff failed to make a case justifying his recovery, on the ground that he did not show that the dog in question was a vicious animal, and known to be such by the defendant, prior to the attack on the plaintiff. It may be stated, without citing any authority in support of the proposition, that it is a well-settled rule of law that, in order to make the owner of a dog liable in an action at the suit of a person injured by such animal, it must be shown that such owner had knowledge of its vicious propensities. The person who seeks to maintain the action has the burden of showing this, and a failure to do so would necessarily be a failure to make a case entitling a recovery in the action. It need not, however, be shown that such owner had actual knowledge that such animal was in the habit of attacking people, but such a knowledge of its vicious propensities as would endanger the safety of such persons as might innocently come in contact with it, being unaware of its true character. An examination of the return in this case discloses the fact that the evidence upon this branch or point is somewhat meager. But, there being some evidence of facts and circumstances, viz., that the animal in question had, prior to the time of its attack upon plaintiff, attacked and bitten another person; that thereafter it was kept, muzzled, upon and about the defendant's mill and premises; that defendant was about these premises daily during this time, and could hardly have failed to acquire a knowledge of the true character and disposition of the animal,—tending to show, and, perhaps, strong enough to justify the conclusion, that the defendant did know the disposition of the dog to bite people prior to its attack upon the plaintiff, such must have been the finding of the magistrate, or the judgment would have been otherwise. I have, therefore, notwithstanding some doubts entertained of the sufficiency of the evidence to prove *scienter*, concluded to affirm the judgment, and an order is directed accordingly."

Argued before LEARNED, P. J., and FISH and LANDON, JJ.

Spencer & Banker, (Edgar A. Spencer, of counsel,) for appellant. *Smith & Nellis*, (Andrew J. Nellis, of counsel,) for respondent.

LANDON, J. The complaint in the justice's court charged an assault upon the plaintiff "by the defendant and his dog." No objection was taken upon the trial to the jurisdiction of the justice. The evidence tended to show that the defendant's dog bit the plaintiff, and that the dog was vicious, and known to be so by the defendant. There was no evidence of any assault by the defendant. Upon appeal to the county court, upon the law only, the county court, upon motion of the plaintiff, permitted the complaint to be amended so as to charge that the defendant's dog, being vicious and known to the defendant to be so, bit the plaintiff. We think the judgment and order of the county court can be upheld. The justice's court had no jurisdiction of an action of assault and battery. Code Civil Proc. § 2863. But no such action was tried. That such a cause of action was stated in the complaint did not deprive the justice of jurisdiction of the cause of action which he did try. The latter cause of action was so far set forth in the complaint as to induce the parties to try it, and, when the county court permitted the complaint to be amended, it did not permit a change of the cause of action actually tried, but simply con-

formed the complaint to it. The amendment did not change the "claim" in litigation. *Id.* §§ 723, 3347, subd. 6. Substantial justice was thus promoted. As the justice did not in fact exceed his jurisdiction, it was proper that the record should be kept within it. Judgment affirmed, with costs.

WALTON v. GODWIN.

(*Supreme Court, General Term, First Department. November 7, 1889.*)

1. DEPOSITIONS—INTERROGATORIES.

In an action for alleged breach of a contract by a corporation, by discharging plaintiff's assignor from its service, plaintiff sought to charge a director of the corporation under Laws N. Y. 1875, c. 611, § 21, on the ground that he had signed a report of the corporation containing false representations as to its stockholders and financial condition. Defendant's answer alleged that he signed the report in the belief that it was true and correct, and that the contract with plaintiff's assignor was annulled, according to its terms, on the ground of his incompetency, at the time of the alleged breach. *Held*, that it was proper to allow cross-interrogatories by plaintiff, on defendant's taking a deposition, as to whether the corporation at or about the time of the alleged breach, and before the report, had not failed financially, and soon after had a receiver appointed, whether its assets were not then transferred to another company, and whether it did not then discharge all of its employees because of its failure.

2. SAME.

But questions as to whether a portion of such employees were not re-employed by the other company, under the same general manager, and whether deponent and another director, whose business it was to determine such things, had ever decided that certain other employees of the first company were incompetent are improper.

Appeal from special term, New York county.

Action by Frank Walton against Parke Godwin, as a director of the American Opera Company, Limited, a domestic corporation incorporated under Laws N. Y. 1875, c. 611. Plaintiff claimed under an assignment to him by Henry Bates of a claim against the corporation for alleged breach of a contract by discharging said Bates from its employ as an opera singer on December 11, 1886. Plaintiff sought to recover from defendant on the ground that he was liable for the debts of the corporation under the act of 1875, § 21, because he had signed a report of the corporation dated January 3, 1887, which plaintiff alleged contained false statements as to its stockholders and financial condition. Defendant answered, and alleged that he signed the report believing that it was true and correct, and that Bates was discharged and his contract annulled by the corporation on December 11, 1886, on the ground of his incompetency, for which ground the contract provided that it might be annulled. A commission issued to take the deposition of Jacques Bouhy, of Paris, France, as a witness for defendant, and defendant excepted to the following cross-interrogatories proposed by plaintiff: "*Eighth.* State whether or not the American Opera Company, Limited, failed financially on or about December 11, 1886, and whether or not it ever produced any public performance of opera after that date; and, if not, state why not, so far as you know. Did it not then retire from business as an opera company, and fail to pay its obligations, and go into liquidation, and was not a receiver soon thereafter appointed by the court in an action brought by a creditor to sequester its property to pay its debts? *Ninth.* What became of the property and assets of the American Opera Company, Limited, after December 11, 1886, so far as you know? Were they not then mostly transferred and delivered to another company, formed about that time under the laws of New Jersey, called the 'National Opera Company, Limited,' and did not that National Company also soon thereafter fail financially, and go also into the hands of a receiver in sequestration proceedings? *Tenth.* Were not all the employees and singers of the American Opera Company, Limited, discharged by it on or about December 11, 1886, on account of its said financial failure, if any, and were not a portion of them re-employed by the said National Opera Company under the same

general manager, Charles E. Locke, who had previously acted as general manager of the American Opera Company, Limited?" "Fourteenth. State whether or not you and Theodore Thomas, acting as the vocal and musical directors of the American Opera Company, Limited, about December 11, 1886, or ever, adjudged and determined together and decided that either of the following named persons then employed by said company was then incompetent to sing or perform his or her parts as provided by their contracts with said company, namely: John E. Brand, Alfred W. Young, Joseph C. Elliott, William Parry, James J. Boyle, Alice Hawkins, Alice Richards, Ruth Torbett, Jessie Watson, Jessie Woods, Jennie Woods, Georgie Girard, May Warren, Hattie Patterson, and Emily Stanly." From the allowance of these interrogatories defendant appeals.

Argued before VAN BRUNT, P. J., and BRADY and DANIELS, JJ.

G. Washbourne Smith, (*Nelson Smith*, of counsel,) for appellant. W. W. Badger, for respondent.

VAN BRUNT, P. J. Although it is true that the general rule is to allow all interrogatories which may be propounded under a commission, leaving the question of the admissibility of the evidence to be determined at the trial, where it can be much better and more intelligently done than upon the settlement of the interrogatories, yet where an interrogatory is clearly irrelevant, and is apparently put for the purpose of eliciting information in no way connected with any issue presented by the pleadings in the action, such interrogatory should not be allowed. Applying this rule to the interrogatories now before the court, and which are put by the plaintiff by way of cross-examination, it would appear that no error was committed in the allowance of the eighth, ninth, and the first paragraph of the tenth. There were issues presented which related to the good faith of the opera company in the change; of plaintiff's assignment; and also to the truth of the statements contained in the report signed by the defendant as to the assets of the opera company; and these interrogatories were pertinent to these issues. The last clause of the tenth interrogatory and the whole of the fourteenth seem to be improper. The fourteenth in no way tended to elicit any evidence in any way connected with the issues presented in this action, but seems to have been put for the purpose of procuring information which might affect other claims which had been or might be presented against the signers of the report in question. The order appealed from should be modified, disallowing the last clause of the tenth interrogatory, and the whole of the fourteenth, and as so modified affirmed, without costs. All concur.

SCOFIELD v. SPAULDING *et al.*

(*Supreme Court, General Term, Fourth Department. November, 1889.*)

1. FRAUDULENT CONVEYANCES—EVIDENCE—DECLARATIONS OF GRANTOR.

The declarations of a vendor, made after conveyance, and his evidence in supplementary proceedings, relating to the property conveyed, to the effect that the conveyance was intended to defraud the judgment creditor, are inadmissible against his vendee, though he remains in possession under the vendee's lease.

2. SAME—CONSPIRACY—*RES GESTÆ*.

Nor are such statements admissible on the ground that, a conspiracy between vendor and vendee to defraud having been shown, the declarations of the one were binding on his co-conspirator, as such declarations were merely narrative of a completed transaction, and formed no part of the *res gestæ*.

Appeal from special term, Otsego county.

Action by Byron J. Scofield, receiver of William Spaulding, against William Spaulding and Philo B. Spaulding, to set aside a conveyance of a house and lot in Oneonta; also a vacant lot; which conveyance was executed on the 8d day of January, 1885, and recorded on the ——— day of January, 1885, and

recited a consideration of \$3,200. The grantee, Philo B. Spaulding, gave, in exchange for the conveyance, a deed of a patent-right for shears or pruning hook, for the territory of 31 counties in the state of Pennsylvania. The referee has found that the deed of the patent-right territory was of no value, and that the exchange was made "with intent to cheat and defraud, hinder and delay, the creditors of William, and that it was with a like intent on the part of Philo B." At the time of the conveyance in question the house and lot was of the value of about \$3,500; and the vacant lot of the value of about \$250; and the grantor had goods in the store of the value of about \$1,500; and he had accounts of the value of about \$2,000; and he had a horse, wagon, harness, and robes, etc., of the value of \$200,—making the total value of his property some \$7,400. His indebtedness amounted to about \$2,000. On the 28th of December, 1884, William transferred to his infant son, William H. Spaulding, his horse, wagon, cutter, two harness, whip, buffalo robe, and lap spread; assuming thereby to pay a debt to his son of \$200. This transfer was in the presence and with the knowledge of Philo. When the conveyance of real estate was made, Philo had notice that William was in debt. On the 16th of January, 1885, William gave a chattel mortgage to his wife for the express consideration of \$2,410, covering the store and goods, and all his accounts; and on the 26th of January, 1885, William gave his wife another chattel mortgage upon a quantity of tobacco which he had received after the execution of the first chattel mortgage, making the second chattel mortgage collateral to the first one. William remained in possession of the real estate, taking a lease thereof for a year from Philo, at a rental of \$125 a year, and at the expiration of one year Philo gave a lease to William's wife, and William and his family remained in the possession, down to the day of the trial, of the house and lot. No evidence was given tending to establish the indebtedness of William to his son or to his wife, other than appear in the transfers made to them.

Evidence was given upon the trial tending to show a fraudulent intent on the part of William at the time of the execution of the conveyance, and that Philo had knowledge of William's indebtedness, and that William desired and intended to cover up all his property, or put it beyond the reach of his creditors. Before this action was commenced the receiver offered to Philo a reconveyance of the territory covered by the assignment, and demanded a conveyance of the real estate. Philo refused to receive the deed of the territory, and refused to execute a conveyance of the real estate.

M. B. Williams was called as a witness for the plaintiff, and testified that he indorsed a note for William Spaulding, April 1, 1884, and that he had a conversation with him at the time of that indorsement with reference to his property. He was then asked to state the conversation, which was objected to, and the referee overruled the objections as to William Spaulding, and sustained them as to Philo Spaulding. He stated the conversation, and he then added: "I had a conversation with him after that,—after his failure; transfer of his property. It was after it came out that he had put his property out of his hands, and before the sale of the goods in the store. It was about the last of January or first of February. *Question.* Tell us what occurred then. (Objected to by defendants' counsel as incompetent, improper, and immaterial, and as no evidence against P. B. Spaulding. Objection overruled. Exception by defendants' counsel.) *Answer.* He said he had property enough to pay me. I asked him where, and he did not say where; but he said he could pay me, but he was going to beat that damned Keyes. I asked him how he could beat Keyes when I was the banker. Says I: 'I have got to pay, if you don't pay.' Well, he said he had enough to pay me, and keep still, I should have my pay. I don't know whether I kept still or not. I presume I did not. I felt a little worked. I don't remember anything further there. I had or heard a conversation with him at the Ballard House, in Cooperstown, I think

in May, 1887, when he was there at some court. Q. Tell us what the conversation was." This question was objected to by the counsel for Philo Spaulding on the grounds before stated. The objections were overruled, and the defendant took an exception. The witness answered, viz.: "It is too damned bad you are here. You have no business here." Says I: "I know it. Pay your bills, and I will go out." He says: "I have got property enough to do it, but I ain't fixed just now so I can do it." He said: "Keyes drew me into it. If I hadn't went into it with Keyes, I wouldn't have went into it." I told him I didn't know whether Keyes drew me into it or he did. I took it he drew me into it. "You compelled me to come." He said Keyes ought to be shot. "He ain't fit to live. There ain't a Keyes on this side of hell fit to live." I asked him the reason why, and he did not give me the reason why he was not fit. Q. What did he say about the transfer of his property, or why he transferred it? A. He talked just as though he owned it. He asked me what I thought his property was worth. Says I: "It is worth what you appraise it at,—\$4,000." He said: "Yes; it is worth \$4,500." That was about all there was in the conversation of the property business that I know. * * * I think he said Barnes had no business to be there, for he had paid him up, and I think he said he had got about \$1,500 or \$2,000 after he paid him up, out of the book accounts."

Hubert Harding, a witness called for the plaintiff, testified that he heard a conversation between William Spaulding and Malcolm Keenan in the winter of 1885. "Question. Tell us what the conversation was." This was objected to, and the objections were overruled, and exception taken. The witness then stated that Keenan wanted Spaulding to renew a note. "Mr. Spaulding said he was perfectly good. He owned a house and lot free and clear, and he owned a vacant lot,—I think he said on River street, or down that way,—and \$2,500 book accounts, and on that consideration Keenan renewed the note." The witness then referred to another conversation which he heard between William Spaulding and Keenan, and he was asked: "Q. What was said at that time?" This was objected to on the same ground. Overruled, and exception taken. The witness answered: "Mr. Spaulding had been in the shop, and started to go out, and Mr. Keenan called him back, and said: 'I want you to fix that up;' and he says, 'I will. I will fix you all right. You wont lose a cent. It is the damned bank I am after; and Mark Keyes, son of a bitch, he drove me to the wall.' He says: 'I am going to beat him.' He says: 'You shant lose a cent;' and he went on out. I do not remember any other conversation with him and Mr. Keenan. I heard Mr. Spaulding talk about the Keyes and the bank once at Cooperstown. I think it was in 1887. Q. What was it?" This was objected to on the same grounds as before, and the objections were overruled, and the defendant took an exception, and the witness answered, viz.: "He was talking to Mr. Williams about this debt, and he said he would pay him, and Mr. Williams asked him when he would pay him, and he did not tell him when he would, that I heard. He was talking about Mr. Keyes and the bank. He called both Keyes damned thieves and robbers; that is about all I heard. I did not pay much attention to it. I did not hear him say anything about transferring his property, or why he had done it."

Marquis L. Keyes, called as a witness for the plaintiff, testified that he was cashier of the First National Bank, and he stated that the bank held a note which matured on the 11th of December, 1884, after the maturity of the note. That conversation was objected to, and an exception taken. The witness stated that he made an effort to secure a mortgage from William, and that thereafter he had another conversation with him, some time in January. That conversation was objected to by the counsel for Philo, and an exception taken to the ruling. The witness answered, viz.: "I asked William Spaulding why he did not do as he agreed, by placing this mortgage on his property.

He said he had concluded to do otherwise, and I looked through his property to see what he had." The witness continued: "In that conversation he said he had transferred his property to his brother,—his real estate,—for a patent-right on pruning shears. I said to him: 'What was you thinking about; you are evidently concocting some scheme to beat your creditors every debt you honestly owe them;' and to that he did not say anything in particular. He said he had sold his real estate for thirty-one counties of the patent pruning shears, in Pennsylvania. He said he received no other consideration whatever. He did not say anything about having transferred property to his minor son. He said he had given his wife a claim on his business. I said to him: 'You said to me you did not owe your wife a dollar.' He then claimed he had given her a claim on his business for \$2,400, to pay her off; that is the way he termed it."

Robert Keenan was called as a witness for the plaintiff, and stated that he heard a conversation between William Spaulding "and another man in February, 1885. I couldn't say who the man was that he had the conversation with. *Question.* Then state what you heard William Spaulding say. (Objected to by P. B. Spaulding on the same ground as last above. Overruled, and exception taken.) *Answer.* I think it was before the sale of goods in the store. He said: 'Anything to beat the damned bank.' He said they tried to beat him out of his house, but he would show them. I do not remember anything else that he said. I think he said: 'By God, I have got it all fixed; anything to beat the damned bank.' That is my recollection."

William Spaulding had been examined in proceedings supplemental to execution, before Charles L. Wilber, as referee. The plaintiff offered to read portions of the evidence, thus taken and given by William Spaulding, from the referee's report taken on the 16th of May, 1885. Specific objections were taken by the counsel for Philo B. Spaulding. The referee made the following ruling, viz.: "If the testimony covers declarations and transactions previous to the 1st of January, 1885, that I exclude; so far as details which occurred after the time Philo Spaulding is shown to have connection with it, that I will hear." The plaintiff then read the following testimony, viz.: "I have transferred my real estate to my brother, Philo B. Spaulding. I transferred real estate first on the 2d of last January, to my brother. * * * \$3,200 was the consideration for which this deed was given. I did not get the money for this deed. I got territory on the Ainslet patent shears. I got a deed of same patent territory. This territory is in Pennsylvania. There was thirty-one counties in this territory."

Charles L. Wilber testified that he saw the Spauldings, both "of them, in the Windsor Hotel bar-room on one occasion. * * * *Question.* 'What did you hear said by William Spaulding?' (Objected to, and exception taken.) There was something said by some one about Mr. Spaulding changing his business. William said this. William said Mark Keyes was trying to drive him to the wall, or to beat him. I can't give the language, but it was generally that Mark was trying to injure him, or to drive him to the wall, or to beat him out of his property, and, if he got his debt before he was ready to pay it, he would be smarter than he was. * * * I think there was something said about a patent-right, but I could not pretend to give the conversation upon that subject. I think there was something said that he had transferred his real estate for a patent-right, or a patent-right territory. * * * I think he said he had made a deal with Philo, his brother."

This conversation was also detailed by the witness Potter; and the same, in substance, was repeated by the witness Peck, who says: "William made the remark that he had been making a deal with him. That he had traded off his house and lot for a patent-right, and was going into the patent-right business. I asked the question what the patent-right was. He said it was a patent pruning hook or shears. That is about all that was said about that."

William said he did not propose to be beat out of what he had. That was in the presence of Philo, and in his hearing. They stood right together, in the west side of the bar-room."

Evidence was given on the trial tending to show that the patent-right was worthless, some 12 years of its life having run. While the evidence was contradictory in respect to the value of the invention, the finding of the referee that it was worthless is abundantly sustained by the evidence. William's wife did not execute the deed. It was admitted by the counsel for Philo "that he was in possession of the shares when the production of the same were demanded of him by plaintiff's counsel, in order that he might have an opportunity to cross-examine the witness in relation thereto. That the defendant's said counsel refused to produce the same, as did also the defendant." Judgment was entered for plaintiff, and defendants appeal.

Argued before HARDIN, P. J., and MARTIN and MERWIN, JJ.

S. M. Lindsay, for appellants. *Melville Keyes* and *James A. Lynes*, for respondent.

HARDIN, P. J. 1. Upon the evidence before the referee the question of whether or not the conveyance in question was made with intent to hinder, delay, and defraud the creditors of William Spaulding was one of fact. *Peck v. Crouse*, 46 Barb. 151; 3 Rev. St. (7th Ed.) 2329. We think the evidence fully warranted the referee in finding, as a matter of fact, that the conveyance was made with the fraudulent intent on the part of the grantor, and received by the grantee with the like fraudulent intent. *Starin v. Kelly*, 88 N. Y. 418.

2. We are of the opinion that the admissions or declarations of William were competent evidence against him, as he was a party defendant. He remained in the possession of the property, and, although it is said that it was under a lease, yet the position of the plaintiff in attacking the conveyance is that the lease is only a part of a fraudulent contrivance to keep the property beyond the reach of William's creditors.

3. After the evidence was given tending to establish a conspiracy to defraud the creditors entered into by William and Philo, the admissions or declarations of William were competent evidence as against him. *Cuyler v. McCartney*, 40 N. Y. 228; *Loos v. Wilkinson*, 110 N. Y. 195, 18 N. E. Rep. 99; *Waterbury v. Sturtevant*, 18 Wend. 359. When the admissions and declarations of William were offered, they were competent evidence against him, and therefore the court could not have excluded them. *Wright v. Nostrand*, 94 N. Y. 31. Before the evidence closed there was abundant testimony for the referee to find that there was a combination and conspiracy between the grantor and grantee to hinder, delay, and defraud the creditors of the grantor. The conversation held in the presence of Philo in the Windsor Hotel, detailed by the several witnesses, was sufficient to indicate the fraudulent purposes of the grantor and grantee, and to establish a scheme to hinder, delay, and defraud the creditors of the grantor. Philo was present at the conversation, according to the testimony of the witnesses, and made no statement or declaration contrary to the avowed purpose of William in making the "deal" with Philo by transferring his real estate in exchange for patent-right. He is therefore presumed to have acquiesced in the statements. 1 Cow. & H. (n) 191, 192. However, as the referee received in evidence declarations of William made after the deed, as well as testimony taken in proceedings supplementary to execution, against the objection of Philo, thus in effect holding they were competent evidence against Philo, we think an error was committed. The opinion of MARTIN, J., considers this question *in extenso*, and the views expressed in his opinion must prevail. Therefore we must reverse, and order another trial. Judgment reversed on the exceptions, and a new trial ordered before another referee, with costs to abide the event.

MERWIN, J., concurs.

MARTIN, J. I fully concur in the opinion of Mr. Justice HARDIN that the evidence justified the referee in finding that the transfer in question was made with an intent on the part of the grantor to hinder, delay, and defraud his creditors, and that the grantee was a participant in such fraudulent intent.

The more difficult questions to be solved in this case arise from the admission of certain evidence which was objected to, and admitted under the appellants' exception. On the trial the respondent was permitted to prove the declarations of the grantor, made after the transfer in question was perfected and recorded, to the effect that the purpose of such transfer was to defraud the judgment creditor represented by the plaintiff, and to prevent the collection of its debt. The referee also permitted the testimony given by the grantor in proceedings supplementary to execution to be read in evidence against the grantee. All this evidence was received under the objection of the grantee that it was incompetent as against him. It must be admitted that, as a general rule, the declarations of a grantor which form no part of the *res gesta* are not competent to prejudice the title of his grantee, especially when made after the transfer. *Cuyler v. McCartney*, 40 N. Y. 221; *Bullis v. Montgomery*, 50 N. Y. 352; *Tilson v. Terwilliger*, 56 N. Y. 273; *Burnham v. Brennan*, 74 N. Y. 597; *Tabor v. Van Tassel*, 86 N. Y. 642; *Truax v. Slater*, Id. 630; *Coyne v. Weaver*, 84 N. Y. 386; *Vidvard v. Powers*, 34 Hun, 221; *Burhans v. Kelly*, 2 N. Y. Supp. 175.

It is, however, contended that an exception to this rule exists where the grantor remains in possession. The claim here is that although the grantor had given a deed of the premises, which had been recorded, and taken a lease from his grantee, under which he claimed to hold possession, still, as the grantor was in possession, the case falls within the exception, and the evidence of the declarations of the grantor were admissible against his grantee. In *Gibney v. Marchay*, 34 N. Y. 301, it was held that the declarations of a party in possession of real property are admissible against the party making them, or his privies in blood and estate, but are not competent to attack or destroy a title which is of record. In *Vrooman v. King*, 36 N. Y. 477, it was also held that declarations made by a grantor of premises after he had sold them, though he continue in the occupation up to the time of making such declarations, were not competent evidence, as affecting the rights of his grantee. In *Hutchins v. Hutchins*, 98 N. Y. 64, it was said: "It is only where the party making the declarations has, at the time of making them, the title to the property, that such declarations bind his successor." In *McDuffie v. Clark*, 39 Hun, 170, it is said: "The declarations of a party in possession are admissible in evidence against the party making them, or his privies in blood or estate, not to attack or destroy the title, for that is of record, and of a higher and stronger nature, and cannot be attacked by parol evidence. Such admissions are received in evidence simply to explain the character of the possession in a given case." The doctrine of these cases seems adverse to the respondent's claim; nor do I find anything which upholds it in the cases of *Adams v. Davidson*, 10 N. Y. 309, or *Loos v. Wilkinson*, 110 N. Y. 195, 18 N. E. Rep. 99. In the *Adams Case*, the validity of a general assignment for the benefit of creditors was involved. The declarations of the assignor before delivery of the property assigned, as to the purpose of the assignment, were admitted in evidence, and their admission was sustained. Although this case, if not overruled, has been quite pointedly criticised in subsequent cases in the same court, still, if regarded as authority, it does not justify the rulings complained of in the case at bar. In the *Adams Case* the transaction was incomplete when the declarations were made, as no delivery of the property assigned had taken place. In the case at bar the transaction was at an end. The deed had been given and recorded, and a lease of the premises taken by

the grantor from his grantee. The whole transaction was not only complete, but it was valid and binding between the parties, and as to all the world, until set aside. In the *Loos Case* the conveyance was a secret one, and the declarations of the grantors were to the effect that they still owned the property. Such declarations were held competent, on the ground that they were a part of the fraud, and it was there said: "They are in the nature of *res gesta* declarations, and on the question of fraud clearly competent." In the case at bar the declarations proved were no part of the fraud, nor did they constitute any part of the *res gesta*. They were at most mere declarations or admissions as to a past transaction. To constitute a part of the *res gesta*, the declarations must be made at the time the act was performed which they are to characterize. Here the act referred to had been performed and fully completed. The fraud, if any, had been fully consummated.

It is said, however, that the lease was a part of the fraudulent scheme, and hence the grantor's possession was not under the lease, but under his original title. The question of the validity of such lease was one of the questions being tried, and until determined, and the deed and lease were set aside, I am unable to see how the court could hold that the grantor was in possession under his original title. The question was as to the admissibility of evidence, and not as to the rights of the parties as they should finally be determined. The scheme, if fraudulent, was an executed one, and, as between the parties, their contracts were binding, and their claimed rights were their real rights. I cannot think that these declarations were any part of the *res gesta*, nor that the possession of the grantor at that time, under the circumstances disclosed by the evidence, rendered the declarations of the grantor competent evidence against his grantee.

It is also said that the evidence was sufficient to justify the referee in finding that there was a conspiracy between the grantor and grantee to defraud the creditors of the former, and therefore his declarations were admissible against the grantee. If it were conceded that such conspiracy existed, it would be difficult to perceive how it rendered the evidence of such declarations competent against the grantee. Although, when the connection of individuals in an unlawful enterprise is shown, every act and declaration of each member of the confederacy, in pursuance of the original plan, and with reference to the common purpose, is, in contemplation of law, the act and declaration of all, and is therefore evidence against each, still an act cannot be varied, qualified, or explained by a declaration which amounts to no more than a mere narrative of a past transaction. Acts and declarations of conspirators are thus admissible only when made and done during the pendency of the unlawful enterprise, and in furtherance of its objects. If made or performed at a subsequent period, they are merely narrative, and not admissible. 1 Greenl. Ev. § 111; 1 Tayl. Ev. (Text-Book Series,) §§ 589, 590, 593; *Indemnity Co. v. Gleason*, 78 N. Y. 504, 515; *People v. Gorham*, 16 Hun. 93.

As the evidence under consideration consisted of mere declarations in regard to a past transaction, and were not made in furtherance of any unlawful purpose, it was not, we think, rendered competent by the previous existence of such purpose, nor by any conspiracy that may have existed to accomplish that purpose. I find nothing in the case of *Wright v. Nostrand*, 94 N. Y. 31, to sustain these rulings. It was there held that where a judgment debtor was called as a witness for the defendant, to give material evidence, his testimony in supplementary proceedings was admissible, not only against him, but also against all the defendants, for the purpose of affecting his credibility by showing conflicting statements. In this case William Spaulding, the grantor, was not called or sworn as a witness. There was no objection to the evidence in his behalf. The objection was specific, that it was incompetent against Philo B. Spaulding, the grantee. Under such an objection, the evidence was received. The evidence of the grantor's declarations, made

subsequent to such transfer, and his evidence given in proceedings supplementary to execution, was, I think, incompetent as against Philo B. Spaulding, the grantee, and that the exceptions to its reception were well taken. For the error in admitting such evidence I think the judgment should be reversed.

WALDEN NAT. BANK *v.* SNYDER *et al.*

(*Supreme Court, General Term, Second Department. December 10, 1893.*)

1. BANKS AND BANKING—BOND OF CASHIER—LIABILITY OF SURETIES.

The conditions of a bank cashier's bond were that he should honestly and in good faith perform all his duties, and all duties incident to the office of cashier, and all duties, acts, and work required by the bank or its directors, and "in all respects conduct honestly and in good faith towards or in respect to said bank, its moneys and securities, and the moneys and securities of any other person or persons left in any manner with said bank." To secure accommodations from the bank, a stockholder assigned his stock to the cashier, to be held by him as collateral security, and the bank issued to him new certificates of stock, canceling the old ones. *Held*, that the sureties were liable for conversion of the stock by the cashier.

2. SAME—NATIONAL BANKS—LOAN ON STOCK.

The sureties of a national bank cashier cannot, as defendants in an action to recover for the cashier's wrongful conversion of stock, attack the validity of the transaction by which the bank issued stock to the cashier, by alleging that he held the stock in violation of the United States banking act, which prohibits a bank from making loans or discounts on the security of the shares of its own capital stock, as only the government could question the validity of the transaction.

Appeal from special term, Orange county.

Action by the Walden National Bank against Michael G. Snyder and Caleb Birch, sureties on the bond of William G. Rutherford, cashier of plaintiff bank. The conditions of the bond were that the said Rutherford "honestly and in good faith perform all the duties of cashier in the Walden National Bank, and all the duties in any manner incident thereto while acting as such cashier, and also all such duties, acts, and work as may be required of the said William G. Rutherford by the said bank, or its board of directors, which shall from time to time be assented to on his part, and in all respects conduct honestly and in good faith towards or in respect to said bank, its moneys and securities, and the moneys and securities of any other person or persons left in any manner with said bank." Several years prior to the date of the bond, and while Rutherford was cashier of plaintiff bank, one Tarbell assigned to him certain stock of plaintiff bank of about \$3,000 value; and the bank issued new certificates for the stock to Rutherford in his individual name, taking up and canceling the old certificates. Tarbell became indebted to the bank, and under its direction Rutherford sold one-third of the stock, and applied the greater portion of the proceeds in payment of the Tarbell notes. Later Tarbell borrowed \$2,000 from the bank, and Rutherford indorsed his notes. The bond was given subsequent to these transactions; but soon after its execution Rutherford borrowed money of the Chase National Bank, and deposited \$1,000 of the stock as collateral security for his individual note of \$1,000. This note was paid by one of plaintiff's directors, who took up the stock. Subsequently plaintiff recovered judgment against Tarbell and Rutherford for the \$2,000 of unpaid notes. The remaining third of the stock was assigned by Rutherford to the Goshen National Bank before delivery of his bond. The complaint alleges that the stock was assigned to Rutherford, and the new stock certificates issued in lieu thereof, with the express understanding that it was to be held by him as collateral security for the payment of Tarbell's notes, and that it was misappropriated. The defense was that the transactions of Rutherford with reference to the stock were those of an individual, and did not pertain to his duties as cashier; also that national banks are prohibited from making loans on the security of their own capital stock. On trial at the special term the court found that the stock pledged by Rutherford on his private note to

the Chase National Bank, for \$1,000, was recoverable, with interest and cost. Judgment against defendants was entered accordingly, from which they now appeal.

Argued before BARNARD, P. J., and DYKMAN and PRATT, JJ.

A. S. & W. F. Cassedy, for appellants. B. R. Champion, for respondent.

DYKMAN, J. This is an action upon the bond of William G. Rutherford, as cashier of the plaintiff, against the sureties in the bond for the recovery of the damages sustained by the bank through the misconduct of the cashier. The facts are quite complicated, but they are to a considerable extent undisputed, and the findings of the trial court have ample support in the testimony and the stipulation of the parties. The defense seems to rest upon the theory that the transaction of Rutherford in the conversion of the stock which resulted in the loss to the bank, and which constitutes the basis of the claim against the sureties in this action, was not in the line of the regular duties of a cashier, and that the sureties are not liable upon the facts found by the court. In relation to the first position, it is to be said that no misconduct is in the line of duty of a cashier of a bank, or any other officers, and yet persons who become surety in official bonds undertake to indemnify against malfeasance in office as well as misfeasance. The second position is founded upon the provision of the United States banking act, which prohibits banking associations from making loans or discounts on the security of the shares of its own capital stock, without providing any penalty for a violation of the law. It seems plain, therefore, that the government alone can attack the validity of such a transaction, and that the prohibition cannot be urged as a justification of the cashier for a wrongful conversion of the stock. A full and careful examination fails to disclose any error in the proceeding, or any defense to the action. The judgment should therefore be affirmed, with costs.

MCDONALD v. MCDONALD.

(*Supreme Court, General Term, Third Department. December 11, 1889.*)

LIMITATION OF ACTIONS—RUNNING OF STATUTE—PARTIAL PAYMENTS.

R. was general agent and manager of defendant's business, representing her in a firm of which she was a member, and in such capacity made payments on a note given by defendant, receiving the money from the firm on her account. *Held*, that the payments were sufficient to take the note out of the statute of limitations.

Appeal from circuit court, Montgomery county.

Action by Harriet McDonald against Maria McDonald on a promissory note. There was a judgment for plaintiff, and defendant appeals.

Argued before LEARNED, P. J., and LANDON and PUTNAM, JJ.

Maxwell Brothers, for appellant. C. S. Nisbet, for respondent.

LEARNED, P. J. This is an action on a promissory note. It was by consent tried before the court. The defense was the statute of limitation, and the reply to that defense was that of partial payments within the six years. The court found such payments to have been made, and the only question is whether the proof justified the finding. That proof is, in substance, as follows: One Reid was the general agent and manager of defendant's business. He represented her in the firm of I. C. Shuler & Co., of which she was a member. He made the payments on the note, and made the indorsements of payment. His authority was that of general instructions from defendant to attend to all her financial business. The money was paid by I. C. Shuler & Co., and charged to her account. She never gave any particular instructions to make these payments. He drew this money from the firm, acting for her, and charged it up to her account. The defendant urged on the trial that after 1880 the note (for \$600) bore only 6 per cent. interest, and that, as \$42 for a

year's interest had been paid in several instances, the note had become usurious. This point does not seem to be presented on the appeal, and by the memorandum of the learned justice who tried the case it appears that payments were credited and interest charged at the rate of 6 per cent. after January 1, 1880. There was no usury.

The defendant also urges that Reid is not shown to have had authority to make the payments. Here the authority is distinct and undisputed. Reid was defendant's general agent and manager. No contradictory evidence is given, and the court found that she made the payment. The case of *Littlefield v. Littlefield*, 91 N. Y. 210, on which defendant relies, was widely different. In that case a surety was called on by the creditor to pay. The surety said: "Tell him [the principal] for me that he must pay," etc. "Wait till Ira [the principal] comes home." The principal subsequently made a payment, of which fact he informed the surety. Thus there was no agency shown. Indeed, there could hardly be an agency, because the person who made the payment was the principal, and the person sought to be charged was surety. So that, as between them, the surety would not be liable to the principal for any part of the payment made by him. The principal could not be paying the surety's money. In the present case Reid represented defendant in the firm. By virtue of such representation he received her money from the firm, and by his general authority to manage her business he paid a debt, in part, which she owed. These payments extended from 1878 to 1887, and there is no evidence that during these nine years the defendant made any objection. The judgment should be affirmed, with costs.

RUPPEL v. SCHLEGEL et al.

(Supreme Court, General Term, Second Department. December 10, 1889.)

1. WILLS—CONSTRUCTION—NATURE OF ESTATE.

A testator devised all his property to his wife for life, and, after her death, all the remainder left by her "to the Roman Catholic Church of the Most Holy Trinity, in Montrose Ave., Brooklyn, E. D., but under the following ordination;" that in each year a high mass shall be celebrated after the death of himself and wife, for their souls, respectively, and a part of the estate shall be used in aiding poor students, intending to become Catholic priests or teachers, and a part to establish a Catholic newspaper. *Held*, that the devise was valid, and did not create a trust, but vested the fee-simple title to the property in the church.

2. SAME—ACTION TO CONSTRUCT.

Under Code Civil Proc. N. Y. § 1866, which provides that an action may be maintained to determine the validity, construction, or effect of a testamentary disposition, the sister and heir at law of a testator, who is not a beneficiary, but who contests the validity of a devise, cannot sue in equity for a construction of the will.

Appeal from special term, Kings county.

Action by Margaret Ruppel against Mary E. Schlegel and others for the construction of the will of Adam Schlegel, deceased, under Code Civil Proc. N. Y. § 1866, which provides that an action may be maintained to determine the validity, construction, or effect of a testamentary disposition. The opinion of the surrogate, filed July 26, 1886, is as follows:

"TUTHILL, S. The will was properly executed, according to all the formal requirements of the statute, and the testator appears to have been of sound and disposing mind and memory, and not under restraint. The real and personal estate is all given to the widow for life, and, on her death, it is disposed of, by the fifth clause of the will, as follows: '*Fifth.* After the death of my said wife, Mary Elizabeth Schlegel, all the rest, residue, and remainder of the estate by her left, I give and bequeath to the Roman Catholic Church of the Most Holy Trinity in Montrose Ave., Brooklyn, E. D., but under the following ordination: (a.) That in each and every year one high mass shall be celebrated for my poor soul, and, also, after the decease of my said wife, one high mass shall be celebrated every year for the soul of my wife. (b.) And a part

of the said estate shall be used for to pay for poor students intending to become Catholic priest or Catholic teacher. (c.) And a part of said estate I ordain shall be used for starting a newspaper for the interest of the Catholic people.'

"It is contended that if the fifth clause be valid the church must, under chapter 360, Laws 1860, be restricted to one-half the estate. The value of the real estate does not appear from the evidence, but it does appear that there are no debts of any account, and that the personal estate is about \$3,000, and there is considerable real estate. The widow was born January 14, 1828, so that at her husband's death, taking her age at her nearest birthday to be 58, the gross value of her life-estate was \$44 out of every \$100 of the estate. The will gives to her a life-estate, and the remainder to the church. It appears, then, that the value of that part which is given to the widow is less than one-half of the decedent's estate, and it follows that more than one-half the estate is given to the church, and whatever shall pass under the said fifth clause must be reduced to one-half the estate; the value of the estate to be ascertained at the date of the death of the testator, by deducting the debts, if any, and the value of the widow's dower, and whatever should be set off to the widow by the appraisers, under the statute. The residue of the estate, after the church has had what it is entitled to, under said fifth clause, and after paying the debts and the expenses of settling the estate, goes to the heirs at law and next of kin, as intestate property. But at the widow's death the church will take the whole, if it does not exceed what was one-half the estate at decedent's death, with interest since then.

"It is contended that the said fifth clause attempts to create an active, express trust,—the church to be trustee, and the decedent and his wife, for all coming time, to be *cestuis que trustent* and beneficiaries; that such a trust is unlawful. But there is no trust created here. The gift is absolute to the church. The language does not by its terms create a trust; and there are no beneficiaries, such as the law recognizes, in whom the equitable title can vest. Where the testator has not used the language ordinarily used for the declaration of a trust, we cannot impute to him intention of creating a trust, for the sake of condemning the trust.

"The word 'ordination' has no specific legal meaning; but I think we may ascertain the testator's meaning without doing violence to any established rules of interpretation. I think the testator intended the church should take absolutely, and was trusting to the gratitude and generosity of the church to say the masses, and do something for the class of students named, and something towards establishing a newspaper. The word 'ordination' has something of a peremptory look; but his not specifying any sum of money, or any particular part of the estate, either to go to the students or the newspaper, looks as if the testator was only intending to make suggestions. The testator knew it would not cost the church anything to say the masses, and so the church was not directed to use any part of the estate for that purpose. He knew that when he said a part of his estate should be used to pay for poor students he was not directing one-tenth nor nine-tenths of his estate to be used for that purpose; and the same may be said as to the newspaper. He could have had no other intelligent purpose in the use of such language, except that of suggesting his own wishes to the church in a general way, and then leaving it to the gratitude and good judgment of the church to carry out his wishes. There was nothing strange in the testator anticipating that the church would be willing to comply with his wishes, nor any impropriety in the church accepting the property with such intention. Churches, by statute, can use their property for pious purposes. The saying of masses is a pious act. The court of appeals, in *Gilman v. McArdle*, 99 N. Y. 451, 2 N. E. Rep. 464, recognized the principle that one could contract to purchase masses; and Judge CULLEN, in the *Holland Case*, [N. Y. Daily Reg. Jan. 29, 1886,] sus-

tained a residuary devise to be expended in masses. The helping of poor students was held, in *Rainey v. Laing*, 58 Barb. 453, to be a pious use. The sustaining of a religious newspaper is an equally pious use; and the starting of a newspaper by a church for the interest of the Catholic people is not necessarily any other than a pious act. But, if the term 'upon the following ordination' were interpreted to mean the same as 'for the following purposes,' it would be quite similar to the case of *Rainey v. Laing*. In that case, by the fifth clause, the testator gave the residue of his estate to the said general synod, to be applied to the support and education of pious, indigent young men, preparing for the gospel ministry in that church. Held, no trust created, and that the fee vested absolutely in the synod. Still, if this word 'ordination' is read as 'condition,' the purport and sense are not changed or altered. At all events, it cannot possibly be construed as a condition which would prevent the vesting of the title in the church. It would be only a condition subsequent; and the question of the effect of non-compliance with it can only arise after such non-compliance has happened. The costs of proponents, including stenographer's fees, should be paid out of the estate."

Defendant appeals from the judgment of the King's county court, which is as follows: "Irrespective of the question whether the plaintiff has a standing in court to prosecute this action, I think the defendants must have judgment. There is no trust contained in the fifth clause of the will, but the property is given absolutely to the church, upon a condition subsequent, annexed to the gift. There are no beneficiaries, and hence no one interested, or to become interested, in the equitable title. No sufficient language is used to create a trust. What is said under the term 'ordination' is a mere indefinite request, and, at most, is a condition subsequent, and will not prevent a vesting of the title. The surrogate has said in his opinion all that is necessary upon this subject. Judgment for defendants. Costs of both to be paid out of the estate."

Argued before BARNARD, P. J., and DYKMAN and PRATT, JJ.

Lyon & Nemirs, (*Daniel Nemirs*, of counsel,) for appellant. *Thomas Young*, for respondents.

DYKMAN, J. The judgment from which this appeal is taken is right, and should be affirmed. Courts of equity entertain jurisdiction over actions for the construction of doubtful provisions in last wills and testaments, in behalf of beneficiaries, executors, and trustees, but the plaintiff occupies no such position or relation. If it be our duty to examine the merits, we concur in the reasons assigned by the surrogate and the court at special term. The judgment should be affirmed, with costs. All concur.

HOWE v. MOREHOUSE *et al.*

(*Supreme Court, General Term, First Department. December 2, 1889.*)

SALE—ACTION FOR PRICE—VERDICT.

In an action for the value of gunpowder consigned to defendants, defendants contended that it had been consigned to one W., and not to defendants. Plaintiff testified that the contract of the sale was directly with defendants, and that he had sent it to W. for defendants, and by their directions. Plaintiff introduced a letter to him from one of defendants, stating that he had never had an invoice of the powder sent to "Weed Mines," and that if plaintiff would send him a statement he would render him an account. "Weed Mines" was the place where W. had his storage magazine. Held, that the evidence showed that the contract for the powder was with defendants, and that it was sent to W. for them, and by their directions.

Appeal from circuit court, New York county.

Action by Robert J. Howe against Joseph J. Morehouse and another. Judgment was entered for plaintiff, and defendants appeal.

Argued before VAN BRUNT, P. J., and DANIELS and BARRETT, JJ.

A. M. & G. Card, for appellants. *E. P. Wilder*, for respondent.

BARRETT, J. This appeal is without merit. The facts were clearly with the plaintiff. He sued the defendants for the value of a quantity of gunpowder which, the complaint charges, was consigned to them, and for which they have never accounted. The defense is that the gunpowder was really consigned to one Williams, and not to the defendants. The plaintiff testified that the contract was directly with the defendants, and, in substance, that he had nothing to do with Williams, except to send the gunpowder to him, for the defendants, and by their direction. The defendants disputed this, but the correspondence favors the plaintiff's statement; especially Morehouse's letter in response to that of the plaintiff dated February 7, 1888. That letter reads as follows: "*R. J. Howe, N. Y. City*—DEAR SIR: Yours of the 7th inst., addressed Metallic Cap Company, has been forwarded to me. I have never had an invoice of the powder sent to Weed Mines. If you will send me a statement of what was shipped there, the price, etc., I will render you an account of what remains there. Truly yours, &c., J. J. MOREHOUSE, per L. M." This letter seems conclusive. "Weed Mines" was the place where Williams had his storage magazine. There was an effort to make it appear that this letter was written in February, 1882, instead of February, 1883. The letter was dated "1882," but that date was evidently a clerical error. The plaintiff had no such transaction with the defendants prior to February, 1882, and, besides, the letter in question was plainly in answer to that written by the plaintiff on the 7th of February, 1883.

There are no exceptions in the case of any importance. Upon the testimony there was no question of credit given to Williams, and the request to charge that if the plaintiff gave him credit there could be no recovery was without relevance to the facts. The other requests to charge were equally untenable. Even if Williams "used and had" the powder, why should not the plaintiff recover if the jury found that, under the contract, his use and possession were the defendants'? The same inquiry applies to the request to charge "that if defendants shipped this powder to Williams, and Williams received and retained it, and plaintiff consented to it, plaintiff cannot recover." It all comes back to the original question whether Williams "received and retained" the powder for the defendants under the contract testified to by the plaintiff. The fact is that he did. He was merely the vehicle for the reception of the goods by the defendants. The jury have so found by their verdict, and that verdict is satisfactory. The judgment should therefore be affirmed, with costs. All concur.

MUTUAL LIFE INS. CO. v. COREY *et al.*

(*Supreme Court, General Term, Fourth Department. November, 1889.*)

1. ACKNOWLEDGMENT—DEEDS—NOTARIES PUBLIC.

1 Rev. St. N. Y. (8th Ed.) p. 879, § 14, providing that notaries public may execute the duties of their office at any place within the state, does not apply to their power to take acknowledgments of deeds given by Laws N. Y. 1859, c. 860, which provides that they may take acknowledgments of deeds "in all the cases where the same may now be taken * * * by commissioners of deeds, and under the same rules, regulations," etc., and by Laws 1863, c. 508, which gives them the power "in all cases where justices of the peace or commissioners of deeds" have it; and, the power of those officers to take acknowledgments being then limited to their own counties, a notary has no such power outside the county of his appointment.

2. SAME—EXECUTION—SUBSCRIBING WITNESS—NOTARY PUBLIC.

Where a notary public takes the acknowledgment of a deed outside his own county, and signs as notary only, and at the end of the certificate of acknowledgment, he cannot be regarded as a subscribing witness.

3. SAME—SUBSEQUENT PURCHASER.

A mortgagee who purchases at foreclosure sale under his mortgage, which is valid in equity, though defectively acknowledged, is a purchaser, within 4 Rev. St.

N. Y. (8th Ed.) p. 2451, § 137, providing that a deed not duly acknowledged and not attested "shall not take effect, as against a purchaser or incumbrancer, until so acknowledged," and the question of notice is immaterial.

4. CLOUD ON TITLE—REMOVAL.

After a judgment canceling a deed of land, which is defectively acknowledged and not attested, is vacated, the deed becomes a cloud on the title of a purchaser at foreclosure under a mortgage previously given him by the grantor, which the purchaser may maintain an action to remove.

5. SAME—NECESSARY PARTIES.

Where the judgment canceling the deed is not vacated as to one of the grantees therein, such grantee is not a necessary party to the action to remove the cloud.

6. SAME—LIMITATION.

An action to remove a cloud from title may be brought at any time during the existence of the cloud.

7. WITNESS—PRIVILEGED COMMUNICATIONS—ATTORNEY AND CLIENT.

A notary is not incompetent to testify as to where an acknowledgment of a deed was taken, though he was also employed by the grantor as attorney to draw the deed, as such testimony does not disclose professional communications, within the prohibition of Code Civil Proc. N. Y. § 835.

Appeal from special term, Tompkins county.

Action to remove cloud on title, by the Mutual Life Insurance Company of New York against Lina T. Corey and others. On November 15, 1873, William G. Corey, then being the owner of and living upon a farm in Tompkins county, executed a deed thereof to his wife and four minor children, (being the three defendants herein and Hattie L. Corey,) reserving to himself a life-estate therein. It is found by the court below that no valuable consideration for this deed passed between the parties. It was drawn by one John W. Osborn, and subscribed and sealed by the grantor, in his presence, at the dwelling-house on the farm. Osborn lived in Schuyler county, and at that time was a notary public, duly appointed, commissioned, and authorized to act as such in the county of Schuyler. Corey after he signed the deed, and at his dwelling-house in Tompkins county, acknowledged the execution of it to and before Osborn, who then and there made and signed a certificate of acknowledgment in the usual form, having for its venue Schuyler county. The deed was not otherwise attested. To this deed there was afterwards attached the ordinary certificate from the county clerk of Schuyler county, certifying to the official character of Osborn and the genuineness of his signature; and the deed was, on November 19, 1873, recorded in Tompkins county. In April, 1877, William G. Corey commenced an action against all of the grantees named in the deed, to set it aside on the ground that he executed it, while very sick, believing he was about to die, without consideration, and upon the belief that he was executing a will, and not a deed. The summons in the action was personally served on all the defendants, and all appeared, and answered upon the merits,—the children by guardian *ad litem*, duly appointed. In May, 1877, the attorneys for all the parties stipulated to refer the case to a named referee to hear and determine; and upon this stipulation an order was entered as of course, and without the direction of the court, referring the case to such referee. The case was tried before the referee, the attorneys for all the parties appearing; and the referee afterwards made and filed his decision, holding that William G. Corey, when he executed the deed, was mentally incompetent to execute the same, and did not know its purport, and that it was void. On May 21, 1877, a judgment was entered on this decision, setting aside the deed, and declaring it void. On September 12, 1877, William G. Corey borrowed of the present plaintiff \$5,000, giving therefor his bond dated that day; and, as collateral thereto, he and his wife, Mary L. Corey, executed, sealed, and delivered to the plaintiff a mortgage on the said premises. This mortgage they acknowledged, at their residence in Tompkins county, before John W. Osborn, who then lived in Schuyler county, and was a notary public for that county. The mortgage was recorded in Tompkins county, October 20, 1877. Default having been made in the payment of

this mortgage, plaintiff, on February 10, 1880, commenced an action to foreclose it. The mortgagors, William G. Corey and Mary L. Corey, were made defendants, together with subsequent incumbrancers. The mortgagors defended, but plaintiff recovered judgment of foreclosure against all the defendants, November 9, 1881, upon which the premises were, on December 23, 1881, sold to plaintiff, and the usual referee's deed on foreclosure was given, and was recorded January 9, 1882. The sale was duly confirmed. There was upon the sale a deficiency of \$3,296.24, for which a judgment was entered February 3, 1882, against William G. Corey, and thereafter an execution thereon was returned wholly unsatisfied. About January 25, 1882, plaintiff entered into possession of the farm and has since so continued. On April 24, 1880, the defendants herein and Hattie L. Corey moved for an order setting aside the judgment of May 21, 1877, upon the ground that the order of reference was void because entered by stipulation instead of by direction of court, as required by section 1012, Code Civil Proc. Upon this motion an order was duly entered, July 9, 1881, setting aside the said judgment, and all proceedings subsequent to the joining of issue, as to these defendants. As to Hattie L. Corey, she being then of full age, the payment by her of certain disbursements was made a condition to setting aside the judgment. These she did not pay. The present action was commenced July 29, 1886. The special term held that the deed of November 15, 1873, was not properly acknowledged or attested, and was not valid as against plaintiff, and directed cancellation. Defendants appeal.

Argued before HARDIN, F. J., and MARTIN and MERWIN, JJ.

John J. Van Allen and William N. Noble, for appellants. *E. F. Babcock*, for respondent.

MERWIN, J. It is claimed by the appellants that the deed of November 15, 1873, was properly acknowledged, although before a notary public outside of his own county. The argument is that the general provision of the Revised Statutes, (1 Rev. St., 8th Ed., p. 379, § 14,) that notaries public may execute the duties of their office at any place within the state, applies to their power in taking acknowledgments of deeds. It was held to the contrary in *Re Railroad Co. v. Stewart*, 33 How. Pr. 312, and in *People v. Insurance Co.*, 65 How. Pr. 239. By the Revised Statutes it was provided that notaries public might be appointed in each of the counties of the state; that they should reside in the respective counties for which they should be appointed, and might execute the duties of their office at any place in the state; and certain powers were given to them, (4 Rev. St. 2645,) which did not include the power to take affidavits or acknowledgment of deeds. By chapter 860 of 1859 it was provided that notaries public, "in addition to their present powers," should have authority to administer oaths and affirmations, and take the proof and acknowledgments of deeds and mortgages, "in all the cases where the same may now be taken and administered by commissioners of deeds, and under the same rules, regulations, and requirements prescribed to commissioners of deeds." By chapter 508 of 1863 it was provided that "notaries public shall have all the powers now conferred upon them by law, and shall also have power to take affidavits, and certify to the same, and to take and certify the acknowledgments and proof of deeds and other instruments in writing, in all cases where justices of the peace or commissioners of deeds may now take and certify the same." By chapter 703 of 1872, power was given to the notaries public of the counties of New York and Kings to act in either county. A similar right was given to any notary of several other counties, not including Schuylers, by chapter 807 of 1873, upon filing a certified copy of his appointment, with his autograph signature, in the clerk's office of the counties other than where he resided. By chapter 270 of 1884, any notary is authorized to act in an adjoining county upon filing certain certificates in the clerk's office of such

county. It is thus quite apparent that the legislature have acted upon the supposition that the general power originally given to notaries did not authorize them to exercise their subsequent powers in all parts of the state. Very clearly, it was the intention of the act of 1859 to confer no greater powers than commissioners of deeds then had, and such powers were then by law limited to the county of the appointment. Neither that act nor the one of 1863 conferred any general power, like the one conferred originally on notaries, but it was limited to the cases in which commissioners of deeds or justices of the peace could act. It was not the general power to take affidavits and acknowledgments, but a power to take "in the cases" where the other officers could take. This, necessarily, had the same territorial limitation. We are therefore of the opinion that the notary of Schuylcr county had no power to take the acknowledgment in Tompkins county. This is a question of jurisdiction. The certificate, though in form correct, may be rebutted. *Thurman v. Cameron*, 24 Wend. 87; *Sandland v. Adams*, 2 How. Pr. 127.

But it is suggested in behalf of the appellant that Mr. Osborn, the notary public, should be deemed a subscribing witness. He did not, however, sign as such. His signature is only as notary, and at the end of the certificate of acknowledgment. He did not subscribe his name to the deed as a witness of the sealing and delivery. In *Hollenback v. Fleming*, 6 Hill, 303, a subscribing witness is defined to be one who was present when the instrument was executed, and who at that time subscribed his name to it as a witness of the execution. A subscribing witness attests the delivery as well as the signing. In that respect, it goes further than the acknowledgment. We think the notary was not a subscribing witness.

The plaintiff is in a position to dispute the validity of the deed in question. It is a purchaser or incumbrancer, within the meaning of the statute. 4 Rev. St. (8th Ed.) p. 2451, § 137.¹ Assuming the plaintiff's mortgage was defectively acknowledged, it was valid in equity, (*Payne v. Wilson*, 74 N. Y. 348,) and upon the foreclosure sale the plaintiff became a purchaser entitled to the benefit of the statute. The matter of notice was not material. *Chamberlain v. Spargur*, 86 N. Y. 603.

After the judgment of May 21, 1877, was set aside as to the present defendants, the deed of November 15, 1873, was a cloud on plaintiff's title, and it could maintain an action to remove it. *Paper Co. v. O'Dougherty*, 81 N. Y. 474, 483. That judgment not having been set aside as to Hattie L. Corey, she was not a necessary party defendant. Her rights, if any, would not be affected.

The right of action of plaintiff is not barred by the statute of limitations. The action was commenced within 10 years from the giving of the mortgage. In *Miner v. Beekman*, 50 N. Y. 343, it was said that the owner of the fee had a right to bring an action to remove a cloud at any time during its existence. The notary, Osborn, was called as a witness by plaintiff, and testified that the deed was acknowledged at the house of the grantor. This was objected to, in time, as inadmissible, under section 835 of the Code.² Mr. Osborn was an attorney, and was employed by the grantor to draw the deed. It is claimed that the testimony objected to necessarily involved a communication made by his client to him in the course of his professional employment. The act of the attorney in drawing the deed is one thing; the act of the notary in taking the acknowledgment is another. Concededly, an acknowledgment was taken. The witness, in stating the place where it was taken, did not disclose any communication made to him in the course of his professional employment as an attorney.

¹This section provides that a deed not duly acknowledged, and not attested, "shall not take effect, as against a purchaser or incumbrancer, until so acknowledged."

²Code Civil Proc. N. Y. § 835, prohibits attorneys at law from disclosing professional communications as witnesses.

The appellants claim the equities of the case are with them. This is not made clear. The court below, upon sufficient evidence, found that the deed of 1873 was without valuable consideration. The grantor, in 1877, obtained a judgment setting it aside. Before this judgment was set aside, and while the title of William G. Corey was apparently clear, and he was in possession, the loan was made from plaintiff, and the mortgage given. The plaintiff, as far as the case shows, had no actual notice of any irregularity in the recovery of the judgment. It is doubtful whether it had constructive notice, as the judgment was probably not void, but voidable. We are, however, not required to pass upon the respective equities. The imperfect deed had no effect as against plaintiff. It is not a question of rescinding an instrument, but of invalidity under the statute. There was no estoppel through its covenants of warranty. *Chamberlain v. Spargur, supra*. It follows the judgment must be affirmed, with costs. All concur.

MORRIS *et al.* v. MAYOR, ETC., OF THE CITY OF NEW YORK.

(*Supreme Court, Special Term, Westchester County. October 21, 1889.*)

1. INJUNCTION—PENDENTE LITE—POWERS OF COUNTY JUDGE.

Under Code Civil Proc. N. Y. § 606, providing that an injunction order may be granted "by any county judge," the county judge of the county in which the venue of an action is laid may, on notice to the party sought to be enjoined, grant an injunction to continue during the pendency of the litigation.

2. SAME—NOTICE—PRELIMINARY INJUNCTION.

Code Civil Proc. N. Y. § 609, providing that an injunction order may be granted upon or without notice, in the discretion of the "court or judge;" and section 627, providing that, where an injunction order was granted on notice, the party enjoined may, "on notice to the judge who granted it," apply for an order vacating it,—confer on the judge, as a judge and not as a court, authority to hear both parties on an application for an injunction; and a county judge may give notice of the hearing to the person sought to be enjoined by directing him, in a preliminary injunction, to show cause why it should not be continued.

3. SAME—TRESPASS—CONDEMNATION PROCEEDINGS.

On defendant's failure to appear after due notice, an injunction pending a suit will be granted on plaintiff's showing that defendant is about to forcibly dispossess them of their land under an alleged invalid condemnation proceeding; that great injury would result to plaintiffs if they are deprived of the possession pending the action to determine the validity of the condemnation; and that no injury would result to defendant if it is restrained from taking possession.

At chambers. On motion for a temporary injunction.

Charles E. Coddington, (Noah Davis, Roger A. Pryor, Alfred B. Cruikshank, and H. C. Henderson, of counsel,) for plaintiffs. Wm. H. Clark and Thos. P. Wicker, for defendants.

MILLS, J. On August 12th, inst., an application was made to me, in behalf of the plaintiffs, for a temporary injunction order restraining the defendants from entering upon certain lands in the county of Westchester, the property of, and in the actual possession of, the plaintiffs. The application was made upon the summons, the verified complaint, and the affidavits of Leonard W. Jerome and Charles E. Coddington. By those proofs the following material facts appeared: *First*. That the plaintiff Morris is, and for a considerable period has been, the owner in fee of such lands, and by himself, or by the other plaintiff, his lessee, in actual possession thereof as such owner. *Second*. That the defendants threaten, and, in fact, have attempted, to enter upon a portion of said lands by force and multitude of people, and to forcibly take possession of the same, and destroy the plaintiffs' valuable improvements thereon. *Third*. That defendants, in so doing, assert that they are acting under a claim of right in the city of New York to the ownership of said land, by virtue of certain proceedings alleged by them to have been taken in behalf of the city, under a certain statute, to acquire the same for a public parkway. *Fourth*. That the plaintiffs deny the said claim of right in the city, and contend that the said proceedings are invalid, and desire in this ac-

tion to contest the claim of the city. *Fifth.* That very great pecuniary injury will result to the plaintiffs if they are now deprived of the use and possession of the premises in question. *Sixth.* That no pecuniary damage will result to the city if its authorities are restrained from taking possession of the premises pending this litigation. Neither the facts as to the said proceedings in behalf of the city to acquire the land, nor the facts as to grounds upon which the plaintiffs propose to contest the claim of the city, if asserted in the action, are set forth in the moving papers.

That the facts just recited, uncontradicted and unexplained, warrant any judge or court, having the necessary jurisdiction, in granting an injunction pending the action, seemed to me upon the original application, and still seems to me, perfectly clear. However, as the moving papers showed that the defendants were acting under a claim of right, the order granting the injunction was not made absolute pending the suit, but contained a direction to the defendants to show cause before me on the 14th inst. why the injunction should not continue. On the 13th inst. an alternative writ of prohibition, granted by a justice of the supreme court in the first department, at the instance of the defendants, was served upon me. That writ purported to restrain me from acting upon the injunction application then pending before me, on the ground that the county judge of Westchester county has no jurisdiction to act in the premises. That writ was set aside on the return-day thereof by order of the special term, held by the justice who granted it. By an order to show cause, thereafter made by me, the order to show cause, made as aforesaid on the 12th inst., was made returnable at this time. The service of both orders on the defendants is duly proven. The plaintiffs appear by counsel, and ask that the injunction contained in the order of the 12th inst. may be continued. The defendants fail to appear.

Two questions are presented for determination. The first is, has the county judge of Westchester county jurisdiction to act upon the application now made? And the second is, should the application be granted or denied, upon its merits?

As to the latter question, compelled, as I am, by the failure of the defendants to appear, to act upon an *ex parte* case—the plaintiffs' side only; denied, as I am, the privilege of hearing the defendants' case, and any justification there may be of their acts with reference to the plaintiffs' property,—I have no alternative, in my judgment, but to conclude that the application for the continuance of the injunction should, upon the papers and proofs before me, be granted upon the merits.

As to the other question,—the jurisdiction of the judge,—section 606 of the Code of Civil Procedure appears clearly to grant the power to the county judge to grant the temporary injunction in the first instance. That section says: "Except where it is otherwise specially prescribed by law, an injunction order may be granted by the court in which the action is brought, or by a judge thereof, or by any county judge." It would appear that this power of the county judge exists, whether the venue of the action be laid in New York or in Westchester county. The language is: "Or by any county judge." This matter, however, is not before me to decide, as the venue of the action is now laid in Westchester county.

The only question now remaining is whether the county judge has the jurisdiction in the original injunction order to make an order for the defendants to show cause why the application for an injunction should not be granted. The order to show cause is but a means of giving the defendants notice of the application, and an opportunity to be heard thereon. Section 609 of the Code of Civil Procedure says: "The order may be granted upon or without notice, in the discretion of the court or judge, unless the defendant has answered." Again, section 627 of the Code says: "Where the injunction order was granted without notice, or where it was granted upon notice, with leave to apply to vacate or modify it, the party enjoined may apply, upon notice to the judge

who granted it, * * * for an order vacating or modifying the injunction order." The legislature could not have used language more apt to confer upon any judge having authority to grant an injunction order as a judge, not as a court, authority to hear both parties upon the application, and to require notice thereof to be given to the parties sought to be enjoined, and even to entertain a motion by the party enjoined, on notice to the other party, to vacate or modify an injunction order already made by him. The precise question involved here, as to the right of the county judge to act upon this application, upon notice to the parties sought to be enjoined, has been expressly and affirmatively decided by the general term of the supreme court, in the first department, all three justices concurring. *Babcock v. Clark*, 23 Hun, 391. The substance of the decision is well stated in the head-note, which is as follows: "In an action brought in the supreme court to restrain the foreclosure, by advertisement, of a mortgage, a county judge may grant an order requiring the defendant to show cause before him why a temporary injunction should not be granted, and restrain him in the mean time from selling the premises at the time specified in the advertisement." In the absence of any opposing authority, none being submitted to or known by me, the above decision should be regarded as an ample and binding precedent. Moreover, my own judgment concurs with its reasoning. My decision, therefore, is that the county judge of Westchester county has jurisdiction to entertain the pending application as here presented, *i. e.*, upon notice to the party sought to be enjoined, and that upon the merits, upon the *ex parte* proofs before me, the pending motion should be granted. In order that the defendants may have every opportunity to present their case, and be heard upon the merits, the order may be drawn so as to give them leave to apply to vacate or modify it.

ATKINSON v. OELSNER.

(*Supreme Court, General Term, First Department. May 24, 1889.*)

Argued before VAN BRUNT, P. J., and BRADY and DANIELS, JJ.
No opinion. Motion denied, upon payment by appellant of \$10 costs.

BAUM v. NEW YORK COTTON EXCHANGE.

(*Supreme Court, General Term, First Department. May 24, 1889.*)

For opinion delivered at special term, see 4 N. Y. Supp. 207.
Argued before VAN BRUNT, P. J., and BRADY and DANIELS, JJ.
No opinion. Motion granted, with \$10 costs.

BRITTON v. BURROUGHS.

(*Supreme Court, General Term, First Department. May 24, 1889.*)

Argued before VAN BRUNT, P. J., and BRADY and DANIELS, JJ.
No opinion. Motion granted, with \$10 costs.

BUTLER v. JAEVIS.

(*Supreme Court, General Term, First Department. May 24, 1889.*)

For hearing on appeal, see 4 N. Y. Supp. 188.
Argued before VAN BRUNT, P. J., and DANIELS and BARTLETT, JJ.
No opinion. Stay on the judgment on appeal to the court of appeals ordered and allowed; but not to prevent the collection of securities deposited for the benefit of the plaintiff.

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BUTLER v. JARVIS.

(*Supreme Court, General Term, First Department. May 24, 1889.*)

For hearing on appeal, see 4 N. Y. Supp. 138.

Argued before VAN BRUNT, P. J., and DANIELS and BARTLETT, JJ.

No opinion. Motion for resettlement denied.

In re DEPARTMENT OF PUBLIC PARKS.

(*Supreme Court, General Term, First Department. May 24, 1889.*)

For hearing on appeal, see 6 N. Y. Supp. 750.

Argued before VAN BRUNT, P. J., and DANIELS, J.

No opinion.

In re KELLER. Motion denied.

In re HANFIELD. Reference ordered.

In re HUNT. *In re* LEVEY. *In re* ROWLAND. Order of reference signed.

In re MOQUADE. Reference ordered; notice of proceedings to be given to the Suburban Rapid Transit Company.

In re HUERSTEL. Order of reference to take proof as to title granted.

In re MORRISON. Notice ordered to be given to owners of equity.

GROSSMAN v. SUPREME LODGE KNIGHTS AND LADIES OF HONOR.

(*Supreme Court, General Term, First Department. May 24, 1889.*)

For appeal from order refusing to resettle case on appeal, see 5 N. Y. Supp. 122.

Argued before VAN BRUNT, P. J., and BRADY and DANIELS, JJ.

No opinion. Motion denied, with \$10 costs.

COGGESHALL v. BOHM.

(*Supreme Court, General Term, First Department. May 24, 1889.*)

For hearing at special term, see 5 N. Y. Supp. 67.

Argued before VAN BRUNT, P. J., and BRADY and DANIELS, JJ.

No opinion. Motion denied.

HECKEMANN v. YOUNG.

(*Supreme Court, General Term, First Department. May 24, 1889.*)

For hearing on exceptions, see 5 N. Y. Supp. 212.

Argued before VAN BRUNT, P. J., and BRADY and DANIELS, JJ.

No opinion. Order to show cause granted.

HEYMER v. ARTHUR.

(*Supreme Court, General Term, First Department. May 24, 1889.*)

See ante, 437.

Argued before VAN BRUNT, P. J., and BRADY and DANIELS, JJ.

No opinion. Motion denied, upon payment of \$10 costs.

HOWE v. MOREHOUSE.

(*Supreme Court, General Term, First Department. May 24, 1889.*)

Argued before VAN BRUNT, P. J., and BRADY and DANIELS, JJ.

No opinion. Motion denied.

KUHN v. KUHN.

(*Supreme Court, General Term, First Department. May 24, 1889.*)

For hearing on appeal, see 4 N. Y. Supp. 952.

Argued before VAN BRUNT, P. J., and BRADY and DANIELS, JJ.

No opinion. Motion to dismiss appeal denied.

In re LEXINGTON AVE.

(*Supreme Court, General Term, First Department. May 24, 1889.*)

Argued before VAN BRUNT, P. J., and BRADY and DANIELS, JJ.

No opinion. Motion granted, with \$10 costs.

MANNING v. AMY.

(*Supreme Court, General Term, First Department. May 24, 1889.*)

Action by Jerome F. Manning against Henry Amy.

Argued before VAN BRUNT, P. J., and BRADY and DANIELS, JJ.

No opinion. Motion granted, unless papers served within 30 days.

MAYER v. HARDY.

(*Supreme Court, General Term, First Department. May 24, 1889.*)

For hearing on appeal, see 3 N. Y. Supp. 881.

Argued before VAN BRUNT, P. J., and BRADY and DANIELS, JJ.

No opinion. Motion denied, without costs.

In re MAYOR, ETC., OF NEW YORK. In re ELLIS.

(*Supreme Court, General Term, First Department. May 24, 1889.*)

Argued before VAN BRUNT, P. J., and BRADY and DANIELS, JJ.

See memorandum *per curiam*.

MEYERS v. TABER.

(*Supreme Court, General Term, First Department. May 24, 1889.*)

Argued before VAN BRUNT, P. J., and BRADY and DANIELS, JJ.

No opinion. Motion granted, with costs, unless appellant stipulates to argue at next general term.

MINTO v. AUSTIN et al.

(*Supreme Court, General Term, First Department. May 24, 1889.*)

Argued before VAN BRUNT, P. J., and BRADY and DANIELS, JJ.

No opinion. Motion denied.

MUNRO v. SMITH.

(*Supreme Court, General Term, First Department. May 24, 1889.*)

For hearing on appeal, see 6 N. Y. Supp. 426; at special term, see 2 N. Y. Supp. 318.

Argued before VAN BRUNT, P. J., and BRADY and DANIELS, JJ.

No opinion. Motion denied.

PEOPLE v. AMERICAN BELL TEL. CO.

(*Supreme Court, General Term, First Department. May 24, 1899.*)

For hearing on agreed statement, see 3 N. Y. Supp. 733.

Argued before VAN BRUNT, P. J., and BRADY and DANIELS, JJ.

No opinion. Motion granted.

PERROW v. LINDSAY.

(*Supreme Court, General Term, First Department. May 24, 1899.*)

For hearing on appeal, see 4 N. Y. Supp. 795.

Argued before VAN BRUNT, P. J., and BRADY and DANIELS, JJ.

No opinion. Order amended as directed in memorandum.

RESTCHOFF v. HECKMAN.

(*Supreme Court, General Term, First Department. May 24, 1899.*)

Action by Franz Restchoff against Charles P. Heckman.

Argued before VAN BRUNT, P. J., and BRADY and DANIELS, JJ.

No opinion. Motion denied.

REYNOLDS v. RODDING.

(*Supreme Court, General Term, First Department. May 24, 1899.*)

Argued before VAN BRUNT, P. J., and BRADY and DANIELS, JJ.

No opinion. Motion denied.

In re SMITH.

(*Supreme Court, General Term, First Department. May 24, 1899.*)

Argued before VAN BRUNT, P. J., and BRADY and DANIELS, JJ.

No opinion. Motion denied, upon payment of \$10 costs by appellant, and stipulation to argue at the next term.

WAUGH v. BAILEY.

(*Supreme Court, General Term, First Department. May 24, 1899.*)

For hearing on appeal, see 4 N. Y. Supp. 817.

Argued before VAN BRUNT, P. J., and BRADY and DANIELS, JJ.

No opinion. Motion granted, upon appellant giving undertaking in \$5,900.

In re WIDENING FIFTH AVE.

(*Supreme Court, General Term, First Department. May 24, 1899.*)

Argued before VAN BRUNT, P. J., and BRADY and DANIELS, JJ.

No opinion. Motion granted.

WOOD v. SIMMONS.

(*Supreme Court, General Term, First Department. May 24, 1899.*)

For hearing on agreed statement, see 4 N. Y. Supp. 368.

Argued before VAN BRUNT, P. J., and BRADY and DANIELS, JJ.

No opinion. Application denied.

FORSYTH et al., Respondents, v. HANNAN, Appellant.

(*Supreme Court, General Term, Fifth Department. June 22, 1889.*)

Appeal from county court, Monroe county.

Argued before BARKER, P. J., and DWIGHT and MACOMBER, JJ.

No opinion. Judgment affirmed on opinion of the late county judge, JOHN S. MORGAN.

AYLESWORTH, Respondent, v. GALLAGHER, Appellant.

(*Supreme Court, General Term, First Department. July 9, 1889.*)

For hearing on appeal, see 4 N. Y. Supp. 853, 953.

Argued before VAN BRUNT, P. J., and BRADY and DANIELS, JJ.

No opinion. Motion denied.

BOWERY NAT. BANK v. SNIFFEN.

(*Supreme Court, General Term, First Department. July 9, 1889.*)

See *ante*, 520.

Argued before VAN BRUNT, P. J., and BARRETT and CULLEN, JJ.

No opinion. Reargument ordered.

CHESTER, Respondent, v. JUMEL et al., Appellants.

(*Supreme Court, General Term, First Department. July 9, 1889.*)

For hearing on appeal, see 5 N. Y. Supp. 809, 819, 820, 822, 823.

Argued before VAN BRUNT, P. J., and BRADY and DANIELS, JJ.

No opinion. Motion denied, with \$10 costs and disbursements.

ELWELL v. FABRE.

(*Supreme Court, General Term, First Department. July 9, 1889.*)

For hearing on appeal, see 5 N. Y. Supp. 60.

Argued before VAN BRUNT, P. J., and BRADY and DANIELS, JJ.

No opinion. Motion for reargument denied, with costs.

FISHER, Respondent, v. RANKIN, Appellant.

(*Supreme Court, General Term, First Department. July 9, 1889.*)

For hearing on appeal, see 5 N. Y. Supp. 627.

Argued before VAN BRUNT, P. J., and BARTLETT, J.

No opinion. Motion for reargument granted.

HECKEMAN v. YOUNG.

(*Supreme Court, General Term, First Department. July 9, 1889.*)

For hearing on exceptions, see 5 N. Y. Supp. 212.

Argued before VAN BRUNT, P. J., and BRADY and DANIELS, JJ.

No opinion. Motion for reargument granted. For opinion on reargument, see 8 N. Y. Supp. 111.

HORTON, Respondent, v. CHILDS *et al.*, Appellants.

(*Supreme Court, General Term, First Department. July 9, 1889.*)

See *ante*, 570.

Argued before VAN BRUNT, P. J., and CULLEN, J.

No opinion. Reargument ordered.

MARTIN v. PLATT *et al.*

(*Supreme Court, General Term, First Department. July 9, 1889.*)

For hearing on appeal, see 5 N. Y. Supp. 862.

Argued before VAN BRUNT, P. J., and BRADY and DANIELS, JJ.

No opinion. Motion denied.

MINTO *et al.*, Respondents, v. BAUR *et al.*, Appellants.

(*Supreme Court, General Term, First Department. November 7, 1889.*)

On motion for a reargument. For opinion on appeal, see, 6 N. Y. Supp. 444.

Argued before VAN BRUNT, P. J., and BRADY and BARRETT, JJ.

William F. Browne, for appellants. *James C. De la Mare*, for Minto & McDonald. *Thomas B. Browning*, for Austin.

BARRETT, J. The case of *Coster v. Ferry Co.*, 5 Civ. Proc. B. 146, affirmed 98 N. Y. 660, was not overlooked. It was not specially examined, for the reason that it was not cited by Mr. De la Mare in support of his present contention, but in support of another, and entirely different, proposition, namely, that the attorney might proceed in the action without leave especially obtained. Upon examining the case minutely in the light of Mr. De la Mare's affidavit with regard to the precise facts, I think it is worthy of full consideration. The question is a difficult one, and, in view of this *Coster Case*, and also of the general term decision in *Keeler v. Keeler*, 4 N. Y. Supp. 580, I think there should be a reargument; but such reargument should be confined to this single point. All concur.

BREVOORT v. BREVOORT.

(*Supreme Court, General Term, Second Department. June 28, 1889.*)

Argued before BARNARD, P. J., and DYKMAN and PRATT, JJ.

No opinion. Order affirmed, with costs.

In re BROOKLYN CABLE CO.

(*Supreme Court, General Term, Second Department. June 28, 1889.*)

Argued before BARNARD, P. J., and DYKMAN and PRATT, JJ.

Order affirmed, with costs.

COOK v. LALANCE & GROSJEAN MANUF'G CO.

(*Supreme Court, General Term, Second Department. June 28, 1889.*)

Argued before BARNARD, P. J., and DYKMAN and PRATT, JJ.

No opinion. Judgment affirmed, with costs.

GRAUEL v. SOELLER.

(*Supreme Court, General Term, Second Department. June 28, 1889.*)

For hearing on appeal, see 5 N. Y. Supp. 254.

Argued before BARNARD, P. J., and DYKMAN and PRATT, JJ.

No opinion. Motion denied.

In re NEW YORK & N. H. R. Co.

(*Supreme Court, General Term, Second Department. June 28, 1889.*)

Argued before BARNARD, P. J., and PRATT, J.

Order appointing commissioners affirmed, with costs and disbursements.

RADLIFF, Respondent, v. MATTLAGE, Appellant.

(*Supreme Court, General Term, Third Department. May 27, 1889.*)

Argued before LEARNED, P. J., and LANDON and INGALLS, JJ.

No opinion. Order reversed, with \$10 costs and printing disbursements, and motion denied, with \$10 costs.

PARSHALL, Respondent, v. SMITH, Appellant.

(*Supreme Court, General Term, Fourth Department. July 20, 1889.*)

Appeal from Otsego county court.

Argued before HARDIN, P. J., and MARTIN and MERWIN, JJ.

E. M. Harris, for appellant. *Edick & Smith*, for respondent.

MARTIN, J. We think the evidence was sufficient to justify the justice in finding that the materials furnished by the plaintiff's assignor were furnished to the defendant, and in holding her liable therefor. *Fairbanks v. Mother-sell*, 60 Barb. 406, 408; *Fowler v. Seaman*, 40 N. Y. 592; *Garretson v. Seaman*, 54 N. Y. 652; *Husted v. Mathes*, 77 N. Y. 388; *Treman v. Allen*, 15 Hun, 4; *Tiemeyer v. Turnquist*, 85 N. Y. 516; *Mackey v. Webb*, 6 N. Y. Supp. 795; chapter 381, Laws 1884.

We are also of the opinion that the evidence was sufficient to establish the sale and transfer to the plaintiff of the claim upon which this action was brought. We have examined the rulings of the justice on the admission and rejection of evidence, and have found none that disclose error or require special discussion. We think the county court has rendered judgment according to the justice of the case, and that such judgment should be affirmed. Sections 1206, 1207, Code Civil Proc. Judgment affirmed, with costs. All concur.

PIPER, Respondent, v. HOARD, Appellant.

(*Supreme Court, General Term, Fourth Department. July 20, 1889.*)

Argued before HARDIN, P. J., and MARTIN and MERWIN, JJ.

No opinion. Judgment affirmed, with costs, on the opinion of WILLIAMS, J., delivered at special term.

RYAN, Respondent, v. SYRACUSE, B. & N. Y. R. Co., Appellant.

(*Supreme Court, General Term, Fourth Department. July 20, 1889.*)

Argued before HARDIN, P. J., and MARTIN and MERWIN, JJ.

No opinion. Judgment and order affirmed, with costs, on the opinion of PARKER, J., delivered at special term.

BLOOD, Respondent, v. KANE, Appellant.

(*Supreme Court, General Term, Fifth Department. June 22, 1889.*)

For hearing on appeal, see 6 N. Y. Supp. 853.

Argued before BARKER, P. J., and DWIGHT and MACOMBER, JJ.

No opinion. Motion for reargument denied; leave to appeal to the court of appeals granted.

COLE, Appellant, v. ROBY, Respondent.

(*Supreme Court, General Term, Fifth Department. June 22, 1889.*)

Argued before BARKER, P. J., and DWIGHT and MACOMBER, JJ.

Order affirmed, with costs.

COLLIGNOR, Appellant, v. MILLER, Respondent.

(*Supreme Court, General Term, Fifth Department. June 22, 1889.*)

Argued before BARKER, P. J., and DWIGHT and MACOMBER, JJ.

No opinion. Order of special term reversed, with \$10 costs and disbursements, on the ground that the court had no power to make such order.

In re HAND ST.

(*Supreme Court, General Term, Fifth Department. June 22, 1889.*)

See 6 N. Y. Supp. 766.

Argued before BARKER, P. J., and DWIGHT, J.

No opinion. Reargument granted as to constitutionality of Rochester city charter, relating to modification of award.

JACKSON, Respondent, v. STACE, Appellant.

(*Supreme Court, General Term, Fifth Department. June 22, 1889.*)

Argued before BARKER, P. J., and DWIGHT and MACOMBER, JJ.

No opinion. Judgment and order affirmed.

JONES, Respondent, v. CRUMB et al., Appellants.

(*Supreme Court, General Term, Fifth Department. June 22, 1889.*)

Argued before BARKER, P. J., and DWIGHT and MACOMBER, JJ.

Judgment reversed, and new trial granted before another referee; costs of this appeal to abide the event.

In re KEEGAN'S WILL.

(*Supreme Court, General Term, Fifth Department. June 22, 1889.*)

For former report, see 3 N. Y. Supp. 959.

Argued before BARKER, P. J., and DWIGHT and MACOMBER, JJ.

No opinion. Ordered (1) that William Keegan, John Keegan, and Thomas and Michael Keegan, sons of Michael Keegan, and devisees under the will, be brought in as parties to this appeal, by service of notice of the surrogate's court on presentation of a will for probate; (2) that, on the due appearance of such persons as parties to this appeal, they have leave to apply to this court for an order directing the resettlement of the case herein.

LAMBERSON, Respondent, v. MCNAUGHTON, Appellant.

(*Supreme Court, General Term, Fifth Department. June 22, 1889.*)

Argued before BARKER, P. J., and DWIGHT and MACOMBER, JJ.
No opinion. Order affirmed, with \$10 costs and disbursements.

LANGAN, Appellant, v. JACKSON, Respondent.

(*Supreme Court, General Term, Fifth Department. June 22, 1889.*)

Argued before BARKER, P. J., and DWIGHT and MACOMBER, JJ.
No opinion. Motion denied.

LEONARD, Respondent, v. BROWN, Appellant.

(*Supreme Court, General Term, Fifth Department. June 22, 1889.*)

Argued before BARKER, P. J., and DWIGHT and MACOMBER, JJ.
No opinion. Judgment affirmed.

MOORE, Respondent, v. MCCARTNEY, Appellant.

(*Supreme Court, General Term, Fifth Department. June 22, 1889.*)

Argued before BARKER, P. J., and DWIGHT and MACOMBER, JJ.
No opinion. Judgment affirmed, with costs.

MATTHEWS, Respondent, v. POST, Appellant.

(*Supreme Court, General Term, Fifth Department. June 22, 1889.*)

Argued before BARKER, P. J., and DWIGHT and MACOMBER, JJ.
No opinion. Judgment affirmed on the opinion of the referee.

PEOPLE, Respondent, v. DEAN, Appellant.

(*Supreme Court, General Term, Fifth Department. June 22, 1889.*)

Argued before BARKER, P. J., and DWIGHT and MACOMBER, JJ.
No opinion. Default opened, and appeal restored.

PEOPLE, Respondent, v. MINK, Appellant.

(*Supreme Court, General Term, Fifth Department. June 22, 1889.*)

Argued before BARKER, P. J., and DWIGHT and MACOMBER, JJ.
Judgment and conviction affirmed, and the case remitted to the court of sessions of Monroe county to proceed thereon.

PEOPLE, Respondent, v. SMITH *et al.*, Appellants.

(*Supreme Court, General Term, Fifth Department. June 22, 1889.*)

Argued before BARKER, P. J., and DWIGHT and MACOMBER, JJ.
No opinion. Judgment and conviction affirmed, and case remitted to the court of sessions of Erie county to proceed thereon.

ROME, W. & O. R. Co., Appellant, v. CITY OF ROCHESTER, Respondent.

(*Supreme Court, General Term, Fifth Department. June 23, 1889.*)

Argued before BARKER, P. J., and DWIGHT and MACOMBER, JJ.

No opinion. Judgment and order affirmed, with costs.

In re SAYRE'S ESTATE.

(*Supreme Court, General Term, Fifth Department. June 23, 1889.*)

For hearing on appeal, see 3 N. Y. Supp. 388.

Argued before BARKER, P. J., and DWIGHT and MACOMBER, JJ.

No opinion. Motion for reargument granted.

SEVENTH-DAY BAPTIST EDUCATION SOC., Appellant, v. TRUMAN, Respondent.

(*Supreme Court, General Term, Fifth Department. June 23, 1889.*)

Argued before BARKER, P. J., and DWIGHT and MACOMBER, JJ.

No opinion. Judgment affirmed.

THAYER, Respondent, v. McNAUGHTON, Appellant.

(*Supreme Court, General Term, Fifth Department. June 23, 1889.*)

Argued before BARKER, P. J., and DWIGHT and MACOMBER, JJ.

No opinion. Order affirmed, with \$10 costs and disbursements.

THOMPSON, Respondent, v. ROME, W. & O. R. Co., Appellant.

(*Supreme Court, General Term, Fifth Department. June 23, 1889.*)

Argued before BARKER, P. J., and MACOMBER, J.

No opinion. Judgment affirmed.

WHITMAN, Appellant, v. FOLEY *et al.*, Respondents.

(*Supreme Court, General Term, Fifth Department. June 23, 1889.*)

Argued before BARKER, P. J., and DWIGHT and MACOMBER, JJ.

No opinion. Case ordered resettled, that it may appear whether all the evidence taken by the referee is contained in the record.

WYNKOOP *et al.*, Respondents, v. OSBORNE *et al.*, Appellants.

(*Supreme Court, General Term, Fifth Department. June 23, 1889.*)

Argued before BARKER, P. J., and DWIGHT and MACOMBER, JJ.

No opinion. Court declines to consider the appeal, for the reasons stated in opinion of DWIGHT, J., in *Palmyra v. Wynkoop*, 6 N. Y. Supp. 62, (decided at the present term.)*

LANE, Appellant, v. JACOBS, Respondent.

(*Common Pleas of New York City and County, General Term. April 1, 1889.*)

PER CURIAM. After a re-examination of this case, we are of the opinion that the conclusion reached by us on the previous argument should not be dis-

turbed. It does not appear that any substantial fact has been disregarded, or any point of law overlooked; and, adhering to the rule expressed in *Curley v. Tomlinson*, 5 Daly, 283, we think this application should be denied.

BURTINGTON, Respondent, v. STERNHARDT, Appellant.

(*Common Pleas of New York City and County, General Term. May 16, 1889.*)

Argued before LARREMORE, C. J., and ALLEN and BOOKSTAYER, JJ.

M. A. Quinlan, for appellant. *Klebroch & Marks*, for respondent.

Judgment affirmed, with costs.

CALHOUN, Respondent, v. HACKETT, Appellant.

(*Common Pleas of New York City and County, General Term. May 16, 1889.*)

Argued before LARREMORE, C. J., and ALLEN and BOOKSTAYER, JJ.

A. P. Wagner, for appellant. *C. D. Cruikshank*, for respondent.

Judgment reversed, new trial ordered, costs to abide event.

COHEN, Respondent, v. LOONIE, Appellant.

(*Common Pleas of New York City and County, General Term. May 16, 1889.*)

Argued before LARREMORE, C. J., and ALLEN and BOOKSTAYER, JJ.

P. C. Talman, for appellant. *C. G. Macy*, for respondent.

Judgment affirmed, with costs.

COHEN, Appellant, v. THON, Respondent.

(*Common Pleas of New York City and County, General Term. May 16, 1889.*)

Argued before LARREMORE, C. J., and ALLEN and BOOKSTAYER, JJ.

W. C. Holbrook, for appellant. *E. F. Brown*, for respondent.

Judgment affirmed, with costs.

DEAN, Respondent, v. Fox et al., Appellants.

(*Common Pleas of New York City and County, General Term. May 16, 1889.*)

Argued before LARREMORE, C. J., and ALLEN and BOOKSTAYER, JJ.

E. L. Mooney, for appellants. *C. H. Preyor*, for respondent.

Judgment affirmed, with costs.

DE PUY, Respondent, v. GILMORE, Appellant.

(*Common Pleas of New York City and County, General Term. May 16, 1889.*)

Argued before LARREMORE, C. J., and ALLEN and BOOKSTAYER, JJ.

F. Larkin, for appellant. *Hyland & Zabriskie*, for respondent.

Judgment modified, and as modified affirmed, without costs to either party.

FARRENGO, Appellant, v. SARACCO, Respondent.

(*Common Pleas of New York City and County, General Term. May 16, 1889.*)

Argued before LARREMORE, C. J., and ALLEN and BOOKSTAYER, JJ.

S. D. Seward, for appellant. *A. C. Astarita*, for respondent.

Judgment reversed, new trial ordered, costs to abide the event.

FLEMING, Respondent, v. EVERARD, Appellant.

(*Common Pleas of New York City and County, General Term. May 16, 1899.*)

Argued before LARREMORE, C. J., and ALLEN and BOOKSTAVEN, JJ.

D. M. Neuburger, for appellant. L. J. Conlan, for respondent.

Judgment affirmed, with costs.

FREYGANG v. STANTON.

(*Common Pleas of New York City and County, General Term. May 16, 1899.*)

Argued before LARREMORE, C. J., and ALLEN and BOOKSTAVEN, JJ.

Judgment affirmed, with costs.

HEYDERMAN, Appellant, v. JENKINS, Respondent.

(*Common Pleas of New York City and County, General Term. May 16, 1899.*)

Argued before LARREMORE, C. J., and ALLEN and BOOKSTAVEN, JJ.

D. Steckler, for appellant. J. F. Horan, for respondent.

Appeal dismissed, without costs.

HUBER et al., Appellants, v. RYAN et al., Respondents.

(*Common Pleas of New York City and County, General Term. May 16, 1899.*)

Argued before LARREMORE, C. J., and ALLEN and BOOKSTAVEN, JJ.

Donald McLean, for appellants. J. F. McIntyre, for respondents.

Judgment affirmed, with costs.

JOHN, Respondent, v. BUTTERFIELD, Appellant.

(*Common Pleas of New York City and County, General Term. May 16, 1899.*)

Argued before LARREMORE, C. J., and ALLEN and BOOKSTAVEN, JJ.

J. H. Atkinson, for appellant. P. C. Tallman, for respondent.

Judgment affirmed, with costs.

KELLY, Appellant, v. COLLINS, Respondent.

(*Common Pleas of New York City and County, General Term. May 16, 1899.*)

Argued before LARREMORE, C. J., and ALLEN and BOOKSTAVEN, JJ.

Ros & Macklin, for appellant. Doherty, Dennison & Hendrik, for respondent.

Judgment affirmed, with costs.

KINNEY, Respondent, v. MILLER et al., Appellants.

(*Common Pleas of New York City and County, General Term. May 16, 1899.*)

Argued before LARREMORE, C. J., and ALLEN and BOOKSTAVEN, JJ.

T. C. Cronin, for appellants. E. Coffey, Jr., for respondent.

Order affirmed, with costs.

KLEY v. HEALY

(*Common Pleas of New York City and County, General Term. May 16, 1899.*)

Argued before LARREMORE, C. J., and ALLEN and BOOKSTAVEN, JJ.

Judgment affirmed, with costs.

MINER, Respondent, v. EDISON COMPANY FOR ISOLATED LIGHTING OF THE CITY OF NEW YORK, Appellant.

(*Common Pleas of New York City and County, General Term. May 16, 1889.*)

Argued before LARREMORE, C. J., and ALLEN and BOOKSTAYER, JJ.

Eaton & Lewis, for appellant. *Howe & Hummel*, for respondent.

Judgment affirmed, with costs.

PLATT, Appellant, v. OWEN, Respondent.

(*Common Pleas of New York City and County, General Term. May 16, 1889.*)

Argued before LARREMORE, C. J., and ALLEN and BOOKSTAYER, JJ.

J. M. Ferguson, for appellant. *William Stone*, for respondent.

Judgment affirmed, with costs.

POOLE, Respondent, v. HARRIS *et al.*, Appellants.

(*Common Pleas of New York City and County, General Term. May 16, 1889.*)

Argued before LARREMORE, C. J., and ALLEN and BOOKSTAYER, JJ.

W. & W. Saunders, for appellants. *Foster & Wilson*, for respondent.

Judgment affirmed, with costs.

POST v. MANHATTAN RY. Co. *et al.*

(*Common Pleas of New York City and County, General Term. May 16, 1889.*)

Argued before LARREMORE, C. J., and ALLEN and BOOKSTAYER, JJ.

Judgment affirmed, with costs.

RICE, Respondent, v. MADDOX, Appellant.

(*Common Pleas of New York City and County, General Term. May 16, 1889.*)

Argued before LARREMORE, C. J., and ALLEN and BOOKSTAYER, JJ.

Judgment affirmed, with costs.

VINCENT, Appellant, v. PREFERRED MUT. ACC. ASS'N, Respondent.

(*Common Pleas of New York City and County, General Term. May 6, 1889.*)

Argued before LARREMORE, C. J., and ALLEN and BOOKSTAYER, JJ.

W. B. Kingham, for appellant. *Blair & Rudd*, for respondent.

Judgment affirmed, with costs. (Memorandum on papers.)

WATERS, Respondent, v. MAGINN, Appellant.

(*Common Pleas of New York City and County, General Term. May 16, 1889.*)

Argued before LARREMORE, C. J., and ALLEN and BOOKSTAYER, JJ.

W. R. Leggett, for appellant. *Wm. G. Oppenheim*, for respondent.

Judgment affirmed, with costs.

WEEKS *et al.*, Respondents, v. LOWENBERGER, Appellant.

(*Common Pleas of New York City and County, General Term. May 6, 1889.*)

Argued before LARREMORE, C. J., and ALLEN and BOOKSTAYER, JJ.

C. L. Cohen, for appellant. *S. S. Harris*, for respondents.

Judgment affirmed, with costs. (Memorandum on papers.)

WHITNEY, Respondent, v. PUBLIC GRAIN & STOCK EXCHANGE OF
NEW YORK, Appellant.

(Common Pleas of New York City and County, General Term. May 16, 1889.)

Argued before LARREMORE, C. J., and ALLEN and BOOKSTAVEN, JJ.

W. Niles, Jr., for appellant. W. H. Secor, for respondent.

Judgment reversed, new trial ordered, costs to abide event.

SOANLON, Respondent, v. BROPLY *et al.*, Appellants.

(Common Pleas of New York City and County, General Term. June 3, 1889.)

A. Lamont, for appellants. A. H. Reavey, for respondent.

Appeal from second district court.

Judgment affirmed, with costs.

TOWAET, Respondent, v. BROADWAY & S. A. R. Co., Appellant.

(Superior Court of New York City, General Term. January 7, 1889.)

Appeal from jury term.

Argued before SEDGWICK, C. J., and INGRAHAM, J.

Samuel B. Clarke, for appellant. Henry B. Staples, for respondent.

PER CURIAM. The only objection taken on the appeal is that the verdict was for an excessive amount of damages. It is here to be taken that the jury credited the testimony of the plaintiff in describing the effect upon her of the hurts she received, and of her friend, who was a witness, and of her physician. On considering this testimony, it cannot be held that the jury abused its power to assess the damages. The judgment and order appealed from are affirmed, with costs.

SOOTT, Appellant, v. BROOKLYN CITY R. Co., Respondent.

(City Court of Brooklyn, General Term. November 25, 1889.)

Argued before CLEMENT, C. J., and OSBORNE, J.

F. J. Moissen, for appellant. Charles Scott and Morris & Pearsall, for respondent.

PER CURIAM. The answer in this case was a denial of facts, and not of conclusions, and the motion for judgment on the pleadings was therefore properly denied. The exceptions at folios 52, 60, 61, and 63 were not well taken, for the reason that the testimony, which was objected to, was clearly admissible to contradict the statements of the witness Lippitz. As to the other points raised by the counsel for the appellant, we hold that, on the pleadings and the proofs, the burden was on the plaintiff to show that there was no negligence on his part which contributed to his injury, and also to show that he was injured solely by the negligence of the employees of the defendant.

Judgment and order denying new trial affirmed, with costs.

MALLOY, Appellant, v. ASSOCIATED LACE MAKERS' Co. *et al.*, Respondents.

(Supreme Court, General Term, Second Department. December 10, 1889.)

Appeal from special term, Westchester county.

Action by Michael F. Maloy against the Associated Lace Makers' Company, Herman Duden, Myron Winslow, and Julia E., his wife, to set aside a deed. Code Civil Proc. N. Y. §§ 3252, 3253, provide that, in certain cases involv-

ing realty, or in difficult and extraordinary cases, the court may allow the plaintiff in addition to the prescribed costs a certain percentage on the amount involved in the action.

Argued before BARNARD, P. J., and DYKMAN and PRATT, JJ.

James M. Lyddy, for appellant. *Howard Y. Stillman* and *George A. Heaney*, for respondents.

PRATT, J. Although the title to the real estate may in a certain sense have been involved in the action, the real controversy concerned only the plaintiff's interest therein. Nothing appears in the case that enables the court to know the value of such interest. Probably no one can tell the amount until the close of the partnership accounting. On that state of facts the trial judge could not determine what amount was in controversy, and consequently had no basis upon which to fix an allowance. The litigation was difficult, and it is to be regretted that its weight must be principally borne by the successful party. We see no way to any different result on the papers before us. The order must be affirmed, but without costs.

VIETOR *et al.* v. STROOCK.

(Common Pleas of New York City and County, General Term. December 2, 1889.)

Motion for leave to appeal to the court of appeals. For former opinion, and statement of facts, see 5 N. Y. Supp. 659.

Argued before LARREMORE, C. J., and DALY and VAN HOESEN, JJ.

Jacobs Bros., (Noah Davis, of counsel,) for appellant. *Blumenstiel & Hirsch*, for respondents.

DALY, J. There seems to be no question to submit to the court of appeals in this case. The decision in *Cross v. O'Donnell*, 44 N. Y. 661, does not conflict with that in *Shindler v. Houston*, 1 N. Y. 261, as to what constitutes "acceptance" of goods under the statute of frauds where the price is over \$50, and there is no payment or memorandum in writing. In the latter case there was no acceptance and delivery, as required by the statute. In the case before us there was no question as to the delivery, and the facts evidencing acceptance bring it within the decision in *Cross v. O'Donnell*, first above cited. The contention as to the rule that the recovery in an action must be according to the pleadings as well as the proofs with respect to the averment of a sale of "chinchillas" is disposed of in the opinion delivered on the hearing of the appeal. 5 N. Y. Supp. 659. The point insisted upon is made with respect to a matter of words rather than of substance. The motion should be denied, with \$10 costs.

In re DEPARTMENT OF PUBLIC PARKS.

In re REDMOND.

(Supreme Court, General Term, First Department. December 2, 1889.)

Motion to confirm report of commissioners of estimate. For former report see 6 N. Y. Supp. 750.

Argued before VAN BRUNT, P. J., and BARRETT and CULLEN, JJ.

Wm. H. Clark, for the Department of Public Parks. *W. Bourke Cochrane* and *Frederick P. Forster*, for Margaret F. Redmond.

PER CURIAM. It is apparent upon an examination of the papers that the court did not overlook any point which was presented upon the previous argument, and as to those points the court adheres to its decision. 6 N. Y. Supp. 750. The husband of the owner, in attempting to act as his own law-

yer, does not seem to have adequately protected his own interests. The commissioners seemed to have erred in the exclusion of evidence upon cross-examination of the witness upon the part of the city of purchases in the neighborhood, and their award, in view of the surrounding circumstances, seems to be inadequate. We think this matter should be referred back, in order that they may revise their valuation, and receive the evidence which was improperly excluded.

In re DEPARTMENT OF PUBLIC PARKS.

In re O'BRIEN.

(*Supreme Court, General Term, First Department.* December 2, 1889.)

Motion to confirm report of commissioners of estimate.

Argued before VAN BRUNT, P. J., and BARRETT and CULLEN, JJ.

Wm. H. Clark, for the Department of Public Parks. Andrew A. Henderson, for Maria O'Brien.

PER CURIAM. Report sent back to commissioners for revision.

In re DEPARTMENT OF PUBLIC PARKS.

In re RHINES *et al.*

(*Supreme Court, General Term, First Department.* December 2, 1889.)

Motion to confirm report of commissioners of estimates.

Argued before VAN BRUNT, P. J., and BARRETT and CULLEN, JJ.

PER CURIAM. We cannot direct payment of these bills without proof of their necessity and reasonableness.

WINCHESTER, Respondent, *v.* BROWNE, Appellant.

(*Supreme Court, General Term, First Department.* July 9, 1889.)

Argued before VAN BRUNT, P. J., and BRADY and DANIELS, JJ.

Henry Schmidt, for appellant. A. Walker Otis, for respondent.

No opinion. Order reversed, with \$10 costs and disbursements. For former reports, see 4 N. Y. Supp. 155, 6 N. Y. Supp. 913. See, also, 7 N. Y. Supp. 550, 8 N. Y. Supp. 82.

CLAPP, Respondent, *v.* ATTERBURY *et al.*, Appellants.

(*Superior Court of New York City, General Term.* June 20, 1888.)

Argued before SEDGWICK, C. J., and TRUAX, J.

Logan & Melliss, for appellants. Philip Carpenter, for respondent.

Judgment affirmed. See 6 N. Y. Supp. 510.

METROPOLITAN LIFE INS. CO., Appellant, *v.* CALLAN, Respondent.

(*Common Pleas of New York City and County, General Term.* May 7, 1889.)

Judgment reversed. For former reports, see 4 N. Y. Supp. 833, 3 N. Y. Supp. 242.

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NOTE. A star (*) indicates that the case referred to is annotated.

Abatement.

Of nuisance, see *Nuisance*, 6.

ABATEMENT AND REVIVAL.

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Death of party.

1. A petition to vacate a street assessment is a special proceeding, and abates with the death of the petitioner.—In re Marshall, 7 N. Y. S. 861.

2. An action for an injunction, in which incidentally damages for the maintenance of a railroad are demanded, is not an action for trespass, and on the death of plaintiff may be revived in the name of his devisee and executor.—*Sanders v. New York El. R. Co.*, 7 N. Y. S. 641.

3. Code Civil Proc. N. Y. § 757, provides that in case of the death of a sole defendant, if the cause of action survives, the court must allow or compel the action to be continued against his representatives or successors in interest. Section 447 provides that any person may be made a defendant who has or claims an interest in the controversy adverse to plaintiff, or who is a necessary party defendant for a complete determination or settlement of the question involved therein. An equitable action for an accounting, and the recovery of land alleged to have been conveyed to a decedent in his life-time as security for a debt, was brought against his executrix, who was also his legatee, both individually and in her representative capacity. *Held* that, on her death pending the action, it should be revived, not only against the administrator of decedent and the devisees of the portion of the land remaining unsold, but also against the personal representatives of the executrix.—*Benedict v. Cobb*, 7 N. Y. S. 916.

Accident Insurance.

See *Insurance*, 10-12.

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executors, etc., see *Executors and Administrators*, 4-7.

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ACCOUNT STATED.

What constitutes.

1. Proof that defendant, without objection or making any reply, retained an account for moneys expended and services rendered for him by plaintiff, inclosed in a letter demanding payment, and that subsequently, on meeting plaintiff, defendant acknowledged the receipt of the letter, and said he had no money to settle the account, is sufficient to sustain an action on an account stated.—*Vernon v. Simmons*, 7 N. Y. S. 649.

Objection to evidence.

2. Though, in an action on an account stated, an objection is properly taken to the admission of evidence as to any item not specified in the account stated, but included in the bill of particulars annexed to the complaint, yet, to make it reversible error, it must be followed up by a request to exclude the item from the consideration of the jury.—*Vernon v. Simmons*, 7 N. Y. S. 649.

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 8.
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 Benefit of Creditors*, 1.

Joinder.

In an action for damages, occasioned by
 the erection and maintenance of an elevated
 railroad in front of plaintiff's premises,
 it is an improper joinder of causes of ac-
 tion to unite in the same complaint a charge
 against defendant company for trespass
 and tortious invasion of easements with a
 charge against defendant sureties on a
 bond conditioned for the payment of such
 damages as might be assessed by the final
 judgment of a court of competent jurisdic-
 tion.—*Hart v. Metropolitan El. R. Co.*, 7
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 In supplementary proceedings, see *Execu-
 tion*, 5, 6.
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Agency.

See *Principal and Agent*.

ALTERATION OF INSTRUMENTS.

Materiality.

Under Laws N. Y. 1884, c. 381, providing
 that the separate estate of a married wo-
 man shall be liable for her contracts, and
 that in no case shall a charge on her sepa-
 rate estate be necessary, it is not a mate-
 rial alteration to write above a married
 woman's indorsement on a note that she
 charged her estate with its payment.—
Clapp v. Collins, 7 N. Y. S. 96.

Amendment.

Of acknowledgment, see *Bail*, 1.
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Pleading, 9-18.

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 nies*, 15.

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See, also, *Certiorari*; *New Trial*.
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Costs, 5.
 Costs on, see *Costs*, 12, 18.
 Discretion of trial court, see *Costs*, 7.
 Harmless error, see *Negligence*, 12.
 Reviewable orders, see *Pleading*, 10.

When appeal lies.

1. Where, in an action against a justice
 for adjourning a case when no verified an-
 swer was interposed, the justice admits,
 by demurring to the complaint, that his re-
 fusal to give judgment was arbitrary, will-
 ful, and oppressive, as alleged therein, an
 appeal to the court of appeals will be grant-
 ed from a decision holding him not liable.
 —*Merwin v. Rogers*, 7 N. Y. S. 633.

2. An appeal will be granted to the court
 of appeals from a decision of the general
 term of the common pleas that a person
 who has filed a mechanic's lien under Laws
 N. Y. 1885, c. 842, § 6, and is made a party de-
 fendant to a foreclosure suit by another
 lienholder, need not file a *lis pendens* in or-
 der to continue his lien, as the act is gen-
 eral, and the question may be controverted.
 —*McAllister v. Case*, 7 N. Y. S. 600.

Who may appeal.

3. Where there is an order opening a de-
 fault, and permitting defendant to come in
 on terms, and defend on the merits, defend-
 ant cannot appeal from the order after hav-
 ing complied with the terms.—*Negley v.
 Short*, 7 N. Y. S. 674.

4. The right to appeal from that portion
 of a surrogate's decree which reduces an
 annuity is not lost by a subsequent petition
 to direct the investment of securities to
 produce the annuity under the decree, and
 the acceptance of benefits under a decree
 entered on such petition; the petitioner's
 right to the reduced annuity not being
 questioned in the latter proceedings.—
Cocks v. Haviland, 7 N. Y. S. 870.

Appealable judgments and orders.

5. Under Code Civil Proc. N. Y. § 1342,
 amended by Laws 1881, c. 185, which pro-
 vides for an appeal from an order made by
 the county court in an action taken to it
 by appeal; and section 1340, amended by
 Laws 1888, c. 507, which provides for an
 appeal from an order of the county court
 granting or refusing a new trial,—an ap-
 peal lies from an order of a county court
 granting a new trial in an action taken to
 it by appeal.—*Clark v. Eldred*, 7 N. Y. S.
 95.

Settlement of case.

6. Where a case on appeal has been set-
 tled by the referee before whom the trial
 was had, the court cannot resettle the case,
 but may send it back to the referee for

that purpose, with proper instructions.—*Cheever v. Brown*, 7 N. Y. S. 918.

7. The referee being, for the purpose of the action, a special term judge, the motion to resettle should properly be made before the general term.—*Cheever v. Brown*, 7 N. Y. S. 918.

8. It being denied by affidavit that concessions in regard to certain claims were made as stated in that part of a proposed case which was stricken out by amendment, and it appearing by the stenographer's minutes that objections to such claims had been stated to the referee, and were to be considered by him in making up his report, such claims will not be directed to be restored to the case.—*Cheever v. Brown*, 7 N. Y. S. 918.

9. On settlement of the case on appeal, it is error for the trial judge to arbitrarily strike from appellants' exhibit any words which form a part of it.—*Healey v. Terry*, 7 N. Y. S. 321.

10. Settlement of case on appeal by the trial judge is conclusive where the facts are disputed.—*Green v. Shute*, 7 N. Y. S. 69.

11. Where the record on appeal is so imperfect that the question raised cannot be properly examined, it will be remitted for correction.—*In re Strasburger's Estate*, 7 N. Y. S. 547.

Bond.

12. Where appellant is not moving his case, and the 60 days within which, under Code Civil Proc. N. Y. § 1841, he may perfect his appeal have not expired, a motion to dismiss the appeal, on the ground that no appeal-bond has been filed, will be denied.—*Murray v. Hathaway*, 7 N. Y. S. 915.

Appeals from inferior courts.

18. Code Crim. Proc. N. Y. §§ 719, 720, relating to judgment in special sessions, provide that if defendant be acquitted, and the jury find that the prosecution was malicious, or without probable cause, the court must order the prosecutor to pay the costs of the proceeding, which if he fail to do, or to give satisfactory security therefor, the court may enter judgment for the amount thereof, which may be enforced in the same manner as a judgment rendered by a justice's court, held by a justice of the peace. *Held*, that this is a judgment in a criminal action, and there is no appeal from it allowed by Code Civil Proc. §§ 3044, 3045, which provide for appeals to the county court from judgments rendered by justices of the peace in civil actions.—*People v. Carr*, 7 N. Y. S. 724.

14. On an appeal from a justice of the peace the court cannot allow an amendment demanding judgment for more than \$50, so as to entitle appellant to a new trial,

as allowed by Code Civil Proc. N. Y. § 3068, where more than that sum is demanded by the pleadings of either party, as the case must be disposed of on the pleadings as they left the trial court.—*Longrill v. Downey*, 7 N. Y. S. 508.

15. An appeal from a surrogate's decree will be dismissed on the court's own motion where there is no certificate with regard to the record from the surrogate's court.—*In re Hall's Estate*, 7 N. Y. S. 595.

Rehearing.

16. An application for reargument will be denied, where the applicant does not show that any decisive question has been overlooked by the court, nor that the decision conflicts with any express statute or controlling decision.—*Mahon v. Sewell*, 7 N. Y. S. 600.

17. A motion for reargument, and for leave to go to the court of appeals, on grounds not involved in any issue determined by the judgment, will be denied.—*Kent v. Sibley*, 7 N. Y. S. 801.

Opening of default.

18. A referee's decision finding in plaintiff's favor on questions of fact, but holding her cause of action barred by the statute of limitations, and rendering judgment against her for costs and disbursements of the action, was affirmed on appeal by default, which was afterwards ordered to be opened on her payment of costs of motion, and the giving of a bond to pay the judgment should it be affirmed on the hearing, but on account of her poverty she was unable to procure satisfactory bondsmen. *Held*, that the default should be opened on plaintiff's payment of costs of motion, and the giving of such a bond as she is able to procure.—*Rice v. Maddock*, 7 N. Y. S. 682.

Review.

19. An appeal on exception to the direction of a verdict only brings up for review the question whether there was evidence to sustain the verdict, not the question whether the fact should have been submitted to the jury.—*Green v. Shute*, 7 N. Y. S. 646.

Objections not raised below.

20. A charge that the burden of proof is on the one alleging negligence will not be reviewed on appeal, where no exception was taken at the time, and the attention of the court was not called to any peculiar features of the case which brought it within any exception to the general rule.—*Fassbender v. Western Transit Co.*, 7 N. Y. S. 184.

Presumptions.

21. Where a motion to resettle a case is denied on affidavits, it cannot be assumed by an appellate court that there was other

proof than the affidavits before the trial court which warranted the omission of a certain matter from the case.—*Green v. Shute*, 7 N. Y. S. 646.

Review—Weight and sufficiency of evidence.

22. It cannot be said as a matter of law that a finding of fact against the defendant in an action for fraudulent representations is erroneous, where there is not such a preponderance of the evidence in his favor as to overcome the inference of fraud arising from the plaintiff's evidence.—*Pryor v. Foster*, 7 N. Y. S. 4.

23. A finding of a referee, from conflicting evidence, that an assignment is fraudulent, will not be disturbed on appeal.—*Cohen v. Irion*, 7 N. Y. S. 106.

24. Where there is a conflict of evidence, a verdict for plaintiff, on a charge fair and liberal to defendant, will not be disturbed.—*Anderson v. John Hancock Mut. Life Ins. Co.*, 7 N. Y. S. 601.

25. Where evidence properly submitted to a jury is conflicting, the verdict must stand, though the court might have come to a different conclusion.—*Case v. Simonds*, 7 N. Y. S. 253.

26. Where a defendant's testimony on a material point is contradicted by a number of witnesses, and the verdict is for plaintiff, an order denying a motion for a new trial will not be disturbed.—*Tuthill v. Hussey*, 7 N. Y. S. 547.

27. Where the evidence is conflicting, and the verdict does not indicate passion, prejudice, or corruption, a judgment entered thereon will not be disturbed.—*Smith v. Pryor*, 7 N. Y. S. 622.

28. Where the evidence is conflicting, judgment will not be disturbed on appeal.—*Knapp v. Barclay*, 7 N. Y. S. 765.

—Rulings on evidence.

29. Where there is a conflict of testimony, the erroneous exclusion of any testimony, bearing on the merits, is cause for reversal.—*Smith v. Crego*, 7 N. Y. S. 86.

—Matters not apparent on record.

30. Where appeal has been taken in a case tried before a referee under a stipulation, and appellant's affidavit states that the appeal is taken in good faith, but neither the pleadings, the proceedings before the referee, nor the findings and judgment are before the appellate court, an order of the special term, pending the appeal, directing the county treasurer to repay to plaintiff money deposited by it as security for costs under an order of court, will not be disturbed on appeal.—*Kokomo Straw-Board Co. v. Sachs*, 7 N. Y. S. 179.

—Harmless error.

31. A refusal of a referee to allow the question, "Did you believe this statement

to be true?" is harmless, when the witness has testified that he had acted on the statement.—*Morris v. Wells*, 7 N. Y. S. 61.

32. Though evidence be erroneously excluded, yet if it be subsequently introduced the error is harmless.—*Morris v. Wells*, 7 N. Y. S. 61.

33. If evidence be erroneously admitted, the error is cured where the same facts are properly proven by other testimony.—*Morris v. Wells*, 7 N. Y. S. 61.

34. In an action for personal injuries, where a physician was not allowed, on cross-examination, to state whether an examination of the person of plaintiff, to which he had testified, was fairly made, the error was harmless, when another physician present at the examination testified that it was accurately made.—*McSwyny v. Broadway & S. A. R. Co.*, 7 N. Y. S. 454.

—Objections waived.

35. A party who has submitted to, and conceded, the jurisdiction of a court to determine a motion for judgment, cannot, on appeal therefrom, object to its jurisdiction.—*In re Budlong*, 7 N. Y. S. 289.

Reversal.

36. In the exercise of discretionary power conferred by Code Civil Proc. N. Y. § 1838, the court will order a restitution of money paid on a judgment which has been reversed on appeal, where it appears that the judgment on appeal is in effect a final determination of the issues, though the money originally belonged to the party who obtained judgment in the trial court.—*Hayes v. Nourse*, 7 N. Y. S. 656.

37. Where an appeal is taken on exceptions to the conclusions of law, and there is a separate and distinct finding of fact, unqualified in form, in irreconcilable conflict with the conclusions of law and the judgment, the judgment cannot stand, though from the other findings, which fully sustained the conclusions of law and the judgment, it appears that the finding was made by inadvertence.—*Pappenheim v. Metropolitan El. Ry. Co.*, 7 N. Y. S. 679.

APPEARANCE.

Authority to appear.

Defendant, a resident of Cuba, was sued as a general partner of his co-defendant, though in fact he was a special partner. He was not served with process, and neither appeared, nor authorized an appearance. His co-defendant sent a copy of the writ served on him to attorneys without explanation, directing them to defend. Supposing themselves authorized to do so, the attorneys appeared for all the partners. *Held*, that defendant should have been allowed to set aside the appearance as to him, and leave to substitute attorneys was

not sufficient relief. — *Nordlinger v. De Mier*, 7 N. Y. S. 463.

Application.

For insurance, see *Insurance*, 3-4.

ARREST.

See, also, *Execution*, 12, 13.

Resisting, see *Assault and Battery*.

In civil actions.

1. An affidavit in accordance with Code Civil Proc. N. Y. § 2437, providing for the arrest of a judgment debtor on affidavit that he "will leave the state, or conceal himself, and that there is reason to believe that he has property which he unjustly refuses to apply to the payment of the judgment," furnishes no legal ground for an arrest, where the debtor's home is in another state, and the proof fails to show what property he had, or that he had any. — *Heller v. De Leon*, 7 N. Y. S. 97.

2. On proof that a non-resident judgment debtor has property in, and is about to leave, the state, a warrant of arrest may issue in supplementary proceedings, as provided in Code Civil Proc. N. Y. § 2437; such proceedings being made applicable to non-residents by section 2458, subd. 8. — *Denning v. Schieffelin*, 7 N. Y. S. 98.

3. In order to justify an arrest in an action for conversion, the complaint must show a cause of action, independently of the affidavit for the arrest. — *Saratoga Gas & Electric Light Co. v. Hazard*, 7 N. Y. S. 844.

— **Discharge.**

4. Under Code Civil Proc. N. Y. § 572, as amended by Laws 1886, c. 672, providing that if a plaintiff neglects to enter judgment within 10 days after it is in his power to do so, or neglects to issue execution against the person of defendant within 10 days after the return of the execution against the property, or, in any event, neglects to issue the same within 8 months after the entry of the judgment, or delays the enforcement of his remedies by collusion, defendant must, on his application, be discharged from custody, relief from arrest cannot be granted a defendant where there is no evidence of collusion, and the report of the referee in the action was delivered July 16th, judgment entered July 23d, execution against the property returned unsatisfied September 20th, execution against the person issued September 22d, and arrest made October 25th. — *Lampman v. Smith*, 7 N. Y. S. 923.

Assault.

See *Assault and Battery*.

ASSAULT AND BATTERY.

Criminal prosecution—Resisting of floor.

1. Police officers of New York city are authorized by Laws 1882, c. 410, § 277, to arrest without a warrant any person who in their presence commits an offense prohibited by the laws of the state or ordinances of the city; and one who resists arrest in such cases by striking at the officer with an open knife, commits an assault in the second degree, within the meaning of Pen. Code, § 218, subd. 4, defining it to be "willfully and wrongfully assaulting another with a weapon or other instrument likely to produce grievous bodily harm." — *People v. Murray*, 7 N. Y. S. 548.

2. In resisting the attempt of an officer, with open hands, to arrest him, defendant was not justified in using greater force than was necessary to avoid arrest; and for striking at the officer with an open knife he is guilty of an assault, though the attempted arrest was unlawful. — *People v. Murray*, 7 N. Y. S. 548.

Assessment.

Of taxes, see *Taxation*, 6-10.

ASSIGNMENT.

See, also, *Assignment for Benefit of Creditors*.

Of judgment, see *Judgment*, 24, 25.

mortgage debt, see *Mortgages*, 2.

patents, see *Patents for Inventions*, 1, 2.

Validity—Jurisdiction.

Where it appears that a debt owing by a defendant has been assigned to a non-resident co-defendant, who has not appeared, but has been served by publication, the court has jurisdiction to pass on the validity of the assignment. — *Mahr v. Bartlett*, 7 N. Y. S. 143.

ASSIGNMENT FOR BENEFIT OF CREDITORS.

Rights of creditors.

1. On the refusal of the assignee for benefit of creditors to sue to set aside as fraudulent judgments confessed by the assignor in contemplation of a general assignment, the general creditors may sue for that purpose. — *Spellman v. Freedman*, 7 N. Y. S. 698.

2. The sale, by an assignee for benefit of creditors, of the real property of his assignor, at public auction, in a "lump" instead of by parcels, without notice to creditors, and for an apparently inadequate consideration, affords sufficient grounds for suspicion of fraud to justify a general creditor

of the assignor in suing to set the sale aside, so as to relieve him from costs.—*Price v. Mapes*, 7 N. Y. S. 747.

Preferences and reservations.

8. An assignment of personality by a debtor to one of his creditors, and a subsequent assignment of any surplus that may arise to other creditors, do not constitute a general assignment within the general assignment act of 1877, (Laws N. Y. 1877, c. 486,) and are not void under Laws N. Y. 1887, c. 508, amending said act, and providing that "in all general assignments preferences created therein shall not be valid except to the amount of one-third in value of the assigned estate."—*Boessneck v. Cohn*, 7 N. Y. S. 620.

4. Judgments confessed in favor of certain creditors by a debtor, in contemplation of a general assignment, constitute preferences, within the prohibition of Laws N. Y. 1887, c. 508, relating to assignments for the benefit of creditors.—*Spellman v. Freedman*, 7 N. Y. S. 698.

5. It is not a fraudulent preference, rendering an assignment void, for the assignors to prefer a note given by them in payment of another note against a firm of which they had been members, and for which they were liable.—*Roberts v. Viotor*, 7 N. Y. S. 777.*

6. An assignment for benefit of creditors contained a preference as follows: "L. Cohn, agent or individually. * * * Money loaned, promissory note made by assignors, indorsed by A. J. McIntosh, payable to L. Cohn, agent or individually, unable to say which; dated March 2, 1886, due in four mos., \$2,500; interest from March 2, 1886." The loan had in fact been procured from Cohn as agent. *Held*, that the assignment was not void for uncertainty because it did not give the name of the principal; it appearing that the assignors acted honestly, and described the claim as best they could.—*Roberts v. Viotor*, 7 N. Y. S. 777.

7. P. and A., partners in business, drew from the firm, during the month before their assignment, an amount slightly in excess of their usual drawings. It was in small amounts, distributed through the month, and it did not appear that the assignment was in contemplation more than a few days. In their schedule of liabilities were notes given their wives for money furnished to and used by the firm, though the notes on the books were charged to the personal accounts of the partners. In the assignment the fathers of the partners were preferred for amounts loaned the firm. The name of H., a partner, who had retired from the firm a month before the assignment, was inserted in the schedules as a creditor of the firm, for notes given to

him by P. and A. for his interest. By the books it appeared that the firm was solvent at that time. P. testified that the cause of the failure was embarrassment and delay in payments by firm debtors. *Held*, that these facts did not show that the assignment was made with intent to defraud creditors.—*Lewis v. Bache*, 7 N. Y. S. 757.

8. Where the creditors fail to prove any fraud, no unfavorable inference will be drawn from the fact that the wives of the partners were not called as witnesses.—*Lewis v. Bache*, 7 N. Y. S. 757.

9. An insolvent debtor gave a bill of sale of his stock of goods, worth \$11,000, to his son, a large part of the consideration being an alleged existing indebtedness. The residue of the debtor's estate was inventoried at \$8,000. On the day after the execution of the bill of sale the debtor executed a general assignment for benefit of creditors. *Held*, an attempt to create a preference, and that the assignment would be set aside at the suit of a creditor.—*Manning v. Beck*, 7 N. Y. S. 215.

10. Where there is a finding that some of the items of a preferred debt had already been paid, and that there was a mistake as to some of the others, but that the total debt was in fact greater than stated in the assignment, and that the assignors intended to prefer the debt actually due, and in misdescribing it, which was the result of an honest mistake, there was no intent to hinder, delay, or defraud creditors. the assignment will not be held void as preferring a fictitious indebtedness.—*Roberts v. Viotor*, 7 N. Y. S. 777.

11. Where a member of a firm, known to be insolvent by the partners, retired from it, selling his interest to the remaining partner for his notes for \$2,500, and such notes were afterwards preferred in an assignment by the remaining partner, the assignment is fraudulent.—*Cohen v. Irion*, 7 N. Y. S. 106.

Fraud.

12. The fact that the assignors kept no ledger and no general cash-book a portion of the time, while engaged in business, is not sufficient evidence of a fraudulent intent to justify a holding that the assignment is fraudulent and void.—*Roberts v. Viotor*, 7 N. Y. S. 777.

13. The fact that the assignors had stated at various times to mercantile agencies and several of their creditors that they had a surplus of \$40,000 above their debts and liabilities, and that no losses sufficient to wipe out the surplus had occurred, does not warrant a conclusion that part of the property had been disposed of fraudulently, where there is a finding that the assignment was made in good faith.—*Roberts v. Viotor*, 7 N. Y. S. 777.

14. The entry in favor of several preferred creditors of judgments which are found to have been obtained in good faith, and for sums actually due, except in one case in which an honest mistake was made, will not invalidate the assignment.—*Roberts v. Viotor*, 7 N. Y. S. 777.

15. In an action to set aside an assignment, facts showing that assignor bought goods of plaintiffs with intent not to pay for them are admissible to prove the intent with which the assignment was made, even though judgments have been recovered for the price of the goods.—*Cohen v. Irion*, 7 N. Y. S. 106.

16. Evidence that a debtor owing \$90,000 confessed judgments in favor of five creditors, to "protect" them, and then made an assignment by agreement with the assignee and creditors, although none of the creditors were pressing him; that the estate was levied upon under two executions issued on the judgments before the assignee took possession, and, on refusal of all the creditors to accept a settlement of 50 per cent., was purchased by three of the judgment creditors, for \$11,800, which was credited on the execution; that the goods were turned over to a firm composed of the assignor's brothers, and formed its entire capital, on the agreement of the firm to pay \$12,700 to the judgment creditors, the amount due from the assignor; that the firm thereupon appointed the assignor its general manager, leaving him in full control and possession, under power of attorney; and that the claims were paid to the judgment creditors a few days thereafter,—is sufficient to set aside the confessed judgments and the assignment as fraudulent and void.—*Abegg v. Schwab*, 7 N. Y. S. 46.

Rights of assignee.

17. Where an assignment has been set aside as fraudulent, and the court has found that the assignee confederated with the assignor to defraud his creditors, the assignee is not entitled, on an accounting, to an allowance for attorneys' fees or debts paid to preferred creditors of the assignor, or for any disbursements except wages paid to the assignor's employes, which are expressly authorized by law.—*Smith v. White*, 7 N. Y. S. 378.

18. The purchaser under execution of property assigned for the benefit of creditors has no right to contest prior incumbrances on the property, as the assignment remains in force, notwithstanding the sale of the assignor's interest in the property, and such right is in the assignee.—*Tremaigne v. Mortimer*, 7 N. Y. S. 681.

19. An assignor, or his personal representatives, are necessary parties defendant to an action for settlement of an attorney's

account against the assignee, under Code Civil Proc. N. Y. § 452, providing that, "where a complete determination of a controversy cannot be had without the presence of other parties, the court must direct them to be brought in," as a judgment in an action to which they are not parties would be no bar to another action by the assignor, or his representatives, against the assignee, for a subsequent accounting.—*Wells v. Knox*, 7 N. Y. S. 45.

ASSOCIATIONS.

See, also, *Corporations; Insurance*, 18-16.

Incorporation.

1. The executive board of a voluntary association cannot convert it into a corporation, unless the power is conferred on it by the constitution and by-laws, or by an express resolution of the association.—*Rudolph v. Southern Beneficial League*, 7 N. Y. S. 185.

2. It is necessary that a meeting to ratify the action of a committee which has exceeded its powers in incorporating a voluntary association be called by competent authority; that the members at large of the association be notified of the meeting and its purpose; and that a majority of the members attend.—*Rudolph v. Southern Beneficial League*, 7 N. Y. S. 135.

Elections.

3. When all the voters at an election held by an association are members in good standing, entitled to vote, the fact that the polls are kept open after the time prescribed by the constitution and by-laws will not avoid the election.—*Rudolph v. Southern Beneficial League*, 7 N. Y. S. 185.

Transfer of property—Injunction.

4. Where the decision of a committee of a voluntary association, transferring property and affecting pecuniary interests, operates unjustly as to any members, the enforcement of the decision will be restrained.—*Rudolph v. Southern Beneficial League*, 7 N. Y. S. 185.

Use of name.

5. Members of a voluntary association, who have incorporated themselves under the name of the association without its consent, may be enjoined from using that name.—*Rudolph v. Southern Beneficial League*, 7 N. Y. S. 185.

ASSUMPSIT.

For goods sold and delivered, see *Pleading*, 1, 4, 18.

When lies.

1. In an action to recover a share of the profits realized on certain contracts by de-

fendant, the contract being entire, plaintiff's right of action accrued on the completion of the work; and the fact that defendant had not been paid part of the money on his contracts when the action was brought, does not render it premature.—*Jenkins v. Dean*, 7 N. Y. S. 850.

2. One who receives money of another for a specific purpose, to which he does not apply it, but keeps it, is liable to the owner.—*Darragh v. Ross*, 7 N. Y. S. 864.

Pleading.

3. In an action at law for services performed, the fact that plaintiff asks for an accounting of the profits realized by defendant on certain contracts, to ascertain the amount of plaintiff's compensation, does not make his complaint demurrable on the ground that it does not state a cause of action.—*Jenkins v. Dean*, 7 N. Y. S. 850.

Instructions.

4. In action to recover one-third of the net profits realized on certain contracts by defendant, where there is no dispute as to his liability if there are any profits, but where he claims that the sum to which he is entitled as compensation for the use of his tools and machinery, and for an item of disbursements paid by him, is sufficient to wipe out any apparent balance of profits on the contracts, it is in accordance with justice for the trial judge to charge the jury to find as to the disputed item of disbursements, and as to the value of the use of tools and machinery; to correct the apparent balance of profits in accordance with the finding as to the disbursement, and to deduct from the resulting figures the value of the use of tools and machinery; and to find for plaintiff one-third of the residue, if there should be any.—*Jenkins v. Dean*, 7 N. Y. S. 850.

ATTACHMENT.

See, also, *Garnishment*.

Grounds—Non-residence.

1. An attachment on the ground of defendant's non-residence will not be set aside, where it appears that he lives with his wife in New Jersey, which he stated was his place of residence; that he is registered and votes in that state; that he is assessed for personalty and has his business letters sent there; and that he is neither registered as a voter nor assessed for personalty in this state.—*Canda v. Robbins*, 7 N. Y. S. 896.

2. Where it appears that defendant owns a store in New York city, which is managed by her husband under a power of attorney, that she seldom visits the store, and there is no evidence that she takes an active part in the business, she is within

the Code Civil Proc. N. Y. § 8169, subd. 2, which provides for an attachment in the city court of New York where defendant, "being a resident of the state, is not a resident of the city of New York, and has not an office within that city where he regularly transacts business in person."—*Bowman v. Perine*, 7 N. Y. S. 155.

Lien.

3. Where the lien on goods seized under an attachment is lost by their delivery to defendant under an order vacating the attachment, it is restored by the reversal of such order.—*Pach v. Gilbert*, 7 N. Y. S. 836.

ATTORNEY AND CLIENT.

Affidavit of attorney, see *Pleading*, 15.

Attorneys' fees, allowance in divorce proceedings, see *Divorce*, 2.

Privileged communications, see *Witness*, 1-7.

Authority of attorney—Ratification.

1. A party, by availing himself of a bond procured by his attorney to open up a default, thereby ratifies the act of his attorney, and is liable to the sureties for the amount they are obliged to pay on their undertaking.—*Chadwick v. Manning*, 7 N. Y. S. 623.

Service of papers by attorney.

2. Under Code Civil Proc. N. Y. § 61, prohibiting the clerk of a court from practicing as attorney or counselor therein; and section 65, providing that, if an attorney becomes disabled to act at any time before judgment, no further proceedings shall be taken against the party for whom he appeared until after 30 days' notice to appoint another attorney,—the service of papers by a member of a firm of attorneys, after the other has been appointed clerk of the court, is authorized and regular without a formal substitution for the latter, who remains the attorney of record, where he has ceased to take any part in the proceedings, and had, with the consent of the client, turned over the action, and all the papers therein, to his partner.—*Cronin v. O'Reilly*, 7 N. Y. S. 837.

Disbarment.

3. Under Code Civil Proc. N. Y. § 67, providing that an attorney or counselor who is guilty of any deceit may be disbarred, the term "deceit" implies concealment, or false suggestion, while acting in a professional capacity, to injure a party and mislead a court, and an attorney cannot be disbarred for acts committed as party to an action, other punishments prescribed by law therefor having been inflicted.—*In re Post*, 7 N. Y. S. 438.

Compensation—Lien.

4. Where plaintiff's attorney, for the preservation of his lien on his client's cause of action, under Code Civil Proc. N. Y. § 86, desires to avoid the defense of accord and satisfaction, he should immediately upon the filing of such plea apply for leave to prosecute the action for his own benefit; and without such application made, and leave granted, the court has no right to try his claim.—*Oliwill v. Verdenhalven*, 7 N. Y. S. 99.

5. The attorney's lien upon his client's cause of action which cannot be affected by any settlement between the parties, as provided by Code Civil Proc. N. Y. § 86, does not exist before judgment in an action for personal injuries, such cause of action being unassignable.—*Oliwill v. Verdenhalven*, 7 N. Y. S. 99.

6. In an action for personal injuries, prior to judgment, plaintiff's attorney is entitled to recover against defendant no more than his taxable costs.—*Oliwill v. Verdenhalven*, 7 N. Y. S. 99.

Baggage.

Injuries to, see *Carriers*, 2, 3.

BAIL.**Deposit in lieu.**

1. Code Civil Proc. N. Y. § 586, provides that a defendant who has deposited money in court, in lieu of bail, may deliver to the sheriff a written direction to pay it to a third person in the event that defendant becomes entitled to a return thereof, which direction is "to be acknowledged * * * in like manner as a deed to be recorded." Held that, as the acknowledgment is required merely to note the substance of the direction in the clerk's books and on the certificate of payment into court, an insufficient acknowledgment may be amended *nunc pro tunc*.—*Kennerly v. Tompkins*, 7 N. Y. S. 921.

Liability of sureties.

2. Where the sureties in a bail-bond, in which accused is principal, duly acknowledge the bond and justify as sureties, failure of the principal to acknowledge the bond will not affect the sureties' liability.—*People v. Hammond*, 7 N. Y. S. 219.

Forfeiture.

3. Where it appears that accused was present in court at the time he had given bail for his appearance; that in response to the inquiry of counsel the district attorney stated that he would not move the indictment against accused at that term; and that thereupon accused, on the advice of counsel, induced by the statement of the district attorney, left the court,—there is

no forfeiture of bail, though it is contended that the statement did not necessarily relate to the indictment in question, but to another then pending against accused.—*People v. Hammond*, 7 N. Y. S. 219.

4. On a motion to refund money paid on a forfeited recognizance, proof of service of notice on the district attorney must be made, and a certificate of the deposit, and a certified copy of the order discharging the recognizance, produced.—*People v. Ketterle*, 7 N. Y. S. 657.

5. The certificate of the district attorney is not sufficient proof that the state lost no rights by failure of a prisoner, afterwards acquitted, to appear according to the obligation of the recognizance, but the facts must also be shown in detail, in order that the court may determine the question.—*People v. Devine*, 7 N. Y. S. 660.

— Vacation of judgment.

6. Where it does not appear that the people lost any rights by default of a prisoner, who was afterwards produced and convicted, the excuse for default being that he was present, but did not answer, as he did not hear his name called, a forfeiture of the recognizance will be set aside.—*People v. Baer*, 7 N. Y. S. 660.

7. Judgment entered on a forfeited recognizance will not be discharged on the ground that defendant was afterwards surrendered, tried, and acquitted, unless it is proved that the complainant and the principal witnesses for the people were subpoenaed, and had notice of the subsequent arraignment in court, when acquittal was had.—*People v. Smith*, 7 N. Y. S. 659.

8. Where a defendant whose recognizance has been forfeited is afterwards surrendered by his surety, tried, and discharged, complainant not appearing, judgment on the forfeited recognizance will not be vacated on the certificate of the district attorney that the people have lost no rights by defendant's failing to appear when his case was first called, but it must be shown that complainant and the principal witnesses for the people were subpoenaed, and diligence used to bring them into court when the prisoner was tried and discharged.—*People v. Samuels*, 7 N. Y. S. 659.

9. A judgment on a forfeited recognizance will be vacated, where accused was confined to his house by illness on the day set for trial, and died soon after.—*People v. Perlstein*, 7 N. Y. S. 662.

10. Defendant was produced by his surety on the day set for trial, but, complainant failing to appear, though subpoenaed, the case was adjourned to another day, when defendant was again produced; complainant again failing to appear, after having been subpoenaed. Afterwards the case

was again called, and neither defendant nor complainant appearing, neither having been summoned, defendant's recognizance was forfeited. The surety afterwards surrendered defendant, and he was discharged; complainant again failing to appear. *Held*, that the judgment on his recognizance should be vacated.—*People v. Higgins*, 7 N. Y. S. 658.

11. A forfeited recognizance will be discharged, where it appears that the default was caused by the prisoner's removal from his former place of employment and residence; that his security did not know of the default till after the forfeiture; and that the prisoner was afterwards convicted, and the fine paid; and it does not appear that the people lost any rights by the delay.—*People v. Flynn*, 7 N. Y. S. 661.

12. A judgment on a forfeited recognizance will be vacated, where the surety afterwards produces the accused in court, and he pleads guilty, and pays a fine.—*People v. Perlstein*, 7 N. Y. S. 662.

13. Where defendant has forfeited his bail, and judgment has been entered thereon, the judgment cannot be vacated because defendant is afterwards surrendered, tried, and acquitted, unless it appears that the prosecution has not been deprived of proofs by the delay; and the certificate of the district attorney is not sufficient evidence on that point.—*People v. Tietjen*, 7 N. Y. S. 642.

14. Where the security for one accused of keeping open on Sunday a place for sale of liquor made effort to secure his due attendance, but failed, and the prisoner afterwards appeared, was convicted, and paid a fine, the forfeited recognizance will be discharged.—*People v. Brady*, 7 N. Y. S. 661.

Bailment.

See *Carriers; Pledge; Warehousemen*.

BANKS AND BANKING.

Deposits.

1. On supplementary proceedings against one of the heirs of a decedent's estate, the cashier of a bank disclosed that funds had been deposited in the bank to the credit of the estate. A receiver was appointed, who sent to the bank a written notice stating the appointment of the receiver, and demanding payment of the heir's share of the deposit, and alleging that the amount was due the heir by virtue of a check drawn by the executor of the estate in favor of the heir, and sent to the heir. The bank disregarded the demand, and paid the check when presented. *Held*, that the receiver could recover of the bank so much of the heir's share as was necessary to satisfy the execution, together with

interest, costs, and commissions.—*O'Connor v. Mechanics' Bank*, 7 N. Y. S. 390.

2. Where money is deposited in a bank, and the depositor receives from the bank a deposit book containing a rule requiring depositors to draw money by written order or power of attorney, this condition of the contract of deposit does not impair the rights of the depositor as a creditor of the bank, and his donee may draw the money without a written order or power of attorney signed by the depositor.—*Gammond v. Bowery Sav. Bank*, 7 N. Y. S. 321.

3. Where there is a gift *causa mortis* of money on deposit in a bank and a delivery to the donee of the bank-book, and the bank pays the money to the donor's administrator after receiving notice of the donee's claim, the donee is not compelled to look to the administrator, but may recover from the bank.—*Walsh v. Bowery Sav. Bank*, 7 N. Y. S. 669.

Officers—Bonds.

4. The conditions of a bank cashier's bond were that he should honestly and in good faith perform all his duties, and all duties incident to the office of cashier, and all duties, acts, and work required by the bank or its directors, and "in all respects conduct honestly and in good faith towards or in respect to said bank, its moneys and securities, and the moneys and securities of any other person or persons left in any manner with said bank." To secure accommodations from the bank, a stockholder assigned his stock to the cashier, to be held by him as collateral security, and the bank issued to him new certificates of stock, canceling the old ones. *Held*, that the sureties were liable for conversion of the stock by the cashier.—*Walden Nat. Bank v. Snyder*, 7 N. Y. S. 934.

5. The sureties of a national bank cashier cannot, as defendants in an action to recover for the cashier's wrongful conversion of stock, attack the validity of the transaction by which the bank issued stock to the cashier, by alleging that he held the stock in violation of the United States banking act, which prohibits a bank from making loans or discounts on the security of the shares of its own capital stock, as only the government could question the validity of the transaction.—*Walden Nat. Bank v. Snyder*, 7 N. Y. S. 934.

Savings banks—Deposits.

6. A provision in the by-laws of a savings bank, signed by depositors, that the "bank will not be responsible for frauds committed on the officers by producing the pass-book and drawing money without the knowledge or consent of the owner," does not discharge the bank from obligation to exercise ordinary care as to the identity of persons presenting pass-books. Following

Appleby v. Bank, 63 N. Y. 12.—Saling v. German Sav. Bank, 7 N. Y. S. 642.

7. Where defendant savings bank paid money to S., who presented plaintiff's pass-book and forged his name, testimony of the bank's officer, whose duty it was to examine the signatures, that after making comparison he could readily distinguish the genuine signatures from the forgeries; that he did not ask S. any of the questions as to his birthplace, age, etc., which facts are always set opposite a depositor's name for future identification; that the signature was such a good imitation that he did not think he could be mistaken; that he was frequently so busy that he did not have time to ask the questions; and that, on account of the rush of business, if a signature presented "is a tolerably good signature, we have it paid without any questions."—presented a question of defendant's negligence for the jury.—Saling v. German Sav. Bank, 7 N. Y. S. 642.

8. In an action to recover money on deposit, a witness for defendant testified that plaintiff's pass-book was presented at the bank when the regular teller was absent, and the money was drawn out in each case a day or two after being deposited, and in about the same amounts, and paid by him to the person presenting the pass-book, whom he believed to be plaintiff, but whom he did not know. Plaintiff denied having presented the pass-book or received or authorized the several payments. *Held*, that the questions whether she did or not, or whether the pass-book was stolen from her and clandestinely presented to the bank, and the money obtained by a third person, were for the jury.—Fox v. Onondaga County Sav. Bank, 7 N. Y. S. 17.

9. Laws N. Y. 1875, c. 871, § 82, as amended by Laws N. Y. 1878, c. 347. In respect to savings banks, provides that the deposits shall be paid to a depositor or his legal representative, after demand and previous notice, under regulations prescribed by the board of trustees, which are to be conspicuously posted in the place of business, and printed in the pass-book furnished by the bank, and which shall be evidence between it and depositors of the terms on which deposits are made; but that no payments will be made unless the pass-book be produced, and the proper entry made therein at the time of the transaction. Defendant adopted a by-law providing that "the treasurer will endeavor to prevent frauds, but all payments made to persons producing the pass-book shall be deemed valid payments, and discharge the bank from any further liability." *Held*, that the question whether or not, under such agreement, the bank was negligent in making advances on the pass-book of plaintiff to one presenting it and who was believed by

the paying teller to be the plaintiff, whom the teller did not know, was for the jury.—Fox v. Onondaga County Sav. Bank, 7 N. Y. S. 17.

Bequest.

See *Wills*.

Bill of Particulars.

See *Libel and Slander*, 1, *Pleading*, 14.

Bills and Notes.

See *Negotiable Instruments*.

Bona Fide Purchasers.

See *Negotiable Instruments*, 1; *Vendor and Vendee*, 5-7.

BONDS.

Of bank cashier, see *Banks and Banking*, 4, 5.

On appeal, see *Appeal*, 12.

Indemnity bonds.

1. The obligors in a bond given to a sheriff to protect him from any liability arising from the levy of certain executions are chargeable with notice of a prior levy made under a writ which inures to the benefit of their judgment, and the bond protects the sheriff in making such levy.—Grant v. Tefft, 7 N. Y. S. 129.

2. Defendants, with other judgment creditors, gave the sheriff indemnifying bonds to protect him against any damages, attorney's fees, etc., by reason of sales of personal property under their executions. The sheriff sold the property, and was sued by the assignee of the judgment creditor, who alleged title to the property. After two trials the suit was discontinued. *Held*, in a suit on the bond for attorney's fees expended, that defendants could not show that they had notified the sheriff not to defend the suit, as the other creditors were interested in the defense, and did not consent to its discontinuance.—Grant v. Tefft, 7 N. Y. S. 129.

3. The obligors in a bond of indemnity, given to a sheriff on the levy of certain executions, had agreed to pay counsel fees incurred by the sheriff. The sheriff, in a suit on the bond, showed payment of \$1,000 counsel fee, but did not prove that it was reasonable. *Held*, that the payment was presumptive evidence of its reasonableness, when it was neither attacked by the answer of defendants nor by evidence at the trial, and was sufficient to sustain a verdict for plaintiff.—Grant v. Tefft, 7 N. Y. S. 129.

Action on.

4. In a suit on a bond given to a sheriff to protect him from any liability arising from the levy of certain executions, parol evidence by defendants of conditions that the sheriff would pay the amount of their executions out of the sale of the property levied upon, if they would give him the bond, is inadmissible.—*Grant v. Tefft*, 7 N. Y. S. 129.

BOUNDARIES.

Evidence, declarations of grantor, see *Equity*, 5.

Evidence.

1. Testimony of declarations of a grantor, before the execution of a deed, tending to establish a boundary other than that made by the deed as construed by the court on appeal, is inadmissible, as its effect would be to convey land by parol in contravention of the statute of frauds.—*Harris v. Oakley*, 7 N. Y. S. 282.

Calls.

2. The owner of a lot in the city of Rochester, of the area of about one-half acre, rectangular in form, fronting 274 feet on a street, and abutting on the rear for the same distance on a canal, the location of both, as well as the other lines, being undisputed, conveyed a portion, by description, of "187 feet front and rear, measuring from G. H.'s north line on G. street, and also 187 feet from G. H.'s south line on the canal; being the piece of land occupied as a garden by the grantor." The lot was divided by a fence, one side being used as a garden; the fence starting on G. street midway, but striking the back line at the canal at a point 19½ feet from the middle of the lot. The fence was not mentioned in the deed. *Held*, that the reference to the garden was too indefinite to control the calls for exact distances from known bounds, and the divisional point on the canal should be located 187 feet from G. H.'s line.—*Harris v. Oakley*, 7 N. Y. S. 282.

8. The owner of land on a bay conveyed an acre at the end of the track nearest the bay, described as follows: "Beginning * * * by the beach, running * * * along the beach to," etc. In the general description of the tract it was bounded "easterly by the said beach." The grantee was given the privilege of a road from the middle of the front of the lot to the bay, and also half the drift coming on shore in front of the lot, and all the other privileges of the beach were reserved by the grantor, who bound himself not to build any house in front of the lot. The courses and distances would not carry the boundary to high-water mark. *Held*, that the beach

did not pass by the deed.—*Benson v. Townsend*, 7 N. Y. S. 162.

BREACH OF MARRIAGE PROMISE.

Suit by divorced woman under maiden name, see *Divorce*, 8.

Defenses.

1. Cohabitation by plaintiff prior to the promise constitutes no defense to an action for breach of marriage promise, where the promise was made with knowledge of the fact.—*Rich v. Mayer*, 7 N. Y. S. 69.

Evidence.

2. In an action for breach of promise of marriage, the pecuniary circumstances of defendant may be shown by general reputation.—*Chellis v. Chapman*, 7 N. Y. S. 78.

3. One whom defendant has requested to communicate his matrimonial wishes to plaintiff may testify that she communicated to plaintiff the conversation with defendant.—*Chellis v. Chapman*, 7 N. Y. S. 78.

4. Where the answer charges that plaintiff was never attached to defendant, and evidence has been adduced to sustain the averment, plaintiff may testify in opposition thereto.—*Chellis v. Chapman*, 7 N. Y. S. 78.

5. Allowing defendant to be asked on cross-examination, "Were you ever engaged to marry any other woman aside from" plaintiff? is harmless error, when he answers in the negative, saying, "Never had any real settled engagement; no more than talk from one time to another; no bargain made."—*Chellis v. Chapman*, 7 N. Y. S. 78.

6. Where plaintiff, in an action for breach of marriage promise, on cross-examination has testified that she was then unwilling to marry defendant, she may testify on re-examination to the reason of her unwillingness.—*Chellis v. Chapman*, 7 N. Y. S. 78.

Damages.

7. A charge that the jury may allow punitive damages in their discretion, if they find that defendant was actuated by dishonest motives, is not erroneous.—*Chellis v. Chapman*, 7 N. Y. S. 78.

8. Where defendant was a farmer of some means, 74 years of age, and plaintiff was 46, and had given up a position as principal of a public school at defendant's request, a verdict for \$8,000 will not be set aside as excessive.—*Chellis v. Chapman*, 7 N. Y. S. 78.

BRIDGES.**Injuries from defects.**

1. In an action for the loss of horses caused by defects in defendant's bridge.

plaintiff's driver testified that on approaching the bridge he saw that the planks were separated, and thought it made the bridge unsafe, and that he therefore stopped and looked at it, but decided to take the chances of trying to go over, and that it was in the same condition as it was the day before, when he had crossed in safety. *Held*, that he was guilty of contributory negligence, which precluded a recovery, unless the accident did not result from the defect from which the danger was apprehended. — *Travis v. Town of Carrollton*, 7 N. Y. S. 281.

Rights of corporations.

2. Petitioner was incorporated under Laws N. Y. 1867, c. 395, to build a bridge within a certain time or forfeit all rights under the act. Laws 1885, c. 392, extended the time, and provided that the bridge should be for railway, foot, and carriage travel. *Held* that, as the legislature had no power to make the provision for railroad travel, under Const. N. Y. art. 8, § 18, providing that the legislature shall not pass a private or local bill granting the right to lay down railroad tracks, or provide for building bridges and chartering companies for such purpose, the extension of time granted to the petitioner must fall with the condition upon which it was granted. — *In re New York & L. I. Bridge Co.*, 7 N. Y. S. 445.

Burden of Proof.

See *Evidence*, 1.

BURGLARY.

Indictment.

Under Pen. Code N. Y. § 498, providing that a person who, "with intent to commit a crime therein, breaks and enters a building, or a room, or any part of a building," (defined by section 504 to include an "inclosure,") is guilty of burglary in the third degree, an indictment which alleges that accused broke and entered certain "stove-works," without stating that the works were a building, or a room, or a part of a building, is defective, and the defect is not such "an imperfection in matter of form" as is cured by Code Crim. Proc. N. Y. § 265. — *People v. Haight*, 7 N. Y. S. 89.

Burial.

See *Cemeteries*.

CARRIERS.

See, also, *Horse and Street Railroads; Railroad Companies*.

Loss of goods.

1. Where a carrier fails to give a receipt or to make any other written contract for the shipment of plaintiff's property, it will

not be absolved from liability for the negligent destruction of such property by evidence that plaintiffs or their agent previously knew of conditions in the shipping bills, or receipts given, which would discharge defendant from liability in this instance. — *Reed v. Fargo*, 7 N. Y. S. 185.

Injuries to baggage.

2. Plaintiff's baggage was delivered to defendant in good and dry condition on September 2d, at Larrimore, and was by it brought through to St. Paul, whence by another road it was brought to New York, where, upon its arrival, on September 6th, it was found to be damaged by water. There was evidence that it rained very hard and nearly or quite all night of the day on which defendant received the baggage, and that it reached St. Paul on the morning of September 3d. There was evidence that it was not exposed to the action of water after it reached St. Paul. The mould on the baggage tended to show that the injury was not of a date later than the arrival in St. Paul. *Held*, that the evidence justified the finding that the baggage was injured while in defendant's possession, between Larrimore and St. Paul. — *Estes v. St. Paul, M. & M. R. Co.*, 7 N. Y. S. 863.

3. Where the agent of a railroad company checks the baggage of a passenger over a different route from the one agreed on, and it is injured while on such route, the company is liable as an insurer. — *Estes v. St. Paul, M. & M. R. Co.*, 7 N. Y. S. 863.

Liability for negligence — Express messenger.

4. An agreement between a railroad company and an express company, that the former shall not be liable for any injury done to an employe of the latter, it being part of a contract by which the former was to carry goods for the latter at special rates, and to allow a messenger of the latter to go on each train free of charge, does not exonerate the railroad company from liability for its negligence resulting in the death of a messenger, who was ignorant of such agreement. — *Kenney v. New York Cent. & H. R. R. Co.*, 7 N. Y. S. 255.

Cattle.

Negligent killing, see *Railroad Companies*, 15.

CEMETERIES.

Right of burial — Jurisdiction.

1. A person purchasing the right of burial in ground consecrated for the exclusive purpose of the burial of persons who die in communion with the Roman Catholic Church submits the question as to his dying in communion therewith to the exclu-

sive jurisdiction of the authorities of such church, whose judgment thereon, it being a spiritual matter, cannot be questioned in the civil courts.—*McGuire v. Trustees of St. Patrick's Cathedral*, 7 N. Y. S. 845.

Right of burial—License.

2. Where the right of burial in a certain cemetery is a mere license, it confers no such property rights as are enforceable in equity.—*McGuire v. Trustees of St. Patrick's Cathedral*, 7 N. Y. S. 845.

Easement.

8. In the absence of further testimony on the subject, no such agreement for the grant of an easement as is enforceable in equity can be implied from the following receipt: "Received from John McGuire ten dollars, being the amount of purchase money of a grave, two feet by eight, in Calvary Cemetery, with privilege to erect a headstone thereon. [Signed] D. BRENNAN, Supt. of Office of Calvary Cemetery. Grave 9, plot F, section 8, range 56,"—the payment of the consideration, and the burial of the purchaser's wife in such grave, not being a part performance of such an agreement.—*McGuire v. Trustees of St. Patrick's Cathedral*, 7 N. Y. S. 845.

4. No formal deed is necessary to confer the exclusive right to the use of a lot in the cemetery for burial purposes. Oral permission is sufficient.—*Conger v. Weyant*, 7 N. Y. S. 809.

5. Where defendant's family used a lot for burial purposes, without objection, for over 20 years, grave-stones being erected, marked with the initials of the family, the manager of the cemetery association recognizing their right, and a memorandum of the sale of the lot to defendant being shown in the manager's handwriting, a sale to defendant of the right to use such lot was sufficiently shown.—*Conger v. Weyant*, 7 N. Y. S. 809.

6. More than 20 years' possession under a claim of title will defeat ejectment for a lot in a cemetery.—*Conger v. Weyant*, 7 N. Y. S. 809.

CERTIORARI.

Pleading.

A petition for *certiorari*, which clearly states the grounds of the complaint, should not be quashed because it also sets out other grounds not material to the questions involved.—*People v. McComber*, 7 N. Y. S. 71.

CHAMPERTY AND MAINTENANCE.

Conveyance of land.

8 Rev. St. N. Y. (7th Ed.) p. 2196, § 147, providing that conveyances of land, in the

actual possession of another, claiming under an adverse title, at the time of the delivery thereof, shall be absolutely void, does not apply to a case where both parties claim under a common grantor, and the party in possession, by mistake in the construction of his deed, holds land not embraced therein.—*Harris v. Oakley*, 7 N. Y. S. 232.

Chancery.

See *Equity*.

Change of Venue.

See *Venue in Civil Cases*.

CHARITIES.

Validity of bequest.

1. A bequest for the purpose of creating and maintaining a "musical college," without any directions or the expression of testator's wishes as to a plan for its working, is void for uncertainty.—*People v. Simonson*, 7 N. Y. S. 861.*

2. 1 Rev. St. N. Y. p. 734, § 96, provides that every trust power, unless its execution is made expressly to depend on the will of the grantee, is imperative, and may be enforced in equity for the benefit of interested persons. Section 97 provides that a trust power does not cease to be imperative where the grantee has the right to select any, and exclude others, of the designated beneficiaries. Sections 100, 101, provide that if the trustee of a power die without executing it, or if a will create a power in trust without designating a trustee, the court of chancery shall execute the power. *Held*, that the same rules were applicable to trusts for charitable uses as to powers in trust; and whether the will created the one, or conferred the other, it could not be held valid, unless sufficiently definite in subject and object to be enforced by judicial decree.—*Tilden v. Green*, 7 N. Y. S. 382.*

3. A testator, by a clause in his will, requested his executors and trustees to obtain an act of incorporation for an institution to be known as the "Tilden Trust;" and in case such institution should be incorporated in a form and manner satisfactory to them, within the time limited by the will to organize the corporation, they were to designate the first trustees thereof, and to convey, or apply to the use of, such corporation, the "rest, residue, and remainder" of the testator's estate not specifically disposed of, or so much thereof as they might deem expedient. In case such institution should not be incorporated within the time mentioned, or if the executors should deem it inexpedient to convey said "residue," or any part thereof, to such institution, they

were to apply it to such charitable, educational, and scientific purposes as in their judgment would render the said "residue" the most beneficial to interests of mankind. *Held* that, whether the provision created a trust or a power in trust, it was void for indefiniteness.—*Tilden v. Green*, 7 N. Y. S. 882.

4. The will created various special trusts, and one clause provided that these should be distinct and separate from the "general trust." Another clause referred to the power of the trustees, during the continuance of "the trust" of testator's general estate, to apply any surplus income towards the "special trusts;" and in other places the will referred to the residue of the property, after instituting the several trusts for specific persons, as constituting the subject of "the trust." *Held*, in view of the fact that the executors and trustees, if they withheld any portion of the residue from the Tilden Trust, were still directed to apply it to charitable, educational, and scientific purposes; and that, even after the incorporation of the Tilden Trust, they were not positively directed to endow it,—that the first provision of the said clause, providing for endowing the Tilden Trust, could not be considered as a specific trust, distinct from the latter portion of that clause, and so upheld.—*Tilden v. Green*, 7 N. Y. S. 882.*

5. A testator devised all his property to his wife for life, and, after her death, all the remainder left by her "to the Roman Catholic Church of the Most Holy Trinity, in Montrose Ave., Brooklyn, E. D., but under the following ordination;" that in each year a high mass should be celebrated after the death of himself and wife, for their souls, respectively, and a part of the estate should be used in aiding poor students, intending to become Catholic priests or teachers, and a part to establish a Catholic newspaper. *Held*, that the devise was valid, and did not create a trust, but vested the fee-simple title to the property in the church.—*Ruppel v. Schlegel*, 7 N. Y. S. 898.

6. A bequest "to the American Bible Society, * * * to be used by said society for the promulgation of the Holy Bible," is not void as a gift in trust, without a definite or ascertainable beneficiary capable of enforcing the trust, since the gift was limited to the precise use for which the society was incorporated.—*In re Look*, 7 N. Y. S. 898.

Code.

See *Statutes Cited and Construed*.

Collateral Security.

See *Negotiable Instruments*, 8.

COLLISION.

Of street cars, see *Horse and Street Railroads*, 11, 12.

Between tug and row-boat.

1. In an action for personal injuries caused by a collision of defendants' steam-tug with plaintiff's row-boat, evidence that plaintiff, on looking around, saw the tug and a canal-boat tied to a dock about half a mile ahead of him; that, after proceeding about a hundred feet further, on again looking around, he found himself between the tug and canal-boat, which were coming down the river at full speed; that plaintiff immediately gave alarm to the tug by loud shouting, which was joined in by other persons near by on the river; that the tug showed no response, but kept right on until plaintiff's boat was struck; and that it was light at the time, so that those in charge of the tug could see half a mile down the river,—is sufficient to take the case to the jury on the question of defendants' negligence.—*Fitzsimmons v. McConnell*, 7 N. Y. S. 869.

2. Where there is evidence that plaintiff, as soon as he saw the tug, commenced backing his boat; that he had time to back his boat half a dozen or a dozen strokes, and was going rapidly back at the time of the collision; and that the tug could stop in 300 feet by merely shutting off the power without reversing,—it is for the jury to pass on the question of plaintiff's contributory negligence.—*Fitzsimmons v. McConnell*, 7 N. Y. S. 869.

Commission.

Of executors, etc., see *Executors and Administrators*, 8-10.

real-estate agent, see *Factors and Brokers*.

Common Carrier.

See *Carriers*.

Complaint.

See *Pleading*, 1.

COMPOUNDING FELONY.

What constitutes.

1. A promise by a father to repay money embezzled by his son is not in itself an agreement to compound a felony.—*Smith v. Crego*, 7 N. Y. S. 86.

Evidence.

2. In an action on a note, where the defense is made that it was given in consideration of an agreement to compound a felony, statements by the prosecuting attorney, contained in the minutes of the

magistrate who conducted the preliminary examination into the felony, are not admissible to prove such an agreement.—*Smith v. Crego*, 7 N. Y. S. 86.

Conditional Sales.

See *Sale*, 19.

Consideration.

See *Contracts*, 8.

Constable.

See *Sheriffs and Constables*.

CONSTITUTIONAL LAW.

Special laws, see *Bridges*, 2.

Titles of laws.

1. Laws N. Y. 1884, c. 516, is entitled "An act to amend chapter 410 of the Laws of 1882, entitled 'An act to consolidate into one act and to declare the special and local laws affecting public interests in the city of New York,' in relation to the commissioners of accounts, New York city." The amended act was virtually a charter of the city, being an act to consolidate all the special and local acts by which the government of the city was carried on, and from which its various departments derived their power, and the law of 1884 was simply an amendment of this. *Held*, that the title of the law of 1884 was sufficient.—*In re McAdam*, 7 N. Y. S. 454.

Retrospective laws.

2. Code Civil Proc. N. Y. § 401, provided that "if after a cause of action has accrued against a person he departs from and resides without the state, or remains continuously absent therefrom for the space of one year or more, the time of his absence is not a part of the time limited for the commencement of the action." After an action had been commenced, but before trial, the section was amended by the act of June 4, 1888, so as to require the debtor not only to be a non-resident of the state, but to be absent therefrom. *Held*, that as the effect of the application of the amendatory act to the pending action would be to deprive the plaintiff of a cause of action which was valid when the action was commenced, the amended statute could not operate retroactively without violating the constitution of the United States, prohibiting the states from passing laws impairing the obligations of contracts.—*First Nat. Bank v. Bissell*, 7 N. Y. S. 58.

Due process of law.

3. Where a city council has granted a permit to build frame buildings within the

fire limits, and excavations for the cellars have been made, and materials contracted for, and partly delivered, and the work of building is in progress, a resolution of the council, rescinding its former action, without notice to defendant or opportunity given him to be heard, is, in the absence of any public necessity for such action, void, as taking property without due process of law.—*City of Buffalo v. Chadeayne*, 7 N. Y. S. 501.

4. Code Civil Proc. N. Y. §§ 856, 857, authorizing a judge, on proof by affidavit that a witness refuses to answer a legal question, to commit him to jail by warrant, are not unconstitutional as depriving of liberty without due process of law, in that the proceeding is *ex parte*, and no notice is required.—*In re McAdam*, 7 N. Y. S. 454.

Police power.

5. The authority conferred upon the board of electrical control in the city of New York by Laws 1887, c. 716, § 4, to grant or refuse permits for the continuance of electrical conductors above ground, where no subways have been provided therefor, is a valid exercise of the police power, to the extent of regulating the continuance of such conductors as have become dangerous by reason of defective insulation.—*United States Illuminating Co. v. Grant*, 7 N. Y. S. 788.

Unusual punishments.

6. Laws N. Y. 1888, c. 489, § 5, provides: "The punishment of death must in every case be inflicted by causing to pass through the body of the convict a current of electricity of sufficient intensity to cause death, and the application of such current must be continued until such convict is dead." *Held*, that where a person sentenced to death under this law assails it on *habeas corpus* as contravening the prohibition by the state constitution of cruel and unusual punishments, the burden is on him to prove beyond doubt that such punishment is cruel and unusual in order to overcome the presumption of the constitutionality of the law.—*In re Kemmler*, 7 N. Y. S. 145.

7. The burden of proving that Laws N. Y. 1888, c. 489, providing that the death penalty shall be inflicted by means of electricity, violates the constitutional prohibition of "cruel and unusual punishments," is on him who assails the law on that ground.—*People v. Durston*, 7 N. Y. S. 813.

8. Where the validity of Laws N. Y. 1888, c. 489, providing that the death penalty shall be inflicted by means of electricity, is assailed on the ground that the constitutional prohibition of "cruel and unusual punishments" has been violated, evidence *aliunde* the statute will not be received; but it will be conclusively presumed that

the legislature had ascertained the facts necessary to determine that death by the mode prescribed was not a cruel punishment.—*People v. Durston*, 7 N. Y. S. 818.

CONTEMPT.

Commitment for, see *Constitutional Law*, 3, 4.

To enforce payment of costs, see *Divorce*, 1.

What constitutes.

1. An order was entered restraining certain officers and members, including appellant, from disposing of the property of their corporation, and was served on the president in the presence of appellant, who had notice of the order and its contents. Afterwards, appellant delivered a deed of conveyance of the property described in the order. *Held*, that appellant was guilty of contempt, and was properly fined \$250 and committed to jail for six months.—*People v. Barnes*, 7 N. Y. S. 802.

2. On an examination of a judgment debtor in supplementary proceedings, it appeared that, as next of kin, he had obtained letters of administration on his son's estate, and had, under Code Civil Proc. N. Y. § 1902, instituted proceedings against a railroad company for the killing of his son. An order was made enjoining the judgment debtor from transferring his property, which order was to continue "until further order in the premises." *Held*, that the judgment debtor was guilty of a contempt in afterwards assigning "all his interest of, in, and to the estate of his deceased son," as the necessary effect of the transfer was to impair and prejudice the remedies of the creditor.—*Wynkoop v. Myers*, 7 N. Y. S. 898.

Power to punish.

3. Under Code Civil Proc. N. Y. § 2285, relating to contempts, which provides that, "when the misconduct proved consists of an omission of an act or duty which it is yet in the power of an offender to perform, he shall be imprisoned until he has performed it and paid the fine," defendants, who willfully disobey a subpoena and order requiring the production of certain books, cannot be imprisoned for contempt upon the production of the books before the final order committing them is made.—*Fenlon v. Dempsey*, 7 N. Y. S. 435.

4. Where a judgment debtor is guilty of contempt in transferring his interest in the estate of his deceased son, in violation of an injunction, and there has been no settlement of the son's estate in the surrogate's court, and the amount which the judgment debtor would receive therefrom is uncertain, but a substantial injury has been done the creditor by the assignment,

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the court will, in the absence of a certain measure of damages, adopt the course allowed by Code Civil Proc. N. Y. § 2284, and impose a fine of \$250, and costs.—*Wynkoop v. Myers*, 7 N. Y. S. 898.

Procedure.

5. Under Code Civil Proc. N. Y. §§ 856, 857, authorizing the judge, on proof by affidavit that a witness refuses to answer a legal question, to commit him to jail by warrant, specifying the cause of commitment, etc., the fact that notice of the application was given, and an order to show cause granted, does not require a decision evidenced by an order in writing, as the statute does not require notice or rule to show cause, and such procedure is a mere nullity.—*In re McAdam*, 7 N. Y. S. 454.

CONTINUANCE.

Costs.

1. Where an application for postponement of trial is granted, with an order that plaintiff indemnify defendant for costs in preparation for trial, such order includes witness fees paid out, which were rendered ineffectual by the postponement, and also fees paid witnesses who did not attend court, where the latter cannot be recovered back.—*Inderlied v. Whaley*, 7 N. Y. S. 74.

2. Under Code Civil Proc. N. Y. § 3255, providing that it may be required as a condition to granting an adjournment of a trial that the adverse party shall be paid "a sum not exceeding \$10, * * * besides the fees of his witnesses, and other taxable disbursements, already made or incurred, which are rendered ineffectual by the adjournment," the court has no power to impose payment of a gross sum, as \$50 "for costs and expenses," as a condition.—*Kennedy v. Wood*, 7 N. Y. S. 90.

Conditions of granting.

8. Where illegal conditions of adjournment are imposed, an appeal lies, and the right thereto is not waived by performance of such conditions under protest.—*Kennedy v. Wood*, 7 N. Y. S. 90.

CONTRACTS.

See, also, *Account Stated; Assignment; Assignment for Benefit of Creditors; Bond; Carriers; Covenants; Frauds, Statute of; Fraudulent Conveyances; Guaranty; Insurance; Landlord and Tenant; Marine Insurance; Maritime Liens; Mechanics' Liens; Negotiable Instruments; Partnership; Pledge; Principal and Agent; Sale; Specific Performance; Usury; Vendor and Vendee.*

Actions on, see *Pleading*, 19.

Of corporations, see *Corporations*, 7.

Requisites—Meeting of minds.

1. Where the holders of a note agree with the indorser to accept a certain sum in full of their claim against it, and it appears that the intention of the holders was to release the indorser, but to reserve the right to collect the balance of the note from the maker, while the indorser intended to compromise its liability, and repossess itself of the note, there is no contract between the parties, and payment of the sum agreed on is not an accord and satisfaction as to either indorser or maker.—*Farmer v. Medico-Legal Journal Ass'n*, 7 N. Y. S. 322.

Validity.

2. Consolidation Act N. Y. § 85, provides that any person violating a city ordinance shall be deemed guilty of a misdemeanor. An ordinance of the city of New York prohibits the erection of an awning across the sidewalk. *Held*, that plaintiff, who had erected an awning for defendant in violation of the ordinance, could not recover either on the illegal contract, or on a *quantum meruit*.—*Brinkman v. Eisler*, 7 N. Y. S. 198.

Consideration.

3. Where plaintiff was employed by defendants, at a salary of \$1,200 a year, to teach a class of a certain number of students, and defendants afterwards increased the size of the class, agreeing to give plaintiff additional pay, plaintiff is entitled to recover such additional pay, the extra work being sufficient consideration for the agreement to pay it.—*Freeland v. Bacon*, 7 N. Y. S. 674.

Public policy.

4. An agreement or arrangement to bring about the combination of all the firms and corporations engaged in sugar refining in the United States, and place their affairs in the hands of a board, which is to have control of the business, plainly contemplates the removal of competition, and the advancement of prices of a necessary of life, though such objects be not expressed by its terms; and such a combination is unlawful and criminal, under Pen. Code, § 168, subd. 6, making it a misdemeanor for two or more persons to conspire to commit any act injurious to trade or commerce.—*People v. North River Sugar Refining Co.*, 7 N. Y. S. 408 *

5. The complaint in an action for breach of a covenant not to sell asphalt for pavements and blocks, except to certain persons in certain cities, does not show *prima facie* that the contract is void as tending to create a monopoly, or to enhance the price of asphalt pavements.—*Barber Asphalt Paving Co. v. Brand*, 7 N. Y. S. 744.

Construction.

6. Where plaintiff contracted to do "all the excavating" in building a house for a certain sum, and upon discovering rock it was agreed that the expense of blasting it should be borne by him and defendants equally, the settlement was a fair one, and he is entitled to recover the amount agreed on in addition to the contract price, as the term "excavating" does not necessarily include blasting.—*Hellwig v. Blumenberg*, 7 N. Y. S. 746.

7. One insurance company passed under control of another by virtue of a contract whereby the latter agreed to fulfill contracts entered into by the former with policy-holders, "to the same extent and in the same manner as if no change * * * should take place." *Held*, that this was not a contract to pay in any event what might be due on the policies, but to fulfill the contracts the same as if no change had occurred, and that a receiver of the former company could not sue on a guaranty of such contract without showing that the former company would have been solvent if the consolidation had not occurred, or that the failure of policy-holders to obtain redress resulted from the mismanagement of the other company.—*Pierson v. Cronk*, 7 N. Y. S. 578.

8. A contract by which a contractor, who is about to extend a station platform for a street-railway company, agrees to indemnify the company for "any damages arising from injuries sustained by mechanics, laborers, or other persons, by reason of accidents or otherwise," does not require him to reimburse the company for damages paid for the death of one of the contractor's employes who was killed by the negligent operation of the company's engine.—*Manhattan Ry. Co. v. Cornell*, 7 N. Y. S. 557.

Performance.

9. Where plaintiff tenders performance of a contract, and demands performance by defendant, and states that it would be satisfactory if defendant closed the matter up in a few days, but immediately afterwards again tenders performance, there is no such extension of time as involves either a withdrawal of plaintiff's tender or waiver of defendant's default.—*Hogan v. Burton*, 7 N. Y. S. 723.

Actions on contracts.

10. Plaintiff sought the recovery of money which he alleged he had loaned to a corporation through F., its president. The latter claimed that the money was advanced in pursuance of an agreement to purchase of him a controlling interest in the stock of the corporation, and that, plaintiff not being able to raise the required amount, the arrangement was abandoned.

and a settlement was had. A receipt in full of all plaintiff's claims against the president was shown. Plaintiff denied that the receipt was given for any part of the money sought to be recovered, but he was not corroborated; and, while F.'s character was impeached, his testimony was corroborated by other witnesses. It also appeared that subsequent to the alleged loan a meeting of the trustees of the corporation was held, at which plaintiff, who was a trustee, was present, and negotiations were entered into by a third party to secure control of the corporation, and pay its debts; that a list of the debts of the corporation was handed to such third party, in which no claim was mentioned as due to plaintiff; that the latter asserted no such claim; and that the negotiations were completed in reliance upon such list. *Held*, that a judgment for plaintiff could not be sustained.—*Kraft v. Coykendall*, 7 N. Y. S. 140.

11. Plaintiff made contracts with defendants to deliver them merchandise, and it was stipulated, as a condition of the shipment, that defendants should furnish letters of credit to plaintiff to secure the price, and two letters of credit were furnished under the first order, and shipments made. These letters of credit were afterwards withdrawn, and none others issued. *Held*, that defendants failed to show performance of the contracts on their part, and their counter-claims of damages, by reason of plaintiff's neglect to ship the goods, were properly dismissed.—*Zunz v. Heroy*, 7 N. Y. S. 644.

12. A complaint in an action for breach of a covenant not to sell asphalt for pavements and blocks, except to certain persons in certain cities, alleging sales by defendant without any provision that the asphalt should not be used for the specified purposes, that it had been used by defendant's vendee for those purposes, and that defendant had notified plaintiff of his intention to sell more for the same purposes, is not demurrable in that it contains an averment that defendant's vendee knew of defendant's covenant, and purchased subject thereto.—*Barber Asphalt Paving Co. v. Brand*, 7 N. Y. S. 744.

13. Where plaintiff's assignor entered into a contract with defendant in his own name, and assigned all his interest to plaintiff, it is immaterial, in an action for breach of a covenant, that he referred to himself in the contract as representing a certain company, which is not made a party to the action.—*Barber Asphalt Paving Co. v. Brand*, 7 N. Y. S. 744.

14. Even if the company were the principal, an averment in the complaint that certain persons, whom it may be fairly implied constituted the company, assigned all

their interests in the contract to plaintiff, sufficiently shows that plaintiff is vested with the company's interest.—*Barber Asphalt Paving Co. v. Brand*, 7 N. Y. S. 744.

Contributory Negligence.

See *Bridges*, 1; *Horse and Street Railroads*, 4; *Negligence*, 9-11.

Conversion.

Of goods, see *Trover and Conversion*, 1.

Conveyances.

See *Deed*; *Fraudulent Conveyances*; *Mortgages*; *Sale*; *Vendor and Vendee*.

CORPORATIONS.

See, also, *Banks and Banking*; *Carriers*; *Horse and Street Railroads*; *Insurance*; *Municipal Corporations*; *Railroad Companies*.

Actions against directors, see *Deposition*, 2. Corporate acts, see *Pleading*, 5. Creation, see *Associations*, 1, 2.

Liability of trustee.

1. Where a corporation was formed to succeed a firm which had previously carried on the same business, and the firm turned over no property to the corporation, and its book-keeper is employed to represent and keep defendant, a trustee of the corporation, posted, payment by it to defendant of the firm's debts to him is a misappropriation of its funds, and defendant is properly required to account therefor.—*Rudd v. Robinson*, 7 N. Y. S. 535.

2. He is also properly required to account for illegal interest received by him as a bonus on advances made by him to the corporation.—*Rudd v. Robinson*, 7 N. Y. S. 535.

3. He is also properly required to account for a share in profits received by him on purchases and sales, made by the corporation with moneys advanced by him, in excess of the amounts so advanced, with legal interest.—*Rudd v. Robinson*, 7 N. Y. S. 535.

4. Laws N. Y. 1858, c. 314, enacts that a receiver may "treat as void, and resist, all acts done, transfers and agreements made, in fraud of the rights of any creditor." § 3 Rev. St. N. Y. (6th Ed.) 143, provides that chattel mortgages shall be void, as against subsequent *bona fide* purchasers and mortgagees, unless legally filed, where possession is not taken at or near the time when the mortgage is given. *Held*, that where a chattel mortgage was given by a corporation to defendant, its trustee, and was not filed until the property had been almost all

disposed of, and possession was not taken at or near its date, defendant was liable to account for the property, in an action against him by a receiver.—*Rudd v. Robinson*, 7 N. Y. S. 585.

5. But he may retain moneys refunded to him in lieu of loans made by him to the corporation, in good faith.—*Rudd v. Robinson*, 7 N. Y. S. 585.

6. He is not liable to account for moneys paid by the corporation to other creditors on obligations on which he was liable as indorser.—*Rudd v. Robinson*, 7 N. Y. S. 585.

Contracts.

7. The action of the trustees and stockholders of a company in transferring its capital stock to the persons in control of a combination of all the corporations engaged in the same business, thereby placing the control of its business in the hands of such persons, being in conformity with the provisions of the agreement for the formation of such combination, makes the corporation, as such, a party to the combination, though the agreement was not signed by it.—*People v. North River Sugar Refining Co.*, 7 N. Y. S. 406.

Actions.

8. An action against a domestic corporation by an indorser of its accommodation paper, to recover for payment of protested notes, is an action to recover damages for non-payment, within the meaning of Code Civil Proc. N. Y. § 1778, providing that in an action against a foreign or domestic corporation, to recover damages for non-payment of a promissory note, unless defendant serves with a copy of his answer or demurrer a copy of an order of the judge directing that the issues presented by the pleadings be tried, plaintiff may take judgment, as in case of default in pleading, at the expiration of 20 days.—*Ford v. Binghamton Hydraulic Power Co.*, 7 N. Y. S. 714.

9. The receiver of a corporation in which plaintiff was a stockholder refused her request to sue defendants for an injury to the rights of stockholders, and plaintiff herself brought the suit, making the receiver a party. The latter appeared and answered, asking a dismissal of the action, with costs, but served no answer seeking affirmative relief on the principal defendants. *Held*, that plaintiff might discontinue the action before entry of judgment without notice to the receiver, whether or not a new action would be barred by limitation.—*Beadleston v. Alley*, 7 N. Y. S. 747.

Members and stockholders.

10. Where there is an agreement between the stockholders of a corporation and its creditors for reorganization of the company, and the issue of new stock in lieu of

the old, on condition that the old stockholders pay an assessment sufficient to discharge the floating debt, and another corporation is designated to make the assessment and distribute the stock, it has no arbitrary power to fix the assessment, but is charged with a trust duty, and the stockholders may enjoin the distribution of the stock until the determination of their rights under the agreement.—*Gernsheim v. Olcott*, 7 N. Y. S. 872.

Liabilities.

11. A book-keeper, having no other duties than such as usually pertain to that position, is a "servant," within Laws N. Y. 1848, c. 40, § 18, making stockholders of a corporation liable personally for wages due its laborers, servants, and apprentices.—*Chapman v. Chumar*, 7 N. Y. S. 230.

Dissolution.

12. Where a corporation becomes a party to a combination of all the firms and corporations in the United States, engaged in sugar refining, for the purpose of removing competition, it is liable to dissolution, under Code Civil Proc. § 1798, providing that the attorney general may bring an action against a corporation to annul its charter upon the ground that it has violated any provision of law whereby it has forfeited its charter, or become liable to be dissolved by the abuse of its powers.—*People v. North River Sugar Refining Co.*, 7 N. Y. S. 406.

13. Where a corporation transfers its capital stock, and thereby the control of its business, to persons in control of a combination of all the corporations engaged in the same business, the corporation offends against the provisions of the act under which it was created, and becomes liable to an action for its dissolution, as provided by Code Civil Proc. N. Y. § 1798, subd. 1.—*People v. North River Sugar Refining Co.*, 7 N. Y. S. 406.

Foreign corporations—Service.

14. Under Code Civil Proc. N. Y. § 423, subd. 8, providing that in the absence of the principal officers of a foreign corporation service may be made on a managing agent "within the state," service on the general manager of a foreign corporation, while within the state temporarily, and not performing the duties of his office, is sufficient.—*Porter v. Sewall Safety Car-Heating Co.*, 7 N. Y. S. 166.

COSTS.

In divorce suit, see *Divorce*, 1.

On granting continuance, see *Continuance*, 1, 2.

Who liable, see, *Assignment for Benefit of Creditors*, 2.

Right to costs.

1. In an action to declare unconstitutional an act to establish an electric light plant in the city of Dunkirk, the city, the mayor, the council, and the board of water commissioners were defendants, and made four separate appearances. There was nothing to show that the three first-named defendants represented any other interest than that of the city; but it was shown that the water commissioners were accustomed to be represented in public matters by their own attorney, and that they sometimes held interests antagonistic to the city. *Held*, that an order taxing four bills of costs against plaintiff, as a condition of his discontinuing the action, would be modified so as to tax only two bills against him. — *Hequembourg v. Bookstaver*, 7 N. Y. S. 217.

2. The criterion to determine whether a party is entitled to costs under Code Civil Proc. N. Y. § 8251, providing that the successful party on a motion for a new trial on a "case" shall have costs in the same sum as on appeal, is whether the motion is made on a "case;" and where neither the order to show cause on which a motion for a new trial was made, nor any of the papers used on the motion, are presented to the court on appeal from an order resetting costs, a recital therein that the motion made, and which was decided, was for a new trial on a "case," is conclusive. — *Atkinson v. Truesdell*, 7 N. Y. S. 801.

3. Where, in an action for damages for the maintenance of an alleged nuisance on defendant's land, consisting of noises which rendered plaintiff's houses uninhabitable, there are no allegations of trespass on plaintiff's land, or injury to the freehold, and case would have been the proper remedy before the adoption of the Code, a claim of title to land is not in issue, within Code Civil Proc. N. Y. § 8228, subd. 1, providing that plaintiff is entitled to costs of course on the rendering of a final judgment in his favor in an action triable by jury, in which a claim of title to land arises on the pleadings, as plaintiff need only prove possession. — *Quinn v. Winter*, 7 N. Y. S. 755.

4. Plaintiff's allegation that she was the owner of the houses, and defendant's joinder therein, did not raise the issue of title to land, as such allegation was not necessary to enable plaintiff to sue, and need not be proved. — *Quinn v. Winter*, 7 N. Y. S. 755.

5. An appeal lies from an order denying a statutory right to costs. — *Quinn v. Winter*, 7 N. Y. S. 755.

6. Code Civil Proc. N. Y. § 8229, provides that where, in an action against two or more defendants, plaintiff is entitled to costs against one or more, but not against

all of them, none of defendants are entitled to costs of course. *Held*, that where two defendants have united in one answer, and judgment has been rendered against one and in favor of the other, the successful defendant is not entitled to have the costs of trial taxed in his favor. — *Kane v. Metropolitan El. Ry. Co.*, 7 N. Y. S. 658.

7. Even if the trial court has power to allow costs in proceedings to condemn a right of way, under Code Civil Proc. N. Y. § 8240, as the decision of that matter is in its discretion, it will not be reviewed on appeal, in the absence of abuse of such discretion. — *In re Union El. R. Co.*, 7 N. Y. S. 858.

Who liable.

8. In an action by the receiver of a corporation, to charge defendant, as trustee of the corporation, with moneys unlawfully received and appropriated by him, it is improper to direct the recovery of costs by plaintiff, and award an additional allowance, on an interlocutory judgment requiring the trustee to account; Code Civil Proc. N. Y. §§ 8228, 8230, 8258, limiting the recovery of costs in such a case to final judgment. — *Rudd v. Robinson*, 7 N. Y. S. 585.

Security for costs.

9. As the municipal court of Buffalo is not a court of record, it cannot, under Code Civil Proc. N. Y. § 8268, require non-resident plaintiffs to give security for costs. — *Longrill v. Downey*, 7 N. Y. S. 508.

Taxation.

10. It is within the discretion of the court to have a taxation of costs opened in order that an application for an extra allowance may be made. — *Thompson v. St. Nicholas Nat. Bank*, 7 N. Y. S. 491.

Witness fees.

11. Under Code Civil Proc. N. Y. § 8267, providing that witness fees cannot be allowed without an affidavit stating the number of days of actual attendance, and the distance for which travel fees are allowed, affidavits failing to state the distance the witnesses severally resided from the place of trial are insufficient. — *Inderlied v. Whaley*, 7 N. Y. S. 74.

Costs on appeal.

12. Where two defendants appeal on the same set of papers, and the judgment is affirmed as to one and reversed as to the other, but there is no proof that the successful defendant paid or incurred any part of the expense, and his appeal could have been just as effectively presented in a less expensive manner, no disbursements for printing or for stenographer's minutes will be taxed in his favor. — *Kane v. Metropolitan El. Ry. Co.*, 7 N. Y. S. 658.

13. In such a case, however, the success-

ful defendant is entitled to his costs before the argument, and for the argument on appeal.—*Kane v. Metropolitan El. Ry. Co.*, 7 N. Y. S. 658.

Counsel.

See *Attorney and Client*.

Counter-Claim.

See *Set-Off and Counter-Claim*.

County Judge.

Powers of, see *Injunction*, 1.

COURTS.

See, also, *Justices of the Peace*.

Jurisdiction to enjoin action for infringement of patent, see *Patents for Inventions*, 8.

State courts—Exclusive jurisdiction.

1. Laws N. Y. 1884, c. 202, relating to selling milk diluted with water, provides that "courts of special sessions shall have jurisdiction of all cases arising under this act, and their jurisdiction is hereby extended so as to enable them to enforce the penalties imposed by any or all of the sections hereof." *Held*, that courts of special sessions are not given exclusive jurisdiction of cases arising under the act.—*People v. Harris*, 7 N. Y. S. 778.

—Of inferior jurisdiction.

2. In the absence of any statute depriving district courts of jurisdiction in cases where the sheriff is a party, they have jurisdiction in an action against him for the recovery of a chattel; the same being expressly conferred by Code Civil Proc. N. Y. § 8215, providing that each district court of the city of New York has jurisdiction of an action in which a justice of the peace has jurisdiction, as prescribed in sections 1737, 2861–2863, as subdivision 7 of section 2863 gives justices jurisdiction of actions for the recovery of chattels where the value does not exceed \$200.—*Price v. Grant*, 7 N. Y. S. 904.

3. The fact that section 2865, which gives justices' courts jurisdiction in actions against county officers, is not made applicable to district courts, does not deprive the latter of jurisdiction in actions of replevin where a sheriff is a party.—*Price v. Grant*, 7 N. Y. S. 904.

Conflicting state and federal jurisdiction.

4. A state court is without jurisdiction or power to interfere with a decree of foreclosure, made by the circuit court of the United States against a railroad company,

where the railroad was within the jurisdiction of the court making the decree, and all the parties in interest were before it.—*Gernsheim v. Olcott*, 7 N. Y. S. 872.

COVENANTS.

Running with land.

1. The expression, in a deed granting a right of way, "said lane not to be incumbered or built upon by either party," is a covenant with both parties, running with the land, and passes to a subsequent grantee without special assignment.—*Dexter v. Beard*, 7 N. Y. S. 11.

2. The fact the predecessors of defendant have violated a covenant running with the land, not to incumber or build upon a certain lane, does not relieve defendant of his obligations under the covenant.—*Dexter v. Beard*, 7 N. Y. S. 11.

CRIMINAL LAW.

See, also, *Bail; Indictment and Information; Witness*.

Particular crimes, see *Assault and Battery; Burglary; Disorderly Conduct; Larceny; Prize Fighting; Robbery*.

Evidence—Character.

1. A witness called to testify to the previous good character of a person accused of larceny may be asked, on cross-examination, what case he had heard of defendant's being connected with some time before, referring to some criminal prosecution.—*People v. Watson*, 7 N. Y. S. 582.

Identification—Sufficiency of evidence.

2. Defendant was arrested for robbing complainant, the arrest being made on a description given by complainant. On being confronted with defendant, complainant declared that he was the man, but afterwards said that he had a doubt. After two days spent with a detective, looking for a man whose appearance would agree with his recollection of the man who robbed him, complainant again saw defendant, and then stated that after calm reflection he thought defendant was the man who had robbed him. *Held*, that the identification was not sufficient.—*People v. Smith*, 7 N. Y. S. 841.

Defendant's failure to testify.

3. An instruction that defendant has the right to testify in his own behalf, but that the law expressly provides that no presumption adverse to him is to arise from his failure to do so, and the fact that he does not avail himself of this privilege should not be permitted to prejudice him with the jury, is sufficient for the protec-

tion of defendant's rights in this respect.—*People v. Watson*, 7 N. Y. S. 533.

Verdict—Evidence.

4. Defendant and two others were indicted for robbery. There was evidence that while in defendant's saloon the prosecuting witness was pushed and held down by all three, and that his money was forcibly taken from his trousers pocket by defendant; the two others all the while assisting. Defendant's evidence was to the effect that, on the refusal of the prosecuting witness to pay for his drinks, he was ejected from the saloon; and that he was not pushed down, nor in any way assaulted, further than being shaken by defendant, who took hold of the lapels of his coat, on his refusal to pay for the drinks. *Held*, that a verdict convicting defendant, and acquitting his two co-defendants, was contrary to the evidence, since that against defendant was precisely the same as against the others; and, if the two co-defendants were innocent, defendant could not have been guilty.—*People v. Massett*, 7 N. Y. S. 889.

CUSTOMS DUTIES.

Rights of importers—Illegal seizure.

1. Where the importer of articles which are not dutiable, demands their entry, the collector should grant a permit for their landing, under Rev. St. U. S. § 2826, and seizure of the goods by him, and sending them to public stores to be disinfected, is unauthorized, and does not render them liable for the expenses incurred thereby.—*Lockwood v. Bartlett*, 7 N. Y. S. 481.

2. Such an act is not authorized by Rev. St. U. S. §§ 4792, 4798, which require customs officers to aid in the execution of the health laws of the state, and authorize collectors, in case a vessel is prevented by the health laws from coming to the port of entry, to grant a permit for unloading the cargo at some other place where the health laws permit, where the goods were discharged at the regular port of entry.—*Lockwood v. Bartlett*, 7 N. Y. S. 481.

3. Where the health officer had not ordered the goods to be seized and disinfected, the collector, and all persons detaining the goods for the payment of the unauthorized charges, are liable therefor in damages.—*Lockwood v. Bartlett*, 7 N. Y. S. 481.

4. Defendants, who detained the goods, claiming a lien for disinfecting them, after permits for their delivery had been issued, cannot allege, in an action for such detention, that they had no control of the goods because they were in bonded warehouses, especially as the goods, not being dutiable, were not held as bonded goods.—*Lockwood v. Bartlett*, 7 N. Y. S. 481.

DAMAGES.

Building railroad in street, see *Eminent Domain*, 6, 7.

In action for false imprisonment, see *False Imprisonment*, 7.

Measure of, see *Breach of Marriage Promise*, 7, 8.

Proximate and remote cause.

1. Defendant erected a shanty, of pine boards, close to plaintiff's building; the intervening space being insufficient to allow a person to pass through. The shanty contained a small iron stove, in which was burned soft coal; and oil cans, waste, and oil lamps were kept in the shanty. The shanty caught fire and burned; the flames being communicated to plaintiff's premises, which were damaged. There was no direct evidence as to the origin of the fire. *Held*, that the burning shanty was the direct and proximate cause of the damage to plaintiff's premises.—*Van Fleet v. New York C. & H. R. R. Co.*, 7 N. Y. S. 636.

Measure for breach of contract.

2. Where plaintiff contracted to deliver a quantity of hops to defendants and the latter refused to receive them, but plaintiff made no effort to sell the hops except to one person, and sold them at private sale, and there is no evidence that the price was a fair one, such resale will not fix the measure of damages to be recovered of defendants.—*Case v. Simonds*, 7 N. Y. S. 258.

Measure for tort.

3. In an action for personal injuries, plaintiff may recover, not only for the injury suffered up to the time of the trial, but for what will probably afterwards follow.—*McSwyny v. Broadway & S. A. R. Co.*, 7 N. Y. S. 456.

Excessive damages.

4. Where the evidence tends to show that plaintiff suffered permanent physical and mental injury in consequence of defendant's negligence, a verdict for \$5,000 damages will not be set aside as excessive.—*Kennedy v. Rochester C. & B. R. Co.*, 7 N. Y. S. 231.

5. In an action for personal injuries, a verdict for \$8,000 was not excessive where plaintiff's face was crushed, his lower jaw made immovable, and he was rendered a cripple and invalid for life.—*Oties v. Cowles Electric Smelting & Aluminum Co.*, 7 N. Y. S. 251.

6. In awarding damages for personal injury, the best criterion is the average amount awarded for injuries of a like nature and extent; and, where the verdict largely exceeds this average, it will be set aside, unless plaintiff consents to its reduction.—*Lockwood v. Twenty-Third St. Ry. Co.*, 7 N. Y. S. 668.

7. A verdict for \$18,000 for injuries to a man in the prime of life, resulting in the amputation of a leg and the loss of the use of an arm, is not excessive, or such as to suggest prejudice, partiality, or corruption of the jury.—*Murray v. Brooklyn City R. Co.*, 7 N. Y. S. 900.

Evidence.

8. In an action for injuries received by plaintiff by being thrown from defendant's car, medical testimony on the condition of plaintiff's left arm was properly admitted, where it was shown that, in attempting to keep on the car, plaintiff caught hold of the rail with his left hand, and that his arm was soon after afflicted with paralysis, though nothing was the matter with it before.—*Murray v. Brooklyn City R. Co.*, 7 N. Y. S. 900.

Pleading and proof.

9. The testimony of plaintiff as to the difference between the wages earned by him before and after an injury sued for was admissible, under the averments of the complaint, that "in consequence of the injury he had been unable to labor, and subject to great expense, and otherwise injured, to his damage in the sum of \$5,000."—*Cleveland v. New Jersey Steam-Boat Co.*, 7 N. Y. S. 28.

10. In an action for personal injuries, where the complaint alleges that the injuries rendered plaintiff "incapable of labor," evidence of plaintiff's customary earnings is admissible.—*Popp v. New York Cent. & H. R. R. Co.*, 7 N. Y. S. 249.

Dangerous Premises.

See *Landlord and Tenant*, 1-5; *Negligence*, 5-8.

Death.

As working abatement, see *Abatement and Revival*.

Decedents.

See *Executors and Administrators*.

Transactions with, see *Witness*, 10-16.

DECEIT.

False representations.

1. In an action for false and fraudulent representations on the sale of a horse, it is necessary to prove that defendant knew of the defect, or had reason to believe that it existed.—*Lawton v. Goodrich*, 7 N. Y. S. 76.

2. A finding that a false representation by a purchaser was not relied on by a salesman is contrary to the evidence, when the salesman testifies, without contradiction, that he did rely on it, though it appears

that the salesman's employers made other inquiries before the delivery of the goods.—*Morris v. Wells*, 7 N. Y. S. 61.

Harmless error.

8. In an action to rescind a sale on the ground that it was induced by the fraudulent misrepresentations of the vendee, an erroneous refusal of the referee to find that the misrepresentation was relied on is harmless, where it does not appear that the vendee knew the representation to be false when he made it, or that he made it with intent to defraud.—*Morris v. Wells*, 7 N. Y. S. 61.

Declarations and Admissions.

See *Evidence*, 2-6.

As to boundaries, see *Boundaries*, 1.

Decree.

See *Judgment*.

What is, see *Limitation of Actions*, 2.

DEDICATION.

Extent of right.

1. In an action to restrain defendant from laying railroad tracks in an alleged street of plaintiff, it appeared that a map made by the town-site company, which originally owned the land, showed, along the west side of the street, an open canal, 80 feet wide, which was to be used for private purposes. The canal was never made, and the town-site company subsequently conveyed all its interest in the street to defendant. *Held*, that as plaintiff acquired no rights except such as the town-site company had given the public, and as no adverse user had been shown to modify the terms of the dedication, plaintiff could not restrain defendant's occupation of the 30 feet designated as a canal.—*City of Cohoes v. Delaware & H. Canal Co.*, 7 N. Y. S. 885.

Revocation.

2. In April, 1851, a town-site company authorized its president and agent to agree with defendant's grantor in respect to the location of a railroad. In 1853, with the consent of the town-site company, railroad tracks were laid on an alleged street, occupying 50 feet thereof, and they have been maintained there ever since. Since that time, also, a freight-house has entirely blocked the so-called street at one point. The railroad tracks and the reserved 30 feet for a canal take up the whole width of the street. *Held*, none of the grantees of the town-site company complaining, and no acceptance of the highway by the officers of plaintiff city being shown until 30 years after the occupation of the street for railroad purposes, that this amounted to a

revocation of the dedication made by the town-site company by the designation of the street on its map.—*City of Cohoes v. Delaware & H. Canal Co.*, 7 N. Y. S. 885.

DEED.

See, also, *Covenants; Fraudulent Conveyances; Vendor and Vendee.*

Absolute, as mortgage, see *Mortgages*, 1.

Description, see *Boundaries*, 3.

Estoppel by, see *Estoppel*, 1, 2.

Acknowledgment.

1. A mortgagee who purchases at foreclosure sale under his mortgage, which is valid in equity, though defectively acknowledged, is a purchaser, within 4 Rev. St. N. Y. (8th Ed.) p. 2451, § 137, providing that a deed not duly acknowledged and not attested "shall not take effect, as against a purchaser or incumbrancer, until so acknowledged," and the question of notice is immaterial.—*Mutual Life Ins. Co. v. Corey*, 7 N. Y. S. 989.

2. Where a notary public takes the acknowledgment of a deed outside his own county, and signs as notary only, and at the end of the certificate of acknowledgment, he cannot be regarded as a subscribing witness.—*Mutual Life Ins. Co. v. Corey*, 7 N. Y. S. 989.

— Authority of notary to take.

8. 1 Rev. St. N. Y. (8th Ed.) p. 379, § 14, providing that notaries public may execute the duties of their office at any place within the state, does not apply to their power to take acknowledgments of deeds given by Laws N. Y. 1859, c. 860, which provides that they may take acknowledgments of deeds "in all the cases where the same may now be taken * * * by commissioners of deeds, and under the same rules, regulations," etc., and by Laws 1868, c. 508, which gives them the power "in all cases where justices of the peace or commissioners of deeds" have it; and, the power of those officers to take acknowledgments being then limited to their own counties, a notary has no such power outside the county of his appointment.—*Mutual Life Ins. Co. v. Corey*, 7 N. Y. S. 989.

Construction and effect.

4. A deed made in 1846 had the following clause: "Also a right of way" between the "south line and a line drawn parallel with the north side" of a certain store; "said lane not to be occupied or built upon by either party." The store referred to was built in 1841, and owned by grantor, and bounded the lane, which from its north line to the side of the store was 16 feet wide. There was a hatchway projecting about 5 feet into the lane, leading into the cellar of the store. *Held*, that the expres-

sion "north side of the store" did not mean the north side of the hatchway, and one building where the store stood into the lane 5 feet north of the side of the store to the line of the hatchway will be enjoined.—*Dexter v. Beard*, 7 N. Y. S. 11.

5. Where a grantor executes a deed conveying land in trust for two of his grandsons, in which he directs that if either of them should die under 30 years of age, leaving no child surviving him, his share should be conveyed, assigned, and delivered to his surviving brother, the property on the death of one of the grandsons is to be conveyed directly to the survivor, though he is a minor.—*Draper v. Palmer*, 7 N. Y. S. 614.

6. A deed conveying land in trust for J. and R., in which it was directed that the trust fund should, on the death of either without children, go to the survivor, provided, further, that the trustee should receive the rents and profits of one-half of the trust property, and apply them for the support of J., and that any surplus should be allowed to accumulate for J.'s benefit, and be paid over to him on his becoming 21 years of age. *Held*, that such accumulations vested immediately in J., and became his property, and did not constitute part of the trust fund which, on J.'s death, would go to his surviving brother.—*Draper v. Palmer*, 7 N. Y. S. 614.

Defamation.

See *Libel and Slander*.

Default.

Judgment by, see *Judgment*, 1, 2.

Defective Streets.

See *Municipal Corporations*, 14-17.

DEMURRAGE.

Delay of third persons.

Where judgment has been rendered for demurrage on the ground that the delay was due to defendants' negligence, and it afterwards appears that the delay was due to third persons, and that defendants had stipulated that they should not be liable for demurrage unless the delay was improperly caused by defendants, a rehearing will be granted.—*Van Etten v. Newton*, 7 N. Y. S. 663.

Demurrer.

See *Pleading*, 2, 3.

Deposit.

See *Banks and Banking*, 1-8, 6-9.

DEPOSITARIES.

Liability of depositary.

Where a person claims money in the possession of a depositary of court, and, on receiving notice that it is to be paid out under an order of court, calls at the depositary's office, and attempts to secure a delay, and, on refusal, fails to apply for an order staying proceedings for the payment of the money, he cannot recover of the depositary after it has been paid, though he commenced his action before payment, and his claim is entitled to priority over that paid.—*Swart v. Central Trust Co.*, 7 N. Y. S. 558.

DEPOSITION.

When authorized.

1. Code Civil Proc. N. Y. § 872, subd. 4, and Gen. Rule Prac. N. Y. 88 provide that when the deposition of a party before trial is required, under Code Civil Proc. § 870 et seq., the affidavit to be presented to the judge who grants the order to take the deposition must show that the examination is material and necessary. *Held* that, where the action is to set aside as fraudulent a deed made in 1882, such examination is not shown to be material and necessary by an affidavit that the persons sought to be examined are the only ones having knowledge of the whereabouts of defendant's property at the time of making such affidavit, in 1889; and the order granting the examination will be vacated.—*Swift v. Mayer*, 7 N. Y. S. 680.

Cross-interrogatories.

2. In an action for alleged breach of a contract by a corporation, by discharging plaintiff's assignor from its service, plaintiff sought to charge a director under Laws N. Y. 1875, c. 611, § 21, on the ground that he had signed a report of the corporation containing false representations as to its stockholders and financial condition. The answer alleged that defendant signed the report in the belief that it was true, and that the contract with plaintiff's assignor was annulled, according to its terms, on the ground of his incompetency, at the time of the alleged breach. *Held*, that it was proper to allow cross-interrogatories by plaintiff, on defendant's taking a deposition, as to whether the corporation, at or about the time of the alleged breach, and before the report, had not failed financially, and soon after had a receiver appointed, whether its assets were not then transferred to another company, and whether it did not then discharge all of its employees because of its failure.—*Walton v. Godwin*, 7 N. Y. S. 926.

3. But questions as to whether a portion of such employees were not re-employed by the other company, under the same general manager, and whether deponent and another director, whose business it was to determine such things, had ever decided that certain other employees of the first company were incompetent, are improper.—*Walton v. Godwin*, 7 N. Y. S. 926.

DESCENT AND DISTRIBUTION.

See, also, *Executors and Administrators; Wills.*

Inheritance and legacy taxes.

1. Both real and personal property within this state, devised by a non-resident decedent, dying after the enactment of Laws N. Y. 1887, c. 718, § 1, extending the collateral inheritance tax to all property within this state which shall pass by the will of a non-resident, are subject to the tax.—*In re Vinot's Estate*, 7 N. Y. S. 517.

2. A vested remainder, limited on a life-estate, is subject to the tax.—*In re Vinot's Estate*, 7 N. Y. S. 517.

3. A bequest for maintenance of decedent's burial plot is exempt as funeral expenses.—*In re Vinot's Estate*, 7 N. Y. S. 517.

4. A charitable institution which requires, as a condition of entrance thereto, the payment of an admission fee, and the making of a will by the applicant in its favor, is not an almshouse, within the definition of a "pure charity," so as to exempt a bequest to it from the legacy tax.—*In re Keech's Estate*, 7 N. Y. S. 331.

5. Under Rev. St. N. Y. (7th Ed.) p. 982, § 4, subd. 4, providing that every "house of industry," and "the real and personal property used for * * * purposes belonging to or connected with the same" shall be exempt from taxation, a legacy to such an institution is not subject to the succession tax provided for in Laws N. Y. 1887, c. 718, § 1, since that act excepts "societies, corporations, and institutions now exempted by law from taxation."—*In re Herr's Will*, 7 N. Y. S. 852.

6. A hospital "for the care and treatment of sick and disabled indigent patients" is an almshouse, within the meaning of 1 Rev. St. N. Y. 888, § 4, subd. 4, exempting from taxation the real and personal property belonging to every "poor-house, house of industry, almshouse," etc., so as to exempt a legacy to it from the legacy taxes provided for in Laws N. Y. 1887, c. 718, which exempts therefrom "societies, corporations, and institutions now exempted by law from taxation."—*In re Curtis' Estate*, 7 N. Y. S. 807.

Inheritance and legacy taxes—Recovery of tax erroneously paid.

7. Laws N. Y. 1887, c. 718, directs collateral inheritance taxes to be paid to the comptroller for the benefit of the state. Section 21 requires him to pay them over to the state treasurer. Section 12 provides that when a tax has been erroneously paid to the state treasurer he may, on satisfactory proof made to the comptroller by the county treasurer, refund the money. After money was received by the comptroller and properly paid over to the treasurer, the decree requiring the tax to be paid was reversed. Code Civil Proc. § 1823, authorizes the appellate court, on reversing a judgment, to make restitution of property lost by the judgment. *Held*, that the taxpayer's remedy was under the tax act, and not under the Code.—*In re Howard's Estate*, 7 N. Y. S. 594.

8. The mode of obtaining restitution of a collateral inheritance tax, which was paid under an erroneous decree of the surrogate, is that pointed out by the inheritance tax act (Laws N. Y. 1887, c. 718, § 12,) and not by appeal under Code Civil Proc. § 2587, authorizing the appellate court to enforce the decree appealed from or award restitution, as the case may require, but the decree must be decided erroneous by appeal before restitution can be awarded under the act.—*In re Hall's Estate*, 7 N. Y. S. 595.

Devisees.

See *Wills*.

Actions by, see *Parties*, 3.

Disbarment.

Of attorney, see *Attorney and Client*, 3.

Discharge.

From arrest, see *Arrest*, 4.

Dismissal.

Of complaint, see *Practice in Civil Cases*, 1.

DISORDERLY CONDUCT.

What constitutes.

1. Where the evidence shows that defendant ran through the streets with an open knife in his hand, it is for the jury to say, from all the circumstances, whether his conduct was disorderly within Laws N. Y. 1882, c. 410, § 1458. (consolidation act,) providing that every person in New York city who shall use any threatening behavior, with intent to provoke a breach of the peace, or whereby a breach of the peace may be occasioned, shall be guilty of

disorderly conduct."—*People v. Murray*, 7 N. Y. S. 548.

Power to commit disorderly children.

2. Pen. Code N. Y. § 291, which enumerates various acts and conditions of children for which they may be arrested and committed to any reformatory, and provides that any child coming within the descriptions mentioned may be arrested "as a vagrant, disorderly, or destitute child," was amended in 1886 by omitting the words quoted. *Held*, that a commitment under this section, on a charge of "being a disorderly child," was illegal, as that is not one of the grounds mentioned.—*People v. Mount Magdalen School*, 7 N. Y. S. 737.

3. The provision of section 291, that "whenever any commitment of a child shall * * * be adjudged or found defective a new commitment of the child may be made or directed by the court or magistrate, as the welfare of the child may require," does not authorize another magistrate, almost two years after the commitment, and after a writ of *habeas corpus* has issued, on finding that the commitment was defective, to commit the child for a different offense mentioned in the section, without having the child brought before him, and without any new examination, or legal evidence of what occurred at the former examination.—*People v. Mount Magdalen School*, 7 N. Y. S. 737.

DIVORCE.

Costs—Enforcement by contempt.

1. Code Civil Proc. N. Y. § 1778, provides that when the husband, in a divorce suit, fails to pay any money required to be paid by an order, and it appears to the court that payment cannot be enforced by execution, sequestration, or resorting to his security, he may be punished for contempt. *Held* that, in the absence of affidavits showing that payment cannot be enforced by the other means, the husband will not be punished for contempt in failing to pay costs decreed against him.—*Cockefair v. Cockefair*, 7 N. Y. S. 170.

Counsel fees.

2. Counsel fees will not be allowed a plaintiff who, five years after she has procured a decree for a divorce in another state, brings another action for divorce against the same man, alleging that the judgment in the former action was void.—*Ober v. Ober*, 7 N. Y. S. 848.

Right to assume maiden name.

3. A divorced woman may assume her maiden name, and sue thereunder for breach of marriage promise.—*Rich v. Mayer*, 7 N. Y. S. 69.

Documents.

See *Evidence*, 14-16.

DOMICILE.

What constitutes, see *Attachment*, 1, 2.

Of wife.

A wife who lives apart from her husband for 12 years by mutual consent, during which time their children live with her, and are wholly supported by her, the husband living in another state, and contributing nothing to the support of the wife or children, acquires a domicile in the state where she lives, so that the husband's rights in her property at her decease are governed by the laws of that state, and not of the state where the husband resides.—In re *Florance's Will*, 7 N. Y. S. 578.

Donatio Causa Mortis.

See *Gifts*, 2-4.

DOWER.

Right to dower.

1. It is improper, as part of dower, to give a right of way over land not assigned to the widow but belonging to an heir, or to burden such land with the right of the widow to use water-pipes laid thereon.—*Price v. Price*, 7 N. Y. S. 474.

2. Dower cannot be assigned in a burial lot.—*Price v. Price*, 7 N. Y. S. 474.

Devise in lieu.

3. A devise of one-third of the rents and profits of land to testator's wife will be deemed in lieu of dower, where it would otherwise partly defeat the disposition made by the will of the rents and profits of the other two-thirds.—*Starr v. Starr*, 7 N. Y. S. 580.

Damages for withholding dower.

4. Under Code Civil Proc. N. Y. § 1600, providing that damages for withholding dower shall, as against any other person than the heir, be computed from the time of demand until trial or application for judgment, not exceeding six years in all, the grantee of the deceased husband cannot, by conveying the land pending an action for such damages, exonerate himself from liability for the value of the use of the premises for the period after such conveyance until the trial.—*Price v. Price*, 7 N. Y. S. 474.

EASEMENTS.

Actions for obstruction, see *Landlord and Tenant*, 8, 9.

Burial rights, see *Cemeteries*, 3-6.

Extinguishment by abandonment.

An easement acquired by grant may be extinguished by actual abandonment for a period less than 20 years.—*Welsh v. Taylor*, 7 N. Y. S. 876.

ELECTIONS AND VOTERS.

Election in association, see *Associations*, 1.

Qualification of voters.

1. Where a person who is not shown of record to have been convicted of a crime takes the oath prescribed by statute, the inspectors must receive his vote, notwithstanding anything they may believe or know of his want of qualification.—*People v. Bell*, 7 N. Y. S. 701.

Powers of inspectors.

2. Inspectors of elections exercise ministerial and not judicial powers, and *mandamus* will lie against them to certify election returns, as prescribed by Rev. St. N. Y. (7th Ed.) p. 388, art. 4, though some of the votes may have been illegally cast.—*People v. Bell*, 7 N. Y. S. 701.

EMINENT DOMAIN.

Procedure.

1. Laws N. Y. 1850, c. 140, § 13, (3 Rev. St., 8th Ed., p. 1742,) provides that where any railroad company is unable to purchase necessary realty it may acquire title by certain prescribed special proceedings. Section 14 provides that the company may present a petition to the supreme court "signed and verified according to the rules and practice of such court," and stating, *inter alia*, that the company has not been able to acquire title to certain required and described land, and the reason of such inability. There is no rule of the supreme court prescribing how such petitions shall be verified. *Held*, that such a petition might allege the company's inability to obtain title to the land sought to be condemned, on information and belief.—In re *Metropolitan El. Ry. Co.*, 7 N. Y. S. 707.

2. § Rev. St. N. Y. (8th Ed.) p. 1745, § 18, providing that a certified copy of the order confirming the award of appraisers in condemnation proceedings shall be recorded "in the clerk's office of the county in which the land described in it is situated," does not require recording in the book of conveyances, but a recording in the office of the county clerk is a sufficient compliance.—*Morgan v. New York & M. Ry. Co.*, 7 N. Y. S. 781.

3. Where the finding of commissioners appointed in condemnation proceedings instituted by a railroad company was set aside on appeal, a second application for the condemnation of the land to the special

term was a continuance of the original proceeding; and the addition of the receiver of the company, who had been appointed meantime, did not make it necessary to file a new petition, nor give the owners of the land a right to file an answer, which they had waived by proceeding under the original petition without objection.—*Rochester, H. & L. R. Co. v. Hartshorn*, 7 N. Y. S. 279.

4. Laws N. Y. 1850, c. 140, § 15, provides that on presenting a petition for the condemnation of land, with proof of service, all persons affected thereby may show cause against granting the petition. If no sufficient cause is shown the court shall appoint commissioners. *Held* that, where the owners of land made no answer to the petition, and no objection to the proceedings, until after the award of the commissioners, to whose appointment they consented, such objection came too late.—*Rochester, H. & L. R. Co. v. Hartshorn*, 7 N. Y. S. 279.

Compensation.

5. If a railroad company, which has condemned land under the right of eminent domain, elects, after the report of the commissioners, to proceed and procure the confirmation of the report, the relation of vendor and vendee is established, and the company is bound to pay the award; and this rule is not abrogated by Laws N. Y. 1876, c. 198, amending Laws 1850, c. 140, § 18, [8 Rev. St. (8th Ed.) p. 1745,] and providing that, if the company neglects to record the order confirming the award, and to make payment or deposit for 10 days after the date of the order, any party may record a copy of the order, and the moneys directed to be paid shall be a debt against the company, except that the company may abandon the proceedings by filing a notice to that effect within 90 days after written notice of the recorded order, etc.—*Lent v. New York & M. Ry. Co.*, 7 N. Y. S. 729.

Railroad in street.

6. In proceedings to condemn a right of way for a railroad in a street, evidence of damages to adjacent property, caused by the building of the railroad, arising from the fact that the property is used for a particular purpose, is admissible.—*In re Union El. R. Co.*, 7 N. Y. S. 858.

7. Where a railroad company has built a railroad track in a street on which plaintiff's property abuts, permanent depreciation in the value of plaintiff's property cannot be recovered in a common-law action, but he must be limited to a recovery of such temporary damages as have accrued up to the time of the commencement of the action. Following *Pond v. Railway Co.*, 19 N. E. 487; *Hussner v. Railroad Co.*, 21

N. E. 1002.—*Reming v. New York, L. & W. Ry. Co.*, 7 N. Y. S. 516.

EQUITY.

See, also, *Fraudulent Conveyances; Injunction; Mortgages; Partition; Partnership; Quieting Title; Specific Performance; Trusts.*

Jurisdiction.

1. A suit in equity may be brought against an insurance company and the claimant under a policy to establish the right of plaintiff, as against the claimant, to whatever may be due on the policy, leaving the liability of the company to be determined in a subsequent action at law.—*Mahr v. Bartlett*, 7 N. Y. S. 143.

Fraud.

2. Though no trust results in favor of a person paying the money for a lease to a third person, equity will relieve on the ground of fraud, and a complaint is sufficient which avers that plaintiff spent a large sum of money in improving the premises, and that "defendant took the assignment of the lease in trust for the plaintiff, well knowing not only that the moneys expended in procuring the lease, but those for the erection and construction of the buildings, belonged to her."—*Denning v. Kane*, 7 N. Y. S. 704.

Inadequate remedy at law.

8. In an action in equity on a partnership note against the estate of a deceased partner, a complaint, alleging that judgment has been confessed by all members of the firm except the deceased partner, that after its dissolution two members were released, under Code Civil Proc. N. Y. § 1942, providing that a member of a firm after its dissolution may make a composition with a creditor without releasing the other partners, and that execution against the only other surviving partner has been returned unsatisfied, and he is totally insolvent, shows that plaintiff has exhausted his remedy at law, and presents a sufficient case in equity.—*Harbeck v. Pupin*, 7 N. Y. S. 168.

Reformation of contracts.

4. Evidence that plaintiff's purpose in making a contract could not be accomplished unless a clause alleged to have been omitted were inserted, is not sufficient to show such fraud or mistake as to warrant reformation, where plaintiff's husband, who was her agent, testifies that he heard the agreement read, made no objection thereto, and knew that the clause in question was omitted.—*Hirshbach v. Schmalz*, 7 N. Y. S. 877.

5. Evidence of declarations of a grantor before the execution of a deed, tending to establish a boundary other than that

made by the deed, is inadmissible to show grounds for the reformation of the deed, when the proper parties are not before the court for that purpose, and there are no proper averments in the pleadings for such a purpose.—*Harris v. Oakley*, 7 N. Y. S. 282.

Estates.

See *Dower*; *Easements*.

Tenancy by the entirety, see *Husband and Wife*, 1.

ESTOPPEL.

Res adjudicata, see *Judgment*, 12-14.

By deed.

1. Where land was conveyed under an agreement that the grantee should sell the land and pay any surplus above a debt owed by the grantor to the grantee to the former, neither the grantor nor his assignee in bankruptcy could question the regularity of a sale made under such authority, nor disaffirm the conveyance.—*Wilson v. Parshall*, 7 N. Y. S. 479.

2. A grant by one of two tenants in common to a street-railroad company of the right to construct and operate its road in the street, on which the property held in common abuts, creates no easement; and, the grant containing no warranty, the grantor, having afterwards acquired the interest of her co-tenant in the property, is not estopped to sue to enjoin the construction of a switch in front of the property.—*Eldridge v. Rochester City & B. R. Co.*, 7 N. Y. S. 489.

In pais.

3. Where plaintiff was induced to buy land in part by the advice of defendant, and his representation that it was free from incumbrances, such defendant, having purchased a mortgage executed by the former owner of the land, is estopped to deny that the same is unincumbered, though he supposed it to be so when he made such representations to plaintiff.—*Briggs v. Langford*, 7 N. Y. S. 858.

4. Defendant, who has represented to plaintiff that he signed a guaranty, bearing defendant's name, on which representation plaintiff acts, is estopped to deny his liability on the guaranty, though he did not in fact sign it.—*Metropolitan Manuf'g Co. v. McDonald*, 7 N. Y. S. 500.

5. The owners of land agreed with a railroad company, in view of a proposed condemnation of it, and in consideration of a bond of the company to pay the damages awarded in such a proceeding, to permit it to enter and construct its road on the land "required for its right of way and for the construction of its railroad in accordance with its map on file." The company took

possession of the land so described, and built its road thereon. *Held*, that the owners were estopped to object that the land so appropriated was not such as the company had a right to condemn for the purposes for which it was used.—*Rochester, H. & L. R. Co. v. Hartshorn*, 7 N. Y. S. 274.

6. Where, in adjustment of a controversy over property of a testator, the widow agrees with four of the children to relinquish her claim of dower, in consideration that the other parties acknowledge her right to one-third of the gross profits of the land, and thereafter the money is voluntarily paid to and received by plaintiff, under a claim of right, the parties to the agreement are estopped from recovering money respectively claimed or paid under it.—*Starr v. Starr*, 7 N. Y. S. 580.

EVIDENCE.

See, also, *Deposition*; *Witness*.

Admissibility, see *Breach of Marriage Promise*, 2-6; *False Imprisonment*, 5, 6; *Libel and Slander*, 2, 3.

Agreement to compound felony, see *Compounding Felony*, 2.

Aliunde, see *Constitutional Law*, 8.

Burden of proof, see *Appeal*, 20; *Constitutional Law*, 6, 7.

Declarations, see *Mortgages*, 5.

— of vendor, see *Fraudulent Conveyances*, 7, 8.

In action for nuisance, see *Nuisance*, 11-13.

— price of goods, see *Sale*, 15, 16.

— seduction, see *Seduction*.

criminal case, see *Robbery*, 3.

Newly discovered, see *New Trial*, 7, 8.

Of character, see *Criminal Law*, 1.

fraud, see *Fraud*.

partnership, see *Partnership*, 1, 2.

payment, see *Payment*, 1-3.

Parol, see *Bonds*, 4; *Boundaries*, 1.

Pleading and proof, see *Damages*, 9, 10.

Rulings on, see *Appeal*, 29.

Weight and sufficiency, see *Appeal*, 22-23; *Criminal Law*, 2.

Burden of proof.

1. In an action for the value of goods sold, defendants set up for counter-claim a contract for premiums on sales, alleging compliance with the terms of the contract. The replication admitted a contract, but alleged that it contained an express stipulation of forfeiture for the failure of defendants to perform certain conditions, and that defendants had failed as to such conditions. *Held*, that defendants were only required to show general compliance with the terms of the contract, and that the burden was on plaintiff to prove such particular acts of non-compliance on the part of defendants as amounted to the al-

leged forfeiture.—*Enoch Morgan's Sons Co. v. Smith*, 7 N. Y. S. 648.

Declarations and admissions.

2. In an action to recover an alleged deficiency in the accounts of defendant, as cashier of plaintiff, a statement by the court to the jury that it was admitted that at a certain time the cash in defendant's hands was short by a given amount, based on the testimony of two witnesses that in conversations with defendant it was stated that there was such a deficiency, is erroneous.—*Panama R. Co. v. Charlier*, 7 N. Y. S. 538.

3. An account showing that defendant, as cashier of plaintiff, had credited in his favor a certain draft which had been credited in a former account, is not admissible as tending to show a consciousness on his part of a deficit to an amount equal to that of the draft, where it is not shown that such account was made by defendant, or by any one under his direction or in collusion with him, but it appears that he was absent from plaintiff's place of business when such account was rendered.—*Panama R. Co. v. Charlier*, 7 N. Y. S. 538.

4. Statements of accounts tending to show a deficiency in cash accounts made by another person after defendant's alleged defalcation, are not admissible against defendant, even though he were in collusion with such person.—*Panama R. Co. v. Charlier*, 7 N. Y. S. 538.

5. In an action to recover an alleged deficiency in the accounts of defendant, as cashier of plaintiff, letters to defendant, containing statements which it does not appear were authorized or approved by him, are not admissible against him.—*Panama R. Co. v. Charlier*, 7 N. Y. S. 538.

6. In an action by a vendor to recover goods alleged to have been purchased through fraudulent representations, brought against the assignee for the benefit of creditors of the vendees, the declarations of one of the assignors, made before the assignment, are not admissible.—*Morris v. Wells*, 7 N. Y. S. 61.

Res gestæ.

7. Where letters offered in evidence are the declarations of third persons, written long prior to the controversy upon which the action is founded, they are not part of the *res gestæ*, and are properly excluded.—*Frank v. Brewer*, 7 N. Y. S. 182.

8. In an action for personal injuries, declarations by plaintiff made within an hour after the accident, that her head and side pained her, are admissible in evidence when accompanied by marked signs of physical suffering, and do not appear to have been made for the purpose of informing those about her that she was suffering pain in those parts.—*Kennedy v. Rochester C. & B. R. Co.*, 7 N. Y. S. 221.

Opinion evidence.

9. In an action for personal injuries, evidence of one who saw plaintiff four months after her injury, that she was then suffering great pain, is competent.—*McSwyny v. Broadway & S. A. R. Co.*, 7 N. Y. S. 456.

Expert testimony.

10. In an action for personal injuries, a physician can testify as to the probable permanence of the injuries received.—*Oties v. Cowles Electric Smelting & Aluminum Co.*, 7 N. Y. S. 251.

11. In an action for personal injuries, a physician may testify as to whether, judging from the length of time the pain had lasted since the injury, it is "highly probable—reasonably certain—it will continue."—*Popp v. New York Cent. & H. R. R. Co.*, 7 N. Y. S. 249.*

12. In an action for injuries received from the fall of a derrick, evidence of experts as to the proper method of erecting and supporting the mast was properly admitted.—*Oties v. Cowles Electric Smelting & Aluminum Co.*, 7 N. Y. S. 251.

13. In an action for damages to abutting property, caused by operating an elevated railroad, and to enjoin its further use, where expert testimony of the value of the property is given, the opinions of adjoining property owners, not experts, are admissible to show the value of the expert testimony.—*Carter v. New York El. R. Co.*, 7 N. Y. S. 678.

Documents.

14. In an action by a vendor to recover goods alleged to have been purchased through fraudulent representations, brought against the assignee for the benefit of creditors of the vendees, the inventory of the assignors is admissible.—*Morris v. Wells*, 7 N. Y. S. 61.

15. In an action on account, a letter written by a third person, material to the issue, and calculated to prejudice the jury, which is a mere unverified statement, for the admission of which no foundation is laid, is inadmissible, over objection.—*Parsons v. Ramsey*, 7 N. Y. S. 93.

16. Plaintiff sought the recovery of money which he alleged he had loaned to a corporation through F., its president. The latter claimed that the money was advanced in pursuance of an agreement to purchase of him a controlling interest in the stock of the corporation. F. had pledged more than one-half of the entire stock of the corporation for debts, and it was part of the arrangement, as F. testified, that he should obtain stock enough to enable him to transfer a majority of it to plaintiff. *Held*, that the stock transfer book was admissible to show the date of the transfer of stock to F., which he al-

leged he had purchased in pursuance of the agreement.—*Kraft v. Coykendall*, 7 N. Y. S. 140.

Documents—Books of account.

17. Testimony of a witness that he reported to a book-keeper of a corporation only such matters as he knew to be correct, and of the book-keeper that he entered such matters correctly as reported to him, render the entries admissible in evidence in an action by a receiver against a trustee of the corporation of whom the book-keeper is shown to have been a representative.—*Rudd v. Robinson*, 7 N. Y. S. 535.

Parol evidence.

18. A promissory note was given "for the privilege of advertising purposes of one panel, each 7x22 inches, in 15 cars" of a certain railway, but was silent as to how such privilege was to be enjoyed. *Held*, that the note was ambiguous in this respect, and that parol evidence was admissible to explain the ambiguity.—*Chase v. Senn*, 7 N. Y. S. 65.

19. A memorandum for the sale of lumber was as follows: "Sold to B. & K. * * * 100 M. 1-inch shipping culls, to be shipped before July 1st, at \$11.25, they to pay the B. C. railway charges; and 100 M. 1-inch shipping culls, to be shipped after August 25, and before Oct. 1, at \$11; and 100 M. 16½-inch and up wide coffin boards, sound common, seasoned eight months. Terms, two months." *Held*, that evidence was admissible to show the whole contract, as the memorandum failed to fix the price of the last amount of lumber, or the time of delivery, and the language, "Terms, two months," was ambiguous.—*Hurd v. Bovee*, 7 N. Y. S. 241.

20. A memorandum for the sale of lumber provided that it was to be shipped in three lots, "terms, two months." The price for the first two lots to be shipped was named, but not the price for the last lot. *Held*, that evidence that the purchasers were to give their notes for the several deliveries at two months, and evidence of the price of the last lot, did not vary or contradict the terms of the written memorandum.—*Hurd v. Bovee*, 7 N. Y. S. 241.

21. Parol evidence that more was received on a mortgage than its face, and less on a check than its face, is not objectionable as varying written instruments.—*Daragh v. Ross*, 7 N. Y. S. 864.

22. In an action on a note on which is indorsed, "I guaranty the collection of the within note," evidence is not admissible to prove that defendant, at the time of indorsement, verbally warranted that the note was good, and would be paid at maturity.—*Williams v. Aylesworth*, 7 N. Y. S. 111.

23. Where a note payable unconditionally has been given in consideration of an absolute assignment of a claim against third persons, evidence of an oral agreement that the note was not to be operative unless the money was realized on the assignment is inadmissible, such a condition being inconsistent with the writings.—*Isaacs v. Jacobs*, 7 N. Y. S. 66.

24. An admission contained in a letter may be explained by parol evidence.—*Smith v. Crego*, 7 N. Y. S. 86.

Competency and relevancy.

25. In an action for personal injuries, it was competent for plaintiff to prove by her own evidence that her power of motion was not what it previously had been.—*McSwyny v. Broadway & S. A. R. Co.*, 7 N. Y. S. 456.

Materiality.

26. In an action on a promissory note defendant claimed credits for commissions on beer sold him, of 15 per cent., under contract with plaintiff's agent. Plaintiff alleged that the commissions had been paid. When testifying, the agent was asked whether at the time he ceased collecting from defendant there were any claims by the latter against plaintiff for commissions. It appeared that the agent ceased collecting April 1st; that the transaction continued till July 10th; and that the payments for beer during that time were \$341.20, the commissions on which, under the contract, would have amounted to only \$51.80. Defendant was allowed \$244.50. *Held*, that the question was not immaterial, as the answer might have shown that the commissions had been paid.—*Freese v. Veith*, 7 N. Y. S. 184.

Excessive Damages.

See *Breach of Marriage Promise*, 8; *Damages*, 4-7.

EXECUTION.

See, also, *Attachment*; *Garnishment*; *Judicial Sales*.

Against the person, see *Arrest*.

Property subject to levy.

1. Where a chattel has been replevied it may not be levied on, while in the possession of the sheriff, by virtue of an execution against defendant in replevin.—*Tremaigne v. Mortimer*, 7 N. Y. S. 681.

Sale of property in receiver's hands.

2. A sale by a sheriff, under execution, of property in the hands of a receiver, without leave of court, is void, and passes no title.—*French v. Pratt*, 7 N. Y. S. 240.

Supplementary proceedings—When had.

3. Since the rule that a creditor should sell the judgment debtor's land on execution, and not seek to collect his judgment by means of supplementary proceedings, exists to save the judgment debtor's right of redemption, he cannot complain, where he has formally consented to an order extending the receivership to the land in question.—*Webb v. Osborne*, 7 N. Y. S. 762.

— Executors.

4. The statutes regulating supplementary proceedings are not applicable to executions against executors.—*Collins v. Beebe*, 7 N. Y. S. 442.

— Affidavit for examination of debtor.

5. An affidavit that a third person "has property of the judgment debtor exceeding ten dollars in value, or is indebted to the judgment debtor in a sum exceeding ten dollars," is alternative, and alleges neither the one nor the other fact necessary to obtain an order for examination in supplementary proceedings.—*Collins v. Beebe*, 7 N. Y. S. 442.

6. An affidavit for an examination in supplementary proceedings is sufficient, though the allegation that the person to be examined has possession of the debtor's property is on information and belief. Following *Miller v. Adams*, 52 N. Y. 409.—*Tefft v. Epstein*, 7 N. Y. S. 897.

— Receivers.

7. After an order for the examination of a judgment debtor was made and served in supplementary proceedings, a junior judgment creditor procured an order for the examination of the debtor, to which the latter submitted without service of the order, and a receiver was appointed. The receivership was afterwards extended to plaintiff's judgment. *Heid*, under Code Civil Proc. N. Y. § 2469, providing that the title of a receiver shall relate back, for the benefit of the judgment creditor in whose behalf the proceedings were instituted, to the service of the order for examination, that plaintiff's judgment was a prior lien on the funds in the receiver's hands.—*Youngs v. Klunder*, 7 N. Y. S. 498.

8. Where supplementary proceedings are commenced by two judgment creditors, and, on the application of the junior judgment creditor, a receiver is appointed, whose authority is subsequently extended to the senior judgment, his appointment relates back to the commencement of supplementary proceedings on the senior judgment, and money coming into his hands from the sale of the debtor's lands will be *in custodia legis*, and will, for the purpose of determining the priority of

liens thereon, be treated as the land, and first applied to the payment of the senior judgment.—*Guggenheimer v. Stevens*, 7 N. Y. S. 263.

9. Under Code Civil Proc. N. Y. § 2464, providing for appointment of a receiver in supplementary proceedings, and dispensing with notice to the judgment debtor if the judge is satisfied that the judgment debtor cannot with reasonable diligence be found in the state, in which case the order must recite the fact, a recital that it was brought to the attention of the judge that the debtor was a resident of a distant territory is sufficient to justify the judge in dispensing with service of the notice.—*O'Connor v. Mechanics' Bank*, 7 N. Y. S. 880.

10. Under Code Civil Proc. N. Y. § 2468, providing that the title to the judgment debtor's property shall vest in the receiver, in supplementary proceedings, from the time of the filing in the county clerk's office of an original order of appointment, or an order extending the receivership, the title to the judgment debtor's land vests in the receiver on his filing for record in the county clerk's office the order extending the receivership, though the original order of appointment was not so filed.—*Webb v. Osborne*, 7 N. Y. S. 762.

— Entry of judgment.

11. Where a receiver, appointed in supplementary proceedings, recovers of one owing the debtor a sum necessary to satisfy the execution, together with interest, costs, etc., it is error to direct judgment for an estimated amount pending the determination of the exact amount which the receiver can recover, but the amount must be ascertained before the judgment can be entered.—*O'Connor v. Mechanics' Bank*, 7 N. Y. S. 880.

Execution against the person — When authorized.

12. Under Code Civil Proc. N. Y. § 572, amended by Laws 1886, c. 672, providing that, if plaintiff neglects to issue execution against the person of defendant within 10 days after the return of the execution against his property, or whenever it shall appear to the satisfaction of the court that plaintiff is endeavoring to use the mandate for the purpose of oppressing the debtor, defendant must, on his application, with notice to plaintiff, be discharged from custody, if already taken under the mandate; or, if he has not yet been imprisoned, be relieved from imprisonment by virtue of the mandate, unless reasonable cause is shown why the application should not be granted. Failure to issue execution is not excused by the engagements of plaintiff's attorney.—*Longuemare v. Nichols*, 7 N. Y. S. 157.

13. Where plaintiff in an action on a con-

tract so amends his complaint, by alleging fraud and deceit, as to change the action into one for tort, he acquires the right, on recovering judgment, to issue an execution against the person of defendant, whether an order of arrest had issued in the action or not.—*Carrigan v. Washburn*, 7 N. Y. S. 262.

Execution against the person—Supersedeas.

14. Where a plaintiff is defeated, and defendant seeks to pursue him on a judgment for costs, plaintiff becomes a defendant, within Code Civil Proc. N. Y. § 572, providing that a defendant shall have a writ of *supersedeas* in certain cases of debt.—*Longuemare v. Nichols*, 7 N. Y. S. 672.

15. The power of the court being discretionary, the application for *supersedeas* will be denied when it appears that the adverse party has been vigilant in asserting his rights.—*Longuemare v. Nichols*, 7 N. Y. S. 157.

16. Under the statute, as amended, defendant need not be in actual custody in order to make the application for *supersedeas* of the execution.—*Longuemare v. Nichols*, 7 N. Y. S. 157.

17. The remedy is afforded by the statute to defendant alone, and relief cannot be granted to a plaintiff against whom costs have been decreed.—*Longuemare v. Nichols*, 7 N. Y. S. 157.

EXECUTORS AND ADMINISTRATORS.

See, also, *Descent and Distribution; Wills.*

Actions, see *Abatement and Revival*, 8; *Parties*, 8.

Supplementary proceedings against, see *Execution*, 4.

Proceedings for discovery of assets.

1. Code Civil Proc. N. Y. § 2706 et seq., provides a means of discovery when money or other personal property which ought to be delivered to the administrator, or which ought to be included in an inventory or appraisal, is in the possession or under the control of a person who withholds the same, or conceals or refuses to exhibit it, so that it cannot be inventoried or appraised. Section 2710 provides that the proceeding must be dismissed on the filing of a verified answer setting up ownership or possession by virtue of a lien or special property. In a proceeding under the statute it appeared that the administrator had filed an inventory which included the property sought to be discovered; and respondent's answer alleged that the administrator had left the property in respondent's hands, under a special arrangement authorizing its use, conversion, and reinvest-

ment from time to time; and that the property in respondent's hands when decedent died had been converted under said arrangement. *Held*, that the object of the statute was to provide a summary means of discovery, and, in case of mere naked possession of decedent's property, to compel delivery to the legal representatives and that petitioner had no remedy under the statute, his remedy being an action for an accounting.—*In re Cunard's Estate*, 7 N. Y. S. 558.

Allowance of claims.

2. Loans made to executors or trustees are not valid claims against the testator's estate. Following *Glenn v. Burrows*, 37 Hun, 602.—*Glenn v. Burrows*, 7 N. Y. S. 180.

Compelling the filing of claims.

3. Plaintiff's testator, as a condition for substituting an attorney in a pending suit, was required to enter into a bond to pay the former attorney any sum he might recover in a suit for fees. He obtained one D. to furnish the bond, giving him certain railroad bonds as security. Two years and a half after testator's death, the attorney not having filed his claim against testator's estate, his executors sued him and the surety, seeking to compel the attorney to file his claim within three months or be debarred from a suit on the bond, in order that the estate might be settled. *Held*, that the action would not lie.—*Thompson v. Hawke*, 7 N. Y. S. 490.

Settlement and accounting.

4. Where a legatee, after bringing an action against the executor for an accounting, is appointed administratrix of the estate, she becomes a necessary party to such action in her representative, in addition to her individual capacity, that the judgment may be a final adjudication of the questions involved.—*Hayward v. Place*, 7 N. Y. S. 523.

5. A contestant, who has been duly cited, but has filed no objections to an executor's account, is not entitled to cross-examine the executor, in proceedings had on a reference to try the issues raised by objections to the executor's accounts.—*In re Gilman's Estate*, 7 N. Y. S. 694.

6. Where an executor and a legatee have misappropriated the estate of their testator, they are yet liable for no more than is proved to have remained in the hands of the executor, and to have been received by the legatee beyond what he was entitled to; and a judgment against them transcending this liability, without showing in what manner or upon what evidence it is done, so that its modification is impracticable, will be reversed.—*Hayward v. Place*, 7 N. Y. S. 523.

7. Where a claim of an administrator

against his decedent's estate is assigned, and referred as a disputed claim, and the administrator fails to make the apparent defense of the statute of limitations, and all the testimony in support of the claim is incompetent, though not objected to by the administrator, the judgment allowing such claim will be set aside upon exceptions to the referee's report on a settlement of the administrator's accounts, and all claims for costs and expenses in connection therewith will be disallowed.—*In re Hill's Estate*, 7 N. Y. S. 828.

— Commissions.

8. A will authorized the executors, in their discretion, to continue a certain business of the testator, which one of the executors had been carrying on for him at a stated salary. His co-executors agreed to pay him at the same rate for continuing the business. *Held*, that it was in the line of his duty as executor, and he should be allowed no more than the statutory commission for the services.—*In re Hayden's Estate*, 7 N. Y. S. 818.

9. To entitle each co-executor to full commissions, under Code Civil Proc. N. Y. § 2736, providing that where the value of decedent's personal estate amounts to or exceeds \$100,000 over all his debts, each executor or administrator is entitled to the full compensation allowed a sole executor or administrator, it is sufficient if the value of such estate amounts to the requisite sum at the time of the executors' accounting, though it fell short of that amount when the inventory was taken.—*In re Blakeney*, 7 N. Y. S. 55.

10. Code Civil Proc. N. Y. § 2736, providing that, where the personal estate of a decedent amounts to \$100,000 or more above his debts, each executor, if there are not more than three, is entitled to full compensation allowed to a sole executor, does not authorize such commission to executors who resign their trust, and are succeeded by an administrator; nor is one of three such executors entitled, on the ground that he did all the work, to a triple commission on sums actually received and disbursed.—*In re Hayden's Estate*, 7 N. Y. S. 818.

Experts.

See *Evidence*, 10-18.

Express Trusts.

See *Trusts*, 1-3.

FACTORS AND BROKERS.

See, also, *Principal and Agent*.

Right to commissions.

A real-estate agent who fails to induce the vendee to pay the price of land de-

manded by the owner, but predicts that the vendee will ultimately pay such price, is not entitled to commissions where the owner afterwards sells the land to others for such price, without knowledge that it was actually purchased for the vendee.—*Goldstein v. Walter*, 7 N. Y. S. 756.*

FALSE IMPRISONMENT.

What constitutes.

1. In an action for the alleged wrongful arrest of plaintiff by an officer in the employ of defendant, it appeared that plaintiff had on a rubber suit, and a hood which concealed his face down to his mouth, with openings for his eyes; that he wore false whiskers; and that he had in his possession a paper box containing oily rags, several wax tapers, and some bottles of a liquid substance. *Held*, that the question whether the officer was warranted in concluding that plaintiff had committed or was about to commit a felony was for the jury.—*Newman v. New York, L. E. & W. R. Co.*, 7 N. Y. S. 560.

2. In an action for false imprisonment, where it appears that the arrest was caused by defendant's employe, who had authority to cause arrests in case of disturbance, it is for the jury to say whether the employe was justified by the circumstances in causing the arrest.—*Shea v. Manhattan Ry. Co.*, 7 N. Y. S. 497.

Malice.

3. In an action for false imprisonment, where the jury find that there was no probable cause to make the charge against plaintiff on which he was arrested, they may infer that it was made through malice.—*Rosen v. Stein*, 7 N. Y. S. 868.

4. In an action for false imprisonment, it appeared that defendants had employed plaintiff to make a number of coats, and, on their refusal to pay for them on account of some defects therein, plaintiff refused to return those that he had in his possession until he was paid. Failing to obtain the coats after several demands, one of the defendants went before the police justice, who advised him to get a warrant, and wrote an affidavit charging plaintiff with petit larceny, which defendant signed without reading, and a warrant was issued, on which plaintiff was arrested. When plaintiff was discharged on the hearing, such defendant stated that he was satisfied, and only wanted to get back the coats. *Held*, that the question of malice was for the jury.—*Rosen v. Stein*, 7 N. Y. S. 868.

Evidence.

5. Plaintiff was arrested on the charge of the larceny of certain goods belonging to defendants. It was admitted that plain-

tiff, who had come into the possession of the goods rightfully, as bailee, intended to keep them. *Held*, in an action for false imprisonment, that defendants were not injured by the exclusion of a question as to whether plaintiff did so intend.—*Rosen v. Stein*, 7 N. Y. S. 868.

6. It was not error to admit in evidence police court records to show that plaintiff was arrested on the charge of defendant's employe, and was discharged by the justice.—*Shea v. Manhattan Ry. Co.*, 7 N. Y. S. 497.

Damages.

7. Where plaintiff testifies that he was detained by a sergeant during the night, at the instance of defendant's officer, but the officer denies this, and the sergeant testifies that the officer did not request him to detain plaintiff, but that he did so because he did not think his explanation satisfactory or that he ought to release him, it is improper to refuse to instruct that if the officer did not request the detention defendant is not liable for the damages caused thereby.—*Newman v. New York, L. E. & W. R. Co.*, 7 N. Y. S. 560.

Exemplary.

8. Where it appears that the arrest was made in good faith, upon suspicion deemed to warrant the same, a refusal to instruct that, there being no evidence of malice, the plaintiff was not entitled to recover exemplary damages, and an instruction that if the officer, in making the arrest, acted carelessly, and in wanton disregard of plaintiff's rights, the jury might award exemplary damages, are improper.—*Newman v. New York, L. E. & W. R. Co.*, 7 N. Y. S. 560.

False Representations.

See *Deceit*, 1, 2.

Farm Crossings.

Action to compel construction, see *Railroad Companies*, 1-8.

Fees.

Attorney's fees, see *Divorce*, 2.

Of witnesses, see *Costs*, 11.

Recovery of license fee, see *License*.

Fellow-Servant.

See *Master and Servant*, 15.

Fire Department.

See *Municipal Corporations*, 6, 7.

Foreclosure.

Of mortgages, see *Mortgages*, 6, 7.

Forfeiture.

Of bail, see *Bail*, 8-5.

FRAUD.

See, also, *Assignment for Benefit of Creditors*, 12-16; *Deceit*; *Fraudulent Conveyances*.

As ground to rescind contract, see *Sale*, 8-9.

Evidence of, see *Assignment for Benefit of Creditors*, 7.

Ground for equitable relief, see *Equity*, 2.

Evidence.

1. Statements of another, by which persons obtained credit, if made without their knowledge, are not admissible against them to prove fraud on their part.—*Morris v. Wells*, 7 N. Y. S. 61.

2. In an action for damages for purchasing cattle with the intent to defraud plaintiffs out of the purchase price, evidence of previous transactions of the same kind between the parties is admissible to show that defendant knew that he would be able to dispose of the cattle before a check, given for the price, could be returned for payment.—*Monroe v. O'Shea*, 7 N. Y. S. 540.

3. Where defendant, as a witness for plaintiff, testified that he thought some of his debtors became insolvent after the purchase, and that one N. owed him \$2,700, it was error to exclude his answer to the question as to when N. became insolvent, as it would tend to show whether there had been any change in defendant's financial condition after the purchase.—*Monroe v. O'Shea*, 7 N. Y. S. 540.

4. In an action for damages for purchasing cattle with the intention of defrauding plaintiffs out of the purchase price, it appeared that the sale was for cash, but that defendant sent his check for the price to plaintiffs in Massachusetts; that it was returned immediately to the bank for payment, and payment was refused; that in the mean time defendant had disposed of the cattle and made an assignment; and that his liabilities amounted to \$44,000, and his assets to \$8,000. *Held*, that the question of defendant's intention to defraud plaintiffs at the time he made the purchase should have been submitted to the jury.—*Monroe v. O'Shea*, 7 N. Y. S. 540.

FRAUDS, STATUTE OF.

Promise to answer for debt of another.

1. In an action to recover for milk sold, plaintiff testified that defendant told him, if he would send his milk to W., defendant would send his check for the price.

Plaintiff was corroborated by one witness. Defendant and W. denied the conversation, and there was some evidence that plaintiff had made an effort to have defendant sign an agreement as surety for the debt. *Held* that, since, if plaintiff's testimony was believed, defendant was the original debtor, a verdict for plaintiff would not be set aside.—*Jessup v. McGarry*, 7 N. Y. S. 751.

Agreements not to be performed in a year.

2. In March, 1887, plaintiff made an oral contract to work for defendant from May 1, 1887, to May 1, 1888. In October, 1887, defendant became displeased with plaintiff because of a mistake made by him, and said that he would let him (plaintiff) go. Afterwards defendant agreed to let the matter remain in abeyance, and finally "called it off." Plaintiff then went on with his duties as before. Nothing was said at this time as to term of service, duties, salary, etc., all of which were governed by the contract made in March, 1887. *Held*, that no new contract was made in October, 1887, so as to take the case out of the statute of frauds as a contract not to be performed within a year.—*Berrien v. Southack*, 7 N. Y. S. 824.

Pleading.

3. Where defendant denies that he made the contract sued on, he may prove that there was no contract in writing, as required by the statute of frauds.—*Berrien v. Southack*, 7 N. Y. S. 824.

FRAUDULENT CONVEYANCES.

Actions to set aside, see *Deposition*, 1.

What constitutes consideration.

1. Where an insolvent debtor, whose debts are all of the same class, conveys all his property to third persons, who immediately convey it to his wife, such conveyances, being without consideration, are in fraud of his creditors, and void.—*O'Connell v. Madden*, 7 N. Y. S. 338.

2. In the absence of circumstances showing bad faith, the assignment of \$50,000 of personality to secure \$18,000 of debts does not raise a presumption of fraud.—*Boessneck v. Cohn*, 7 N. Y. S. 620.

3. A deed to secure two debts of the grantor to the grantee, one of which is fictitious, though the other is actually due, is void *ab initio*, as against creditors of the grantor, and cannot stand as security even for that debt which is actually due.—*Baldwin v. Short*, 7 N. Y. S. 717.

Rights of creditors.

4. A judgment creditor can maintain an action to reach property where it is alleged

the debtor has bought and paid for it with his own money, but has taken the title in his wife's name, for the purpose of defrauding his creditors.—*Stokes v. Amerman*, 7 N. Y. S. 733.

5. Where all the property of an insolvent debtor is fraudulently conveyed to his wife, mortgages executed by the insolvent's wife to certain of his creditors, after his death, do not give preferences to the mortgages as against other creditors; the estate upon the insolvent's death becoming assets in the hands of his administratrix for the benefit of all his creditors.—*O'Connell v. Madden*, 7 N. Y. S. 338.

Actions to set aside.

6. A general creditor cannot maintain an action to set aside judgments confessed and transfers of property made by his debtor, as being in violation of the general assignment act of New York, where the complaint discloses no intention by the debtor to make an assignment.—*Macdonald v. Wallstein*, 7 N. Y. S. 575.

Evidence—Declarations of vendor.

7. The declarations of a vendor, made after conveyance, and his evidence in supplementary proceedings, relating to the property conveyed, to the effect that the conveyance was intended to defraud the judgment creditor, are inadmissible against his vendee, though he remains in possession under the vendee's lease.—*Scofield v. Spaulding*, 7 N. Y. S. 927.

8. Nor are such statements admissible on the ground that, a conspiracy between vendor and vendee to defraud having been shown, the declarations of the one were binding on his co-conspirator, as such declarations were merely narrative of a completed transaction, and formed no part of the *res gesta*.—*Scofield v. Spaulding*, 7 N. Y. S. 927.

GARNISHMENT.

Levy and lien.

In an action against the non-resident firm of L. & Bro., money was attached in the hands of defendant bank, and the attachment was served by the sheriff by handing to defendant's cashier a copy, on which was indorsed a certificate that such paper was a true copy of the original, and that by it the sheriff was commanded to attach all property of L., and that having been informed that said defendant had in its possession money belonging to L., and that defendant was indebted to him, the sheriff attached and required said money to be delivered to him. At the time of delivery of said copy, warrant, and notice, defendant had no property of nor was it indebted to L., but defendant was indebted to the firm of L. & Bro., of which fact the

sheriff was informed. This amount was afterwards applied by defendant towards payment of a debt due to it by L. & Bro. *Held*, that the levy was insufficient under Code Civil Proc. § 649, subd. 3, which requires a notice showing the property attached, to entitle plaintiffs to the application of the balance to the credit of L. & Bro. in defendant's hands to the payment of their judgment, although the bank officers knew what the plaintiffs were attempting to do.—*Hayden v. National Bank*, 7 N. Y. S. 551.

GIFTS.

Inter vivos.

1. C. delivered to A. a sum of money, taking the latter's acknowledgment, which stipulated that the money was to be invested for the benefit of C.'s daughter H., and the interest thereof paid to her when C. should decide that she needed it. It was shown that C. had given his other children advancements, and had expressed the intention to advance H. equally, and that on the day that he delivered the money to A. he took a receipt from H. for the same amount, in which the sum was called an "advancement." H. for some time retained the paper signed by A., but at C.'s request delivered it to him, and at C.'s death the receipt given him by H. was in the latter's possession, but when she obtained it did not appear. A. opened an account with H. as her trustee, as he did with C.'s other children, for whom money had been deposited with A., but it was not shown that C. knew that fact. H. never made use of principal or interest, and C. himself appropriated the money. *Held*, that the evidence did not establish a gift to or trust for H. in the money, and C.'s executors were therefore not liable to her therefor.—*In re Crise's Estate*, 7 N. Y. S. 202.

Donatio causa mortis.

2. A man 70 years old, and in poor health, gave money, which was his only means of support, to his children. The evidence of the children, as to the circumstances of the gift, was conflicting, and was contradicted by the father. No substantial reasons were given for such a gift, and it appeared that after the alleged gift the children agreed among themselves to pay their father interest thereon. *Held* a *donatio causa mortis*.—*Stubing v. Stubing*, 7 N. Y. S. 500.

3. The evening before going to a hospital decedent delivered to plaintiff a tin box, expressing a fear that he would die from the results of a surgical operation which he was to undergo at the hospital, and declaring that if he did not return plaintiff was to have the box and its contents. He underwent the operation 3 days

after his admission to the hospital, and died 11 days later. *Held* a valid gift *causa mortis*, though "technically" death resulted from a thinning of the muscular fibers of the heart, and not from the direct result of the operation.—*Ridden v. Thrall*, 7 N. Y. S. 822.*

4. A good gift *causa mortis* is shown where it is proved that money on deposit in bank was given to plaintiff, and that the bank-book to enable her to get the money was actually delivered to her by the donor, who at the time was in expectation of impending death, and who did die a day or two afterwards.—*Walsh v. Bowery Sav. Bank*, 7 N. Y. S. 669.*

— Pleading and proof.

5. Proof of a gift *causa mortis* is admissible under a complaint alleging a gift *inter vivos*, and the amendment of the complaint to conform to proof of a gift *causa mortis* does not prejudice defendant.—*Walsh v. Bowery Sav. Bank*, 7 N. Y. S. 669.

Goods.

Action for price, see *Sale*, 12-14.

Sold and delivered, see *Pleading*, 1, 4, 18.

GUARANTY.

Evidence.

Testimony by defendant that he does not recollect making a certain representation as to signing a guaranty is not evidence that he did not make it, where a disinterested witness contradicts him.—*Metropolitan Manuf'g Co. v. McDonald*, 7 N. Y. S. 500.

GUARDIAN AND WARD.

Actions by, see *Parties*, 2.

Guardian *ad litem nisi*, see *Infancy*, 2, 3.

Appointment.

1. Where the mother has from girlhood lived a disreputable and licentious life, and had for many years deserted her husband and infant daughter, she will be refused the guardianship of either the person or property of such infant.—*In re Meech*, 7 N. Y. S. 257.

Accounting by administrator.

2. Where a guardian dies before final settlement, his administratrix may be required by the surrogate's court, at any time, to render an account of the trust of her intestate, under Code Civil Proc. N. Y. § 2606, providing that the surrogate's court shall have the same jurisdiction to compel an administrator to account which it would have had against the decedent, if his letters had been revoked.—*In re Wiley's Estate*, 7 N. Y. S. 828.

HABEAS CORPUS.

Hearing—Questions determined.

Code Civil Proc. N. Y. § 2082, provides that in *habeas corpus* proceedings the prisoner is to be remanded if it appears that he is detained in custody by virtue of the final judgment or decree of a competent tribunal of civil or criminal jurisdiction, and section 2081 provides for his discharge if no lawful cause for his imprisonment is shown. Section 2084 prohibits the court, on the return of the writ, from inquiring into the legality or justice of any judgment or decree specified in section 2082, except as therein stated. *Held*, that upon the return to a writ of *habeas corpus* the court may inquire into the constitutionality of the statute under which the judgment was rendered; for it is without authority, and not the judgment of a competent tribunal, if based upon an unconstitutional statute. —in *re Kemmler*, 7 N. Y. S. 145.

HIGHWAYS.

Statutory proceedings to establish—Jury.

1. Under Laws N. Y. 1881, c. 696, providing for a jury of 12 men to certify to the necessity of altering and laying out highways, and prescribing their qualifications and manner of selection, where the names of 12 men are drawn, but 1 is disqualified, the other 11 are not a qualified jury within the meaning of the statute, and their acts as such are void, though the statute also provides that it is sufficient if 9 or more of the jurors act.—*Tiffany v. Gifford*, 7 N. Y. S. 48.

Effect of not opening or working street.

2. A street, which originally was a country highway, had never been opened or worked. On its incorporation, the city never assumed any care or responsibility over it. *Held*, that the street had ceased to be a public highway, under Laws N. Y. 1861, c. 811, providing that a highway not opened and worked within six years shall cease to be a road.—*City of Cohoes v. Delaware & H. Canal Co.*, 7 N. Y. S. 885.

Action for injuries caused by obstruction.

3. In an action for injuries caused by obstructions in a highway, it appeared that, when a stage in which plaintiff was traveling started from a certain hotel, one of the horses balked, and, when finally urged to move by the driver, the team plunged forward at a brisk gait. About 80 feet from the hotel, in the highway, was a well, on one side of which the traveled track was 15 feet wide, and on the other 57 feet. The

driver went through the narrow passage, and struck a heap of frozen snow and ashes near the well, which capsize the vehicle. The obstruction was large enough to upset any vehicle which struck it in rapid motion. *Held*, that the question of negligence was properly submitted to the jury.—*Chamberlain v. Town of Wheatland*, 7 N. Y. S. 190.

4. In an action for personal injuries caused by the upsetting of a stage in which plaintiff was riding, through obstructions in the highway, an instruction that if either of the horses drawing the vehicle was balky or otherwise unmanageable it was negligence to drive them, was properly refused.—*Chamberlain v. Town of Wheatland*, 7 N. Y. S. 190.

HORSE AND STREET RAILROADS.

Injuries to passengers.

1. In an action for personal injury to plaintiff while riding in one of defendant's horse-cars, it appeared that, as the car was passing over a draw-bridge, a key and pole, weighing about 800 pounds, fell, one end of the pole projecting about three feet into the car, and causing the injury. The pole and key, when not used for operating the draw-bridge, were hung up on two railroad spikes, driven in a slant into the trestle-work near the track. The evidence was conflicting, but tended to show that the undue rate of speed of the car caused the bridge to oscillate, and dislodge the key and pole. The driver testified that he "was always afraid of an accident,—was always afraid it would fall;" and that he knew, if he "went over on a trot, it would shake the bridge," and "the faster you go the more it will shake the bridge." *Held*, that a case was made calling for submission to the jury of the question of the negligence of defendant's driver.—*Catalanoito v. Coney Island & B. R. Co.*, 7 N. Y. S. 628.

2. In an action against a street railroad company for personal injuries, there was testimony, which was contradicted, that while defendant's car was going down hill, at the rate of seven miles an hour, the driver, without any apparent reason, applied the brake with such force as to give the car a sharp, quick jerk, which hurled the plaintiff from the front platform. *Held*, that the question of negligence was properly submitted to the jury.—*Murray v. Brooklyn City R. Co.* 7 N. Y. S. 900.

3. Defendant cannot complain of an instruction that "negligence could not be predicated upon the mere question of speed, unless speed was one of the elements that helped to cause the accident," as speed might be an element of negligence,

in connection with the sudden stopping of the car.—*Murray v. Brooklyn City R. Co.*, 7 N. Y. S. 900.

4. It is not negligence *per se* for a passenger to ride on the front platform of a horse-car.—*Hourney v. Brooklyn City R. Co.*, 7 N. Y. S. 602.

Injuries to passengers—Degree of care.

5. A street-car company is obliged to use the utmost care to carry passengers safely.—*McSwyny v. Broadway & S. A. R. Co.*, 7 N. Y. S. 456.

Injuries while entering car.

6. In an action against a street car company for personal injuries, where plaintiff testifies that after the car had slackened speed, and while he was waiting for it to stop, it made a sudden start forward, and threw him off, thus causing the injuries, and defendant's witnesses are not entirely harmonious as to the circumstances, though they all testify that plaintiff got off while the car was in motion, a verdict for plaintiff will not be disturbed on appeal.—*Ganley v. Brooklyn City R. Co.*, 7 N. Y. S. 854.

7. In an action for injuries received in entering defendant's car, a charge that plaintiff could recover only if the car had stopped when she attempted to get in, and that she would be guilty of contributory negligence if she attempted to enter by grasping the rear rail while the car was in motion, and that it was for the jury to determine whether the car started before she had a chance to get in, properly submitted the case to the jury.—*McSwyny v. Broadway & S. A. R. Co.*, 7 N. Y. S. 456.

8. Where, in an action for an injury received in entering defendant's car, the evidence is conflicting as to the manner in which the accident happened, it is a question of fact for the jury, and their verdict is conclusive thereon.—*McSwyny v. Broadway & S. A. R. Co.*, 7 N. Y. S. 456.

9. A street-car company is guilty of negligence in starting a car so as to throw a passenger from the steps while entering, whether the car is started by the act of the conductor or driver.—*McSwyny v. Broadway & S. A. R. Co.*, 7 N. Y. S. 456.

Persons on track.

10. In an action against a street-railroad company for personal injuries resulting in the death of plaintiff's intestate, it appeared that the latter was a girl, about 10 years old; that she stood about 2 feet from the track, with her back to the car, which was about 50 feet away, and called to her companions to follow her; that there was no obstruction to prevent the driver from seeing her; and that the car came up at rapid speed as the child turned to cross the track, when she was struck by it and

run over. *Held*, that plaintiff was entitled to go to the jury on the question of whether the driver exercised ordinary care, as his failure to do so rendered defendant liable, though there was negligence on the part of the child.—*Mallard v. Ninth Ave. R. Co.*, 7 N. Y. S. 666.*

Collision.

11. In an action for injuries to a passenger caused by a collision between defendant's car and another, evidence that defendant's car was driven rapidly, and that the morning was foggy, and admissions of the driver that at a distance of 25 or 30 feet he heard the bell of the other car, which he knew was crossing at right angles to his own, are sufficient to warrant the submission of the question of negligence to the jury.—*Hourney v. Brooklyn City R. Co.*, 7 N. Y. S. 602.

12. Where, in an action for injuries to a passenger caused by a collision between defendant's car and another, plaintiff's testimony that he was riding on the front platform, and not on the guard-rail in front of the car, is contradicted by two witnesses of defendant, the question of his position is for the jury.—*Hourney v. Brooklyn City R. Co.*, 7 N. Y. S. 602.

HUSBAND AND WIFE.

See, also, *Divorce; Dower.*

Rights of husband in estate of wife, see *Domicile.*

Wife's contracts, see *Alteration of Instruments.*

Tenancy by the entirety.

1. In New York, under a conveyance to a husband and wife jointly, they take as tenants by the entirety.—*O'Connor v. McMahon*, 7 N. Y. S. 225.

—Conveyances by husband.

2. Where a husband and wife hold land as tenants by the entirety, a conveyance by the husband, in which the wife does not join, is void.—*O'Connor v. McMahon*, 7 N. Y. S. 225.

3. Under Laws N. Y. 1860, c. 90, § 1, providing that the property acquired by a married woman by grant and the issues thereof shall remain her separate property, and that it shall not be subject to the control or liable for the debts of her husband, plaintiff's husband cannot, by a conveyance of land held by them as tenants by the entirety, deprive her of the enjoyment of the land, and the rents and profits thereof.—*O'Connor v. McMahon*, 7 N. Y. S. 225.

Wife's power to contract.

4. Where promissory notes are executed by a wife to her husband as mere accom-

modation paper, they do not constitute contracts between them; and under Laws N. Y. 1884, c. 881, giving to married women the power to contract as if they were unmarried, and making them and their separate estate liable on their contracts, whether they relate to such separate estate or not, but excepting from the provisions of the act all contracts between husband and wife, the bank which discounts such notes for the husband is entitled to recover thereon against the wife.—*Bowery Nat. Bank v. Sniffen*, 7 N. Y. S. 520.*

Impeachment.

Of witness, see *Witness*, 19-31.

Indemnity.

Effect of bond, see *Bonds*, 1-8.

INDIANS.

Right to sue—Employment of attorney.

Laws N. Y. 1845, c. 150, § 2, provides for the appointment by the governor and senate of an attorney for the Seneca Nation of Indians, who, among other duties, should "prosecute and maintain all actions, suits, and proceedings for them, or any of them, as he might find necessary or proper." Laws 1849, c. 87, § 4, provides that any Indian who is a freeholder shall be subject to the civil jurisdiction of the courts in the same manner, and to the same extent, as a citizen thereof. Laws 1847, c. 865, § 14, provides that any Indian of the Seneca Nation whose claim exceeds the jurisdiction of the "peace-makers" of the nation, established at \$100 by section 8, may sue and be sued "in the same manner, and with like effect, as between white citizens." *Held*, that a Seneca Indian could sue, either in person or by his chosen attorney, for a claim which the jury found to exceed \$100, and was not bound to employ the attorney appointed for the nation.—*Jemmerson v. Kennedy*, 7 N. Y. S. 296.

INDICTMENT AND INFORMATION.

See, also, *Burglary*.

Certainty.

An indictment under Laws N. Y. 1884, c. 202, § 8, making it a misdemeanor to sell, supply, or bring to be manufactured, to any butter or cheese factory, any milk diluted with water, charged that on the 8d and 4th days of the same month defendant did, at the place named, bring to a certain cheese

factory, for the purpose of being manufactured into butter and cheese, a large quantity of milk diluted with water; that the milk so diluted was sold to G. and R.; that defendant delivered water in his milk aforesaid for the purpose and with the intent of defrauding said G. and R. *Held*, that the indictment sufficiently charged a crime, within the requirements of Code Crim. Proc. N. Y. §§ 275, 278, providing that the indictment must contain a plain and concise statement of the act constituting the crime.—*People v. Harris*, 7 N. Y. S. 778.

Indorsement.

Of bills and notes, see *Negotiable Instruments*, 1.

INFANCY.

See, also, *Guardian and Ward*.

Ratification of contract.

1. A mortgage given by an infant is ratified where, after attaining majority, the mortgagor procures releases of portions of the mortgaged premises, and takes no steps in disaffirmance of the mortgage until foreclosure is begun, more than two years after her becoming of age.—*Wilson v. Darragh*, 7 N. Y. S. 810.*

Actions—Guardian ad litem nisi.

2. The provisions of Code Civil Proc. N. Y. § 472, that a guardian *ad litem* shall not be appointed unless his written consent, duly acknowledged, is produced to the court or judge making the appointment, does not apply to a guardian *ad litem nisi*, appointed under section 473, providing that where defendant is an infant resident of the state, but is temporarily absent, the court may appoint a guardian *ad litem nisi*, and give special directions in the order for the service thereof.—*Schell v. Cohen*, 7 N. Y. S. 858.

3. Jurisdiction having been acquired by compliance with the special directions of the court as to the service of the order, appointing a guardian *ad litem nisi* on the infant and his mother, the fact that the consent of the guardian *ad litem* afterwards appointed was not acknowledged at the time of his appointment was a mere irregularity, which could properly be amended thereafter, *nunc pro tunc*.—*Schell v. Cohen*, 7 N. Y. S. 858.

Information.

See *Indictment and Information*.

Infringement.

Of patent, see *Patents for Inventions*, 8.

INJUNCTION.

To restrain use of name, see *Associations*, 5.
— trade-mark, see *Trade-Mark*.

Jurisdiction—County judge.

1. Under Code Civil Proc. N. Y. § 606, providing that an injunction order may be granted "by any county judge," the judge of the county in which the venue of an action is laid may, on notice to the party sought to be enjoined, grant an injunction to continue during the pendency of the litigation.—*Morris v. City of New York*, 7 N. Y. S. 943.

Rights enforced and wrongs prevented.

2. Two brothers assigned to one C. a one-third interest in two patents, one for an improvement in cigarettes and one for an improvement in cigarette machines, and "any improvements, renewals, or reissue of said cigarettes, cigarette machines, or patents," meaning hereby to invest in "C." an undivided one-third of said patents, extension, or improvements thereof." By another agreement an undivided one-fourth interest was conveyed to A. by the brothers and C. in the patents and stock owned by them under the firm name of A. Bros. & Co., "as well as new patents, machines, etc., which may be" used in the business; the intent being to give A. a one-fourth interest in all "the patents and improvements on the same which may hereafter be made, machines, stock," etc., of A. Bros. & Co. This firm, and all the above parties, transferred to plaintiff all the property of the firm, "together with all patents owned by any or either of said firm for improvements in cigarettes and cigarette machines." By a fourth agreement the brothers and C. transferred to plaintiff the "respective interests which we have heretofore enjoyed as members of said firm" in two patents for cigarettes and machines, "this transfer to include any improvements, renewals, or reissues" of the patents. *Held*, that these agreements did not so clearly transfer to plaintiff or assure to it the right to any interest in any invention of one of the brothers not already patented, or which should be patented as improvements on the former patent, as to justify a temporary injunction for violation of the contract by using any improved machine of defendant's invention pending the trial of such issue.—*Allison Bros. Co. v. Allison*, 7 N. Y. S. 268.

3. The granting of permits to replace old electrical wires with new ones of larger size and conductivity, such replacement being matter of construction, is left within the discretion of the board of electrical control by Laws N. Y. 1887, c. 716, § 4, and an injunction will not lie against the re-

fusal to grant such permits.—*United States Illuminating Co. v. Grant*, 7 N. Y. S. 788.

Remedy at law.

4. Under Code Civil Proc. N. Y. § 2263, providing that before final orders summary proceedings shall not be stayed by any court or judge, except in a case where an injunction would be granted to stay the proceedings in an action of ejectment, injunction should not be granted on the grounds that the petition was not properly verified, or did not describe the premises, or did not state the interest of the petitioner, or that the defense of another action pending was not allowed, as all these are legal defenses available on the trial, and reviewable on appeal.—*Bliss v. Murray*, 7 N. Y. S. 917.

5. On defendant's failure to appear after due notice, an injunction pending a suit will be granted on plaintiff's showing that defendant is about to forcibly dispossess them of their land under an alleged invalid condemnation proceeding; that great injury would result to plaintiffs if they are deprived of the possession pending the action to determine the validity of the condemnation; and that no injury would result to defendant if it is restrained from taking possession.—*Morris v. City of New York*, 7 N. Y. S. 943.

6. A temporary injunction should not be granted, in an action to restrain defendant from erecting poles on a street opposite plaintiff's property, to form part of an electric motor system, when it does not appear that the injury to plaintiff, if any, caused by allowing defendant to proceed until the trial will be irreparable, as a public improvement, which may finally be allowed, will thereby be obstructed, and plaintiff will have no inducement to press his action.—*Tracy v. Troy & L. R. Co.*, 7 N. Y. S. 892.

7. Where it is not made clear at a trial whether plaintiff can obtain full damages at law for the violation of a covenant not to build upon or incur a certain right of way, an injunction against such violation is discretionary with the trial court, and will not be disturbed.—*Dexter v. Beard*, 7 N. Y. S. 11.

Pleading.

8. A policy-holder sued to enjoin an insurance company from buying certain land and from erecting a building, and to compel it to sell land already acquired, on the ground that it was exceeding its charter rights and was rendering itself liable to a forfeiture. The complaint failed to allege an intention to buy the land, and showed that the building was already in progress of erection. It did not show that a sale of the land acquired could properly be made, or that such sale could be made without

injury to defendant, nor did it show that plaintiff would suffer in any way by the action of the company, or that its assets would not meet all liabilities if the charter were forfeited. *Held*, that the complaint should be dismissed.—*Levy v. Mutual Life Ins. Co.*, 7 N. Y. S. 562.

9. Where a contract, as set out in a petition for a preliminary injunction for its violation, is not sufficient to justify its issuance, one will not be granted under a second count in the complaint, alleging a mistake in the contract, and asking for its reformation where equities alleged as ground for its reformation are denied in the answer, but plaintiff must await the reformation of the contract before he can obtain affirmative relief based on the contract as reformed.—*Allison Bros. Co. v. Allison*, 7 N. Y. S. 268.

Procedure.

10. Code Civil Proc. N. Y. § 609, providing that an injunction order may be granted upon or without notice, in the discretion of the "court or judge;" and section 627, providing that, where an injunction order is granted on notice, the party enjoined may, "on notice to the judge who granted it," apply for an order vacating it,—confer on the judge, as a judge and not as a court, authority to hear both parties on an application for an injunction; and a county judge may give notice of the hearing to the person sought to be enjoined by directing him, in a preliminary injunction, to show cause why it should not be continued.—*Morris v. City of New York*, 7 N. Y. S. 948.

In Pais.

See *Estoppel*, 3-6.

INSANITY.

Certificate of physician.

1. Acts N. Y. 1874, c. 446, provides that no person can be confined as a patient in an asylum for the insane except upon the certificate of two duly-qualified physicians, setting forth the insanity of such person; and the confinement cannot exceed five days, unless within that time the certificate shall be approved by a judge of a court of record of the county in which the lunatic resides. *Held*, that the physicians may unite in one certificate, or each may make one, which need not be sworn to on the same day, or before the same judge, it being a compliance with the statute if the certificates are approved of within five days.—*In re Approval of Medical Certificates of Insanity*, 7 N. Y. S. 671.

Rights and liabilities of committee of lunatic.

2. It is the duty of the committee of a lunatic to turn over to the administrator

of the latter his own notes found among the papers of the lunatic, though barred by limitation at the time of his appointment as such committee.—*In re Blossom's Estate*, 7 N. Y. S. 860.

3. A committee of a lunatic is, on final accounting, on the death of the lunatic two months after his appointment, entitled to full commissions for receiving and paying out the property which came into his hands as such committee, without regard to the amount disbursed as expenses.—*In re Blossom's Estate*, 7 N. Y. S. 860.

4. It is in the discretion of the court to allow counsel fees on the final settlement of the accounts of a committee of a lunatic.—*In re Blossom's Estate*, 7 N. Y. S. 860.

Inspectors of Elections.

Powers of, see *Elections and Voters*, 2.

Instructions.

See *Assumpsit*, 4; *Trial*, 3-9.

INSURANCE.

See, also, *Marine Insurance*.

Conflicting claims to policy, see *Equity*, 1. Rights of policy holders, see *Contracts*, 7.

Assignment of policy.

1. A policy of insurance is not avoided by an assignment of it as a pledge.—*Mahr v. Bartlett*, 7 N. Y. S. 148.

Application.

2. Where defendant's agent, in writing for deceased an application for a policy in his company, deceased merely giving him the year in which he was born, made a miscalculation, and wrote down the wrong age, there was no misrepresentation as to his age on the part of deceased.—*Brink v. Guaranty Mut. Acc. Ass'n*, 7 N. Y. S. 847.*

3. An application for insurance warranted the answers to be full, correct, and true, and stipulated they should be part of the contract of insurance. The policy referred to the application as a part thereof, and provided that every person acquiring any interest in the contract adopted the application and statements contained therein as his own, admitted them to be material, and warranted them to be full and true. The application of the assured turned out to be untrue as to the facts of his consulting a physician, and having on two occasions been an inmate of a hospital. *Held*, that the company was relieved from liability on the policy.—*Wilkins v. Mutual Reserve Fund Life Ass'n*, 7 N. Y. S. 589.

4. The application warranted the answers and statements thereof, whether written by the applicant by his own hand

or not, to be full and true. The policy provided that it was issued in consideration of the application, which was made a part of the contract, and in consideration of each of the statements made therein, "which, whether written by his own hand or not," every person accepting or acquiring an interest in the contract adopted as his own. *Held* that, as the assured assumed the acts of the agent, and bound himself for the truth of the statements contained in the application, he could not be relieved from his warranty by the fact that the agent had acted faithlessly in filling out the application.—*Wilkins v. Mutual Reserve Fund Life Ass'n*, 7 N. Y. S. 589.

Conditions.

5. An insurance policy on an unfinished house contained the words, "to be occupied as a residence when completed," and gave permission to mechanics to work in and about the house for 90 days. *Held* that, while insured was to have the right to complete the building, this was to be done within 90 days, and work done in the construction of the house after the expiration of that time was a violation of a clause in the policy prohibiting carpenters or other mechanics from working on the house without written permission, even though done by the insured himself.—*Smith v. German-American Ins. Co.*, 7 N. Y. S. 846.

6. A policy of life insurance stipulated that upon a failure to pay any premium when due the policy should become void. There was such a failure, and, upon a tender of the amount thereafter, the insurer accepted it, and gave a receipt, which stated that it was accepted upon condition that the insured was of temperate habits, and in as good health as when the policy was issued; otherwise the payment and receipt and the original policy should be void. Such acceptance and receipt were provided for in the constitution and by-laws of the insurance company, which were made a part of the original contract of insurance. *Held*, that such payment and receipt constituted a new contract, by which insured was bound, whether he read the receipt or not; and, it appearing that he was not at that time of temperate habits, nor in as good health as when he was originally insured, the receipt was of no effect, and the policy remained void.—*Ronald v. Mutual Reserve Fund Life Ass'n*, 7 N. Y. S. 152.

— Waiver.

7. A life insurance company does not waive a forfeiture of a policy by requesting proofs of the death of the insured, and giving instructions in regard thereto.—*Ronald v. Mutual Reserve Fund Life Ass'n*, 7 N. Y. S. 152.

Agents—Authority to waive forfeiture.

8. The policy provided that "no agent of the association has authority to make, alter, or discharge contracts, waive forfeitures, * * * and no alterations of the terms of this contract shall be valid, and no forfeiture thereunder shall be waived, unless such alterations or waiver shall be in writing, and signed by the president." etc. Plaintiff, the assignee of the policy, before the assignment consulted an officer of the company as to the regularity and validity of the policy, and the agent represented the policy to be a valid security. It did not appear that at that time any information of the fact of the answers in the application being untrue had been brought to the attention of defendant or the agent. *Held*, that the agent's representations to plaintiff would not preclude defendant from taking advantage of the untruthful statements in the application, as the agent could not waive any forfeiture.—*Wilkins v. Mutual Reserve Fund Life Ass'n*, 7 N. Y. S. 589.

Action on policy—Decree.

9. A decree that an insurance company shall pay plaintiffs "such moneys as shall be found due and payable under and by virtue of the policy" does not determine that any moneys are due under the policy.—*Mahr v. Bartlett*, 7 N. Y. S. 143.

Accident insurance.

10. Deceased, in his application for an accident policy, stated that he had no disease, and was not subject to fits, or any disorder which would render him liable to accidental injury. There was evidence that he had several times been thrown from his buggy, receiving injuries, and in some instances remaining unconscious for a while; that he had once or twice fallen down without apparent cause, at such times acting strangely, trembling, etc. Several persons, who had known him for many years, testified that he was strong and robust in health, and that they had never known of his having an ailment. *Held*, that the weight of evidence was not in favor of deceased's having misrepresented his physical condition.—*Brink v. Guaranty Mut. Acc. Ass'n*, 7 N. Y. S. 847.

11. Deceased stated that his occupation was that of a "livery stable proprietor, (not working,)" and his duties "such as were required of him in that occupation." The evidence showed that he hired men to do the work around his stable, though he sometimes hitched up a horse himself, and drove persons out. *Held*, that the statement of his duties sufficiently apprised defendant of their character, and, if anything more definite was required, it was the duty

of defendant to ascertain the facts by proper inquiry.—*Brink v. Guaranty Mut. Acc. Ass'n*, 7 N. Y. S. 847.

12. The policy provided that failure to give the company notice in writing of the injury within 10 days after the accident happened should invalidate all claims under the policy. A month after an accident, plaintiff addressed a notice of the injury to defendant, who received and kept it, and afterwards defendant's secretary stated to plaintiff's agent that the notice was sufficient. *Held*, that the notice, though not technically what the policy required, being served on and retained by defendant, further notice was waived.—*Brink v. Guaranty Mut. Acc. Ass'n*, 7 N. Y. S. 847.

Mutual benefit insurance.

13. One of the rules under which an insurance company issued its policies was as follows: "The form of notice to, and the process of collection from, each of the members, of the assessment above named, shall be as follows: A notice shall be sent announcing such assessment, and the number thereof, to the last post-office given to the society by each member; and if the assessment is not received within thirty days from the mailing of said notice it shall be accepted and taken as sufficient evidence that the party has decided to terminate his connection with the society, which connection shall thereupon terminate, and the party's contract with the society shall lapse, and be void; but * * * for valid reasons to the officers of the society * * * he may be reinstated by paying assessment arrearages." Such a notice was sent to one of the members on June 1st, and, the assessment not being paid within 30 days, a second notice was sent on July 5th, and the assessment was paid July 21st, but after the death of the insured; and the officers of the society, knowing of such death, gave a receipt in due form for the payment. *Held*, that the sending of the second notice was a waiver of the forfeiture occurring upon failure to pay the assessment within the required time after the first notice, and, having received such payment unquestioned, the society cannot repudiate its liability on the policies.—*Shay v. National Ben. Soc.*, 7 N. Y. S. 287.

14. Money due on a beneficiary certificate, made payable to a third person for the purpose and with the understanding that it shall be applied in payment of the debts and funeral expenses of the assured, is impressed with a trust to that effect which equity will enforce.—*Boasburg v. Cronan*, 7 N. Y. S. 5.

Change of beneficiary.

15. The laws of the mutual benefit association of which deceased was a member provided that the member might change

the beneficiary of the relief fund certificate, and a new certificate be issued on surrender of the old one. By Laws N. Y. 1883, c. 175, § 18, the right to effect such a change is made obligatory on the association, and the right is given to make such change without consent of the beneficiary. *Held*, that plaintiff, who was named in the first certificate issued to decedent, which was afterwards annulled and a new one issued, had no vested right in the certificate.—*Luhrs v. Supreme Lodge Knights and Ladies of Honor*, 7 N. Y. S. 487.

16. The fact that the decedent attempted to name a beneficiary in the second certificate, who was not entitled to take under the rules and regulations of the association, conferred no right on plaintiff.—*Luhrs v. Supreme Lodge Knights and Ladies of Honor*, 7 N. Y. S. 487.

Interest.

Allowance against trustee, see *Trusts*, 13. On claim against city, see *Municipal Corporations*, 40.

INTERPLEADER.

When allowed.

1. In an action against a bank for certain moneys of which plaintiff claims to have been the actual depositor, where such deposits were made by and in the name of a third person, in whose name the bank-book was also issued, and whose personal representative claims the fund, and plaintiff ostensibly appears to be a stranger to the contract between such depositor and the bank, defendant's motion for interpleader will be granted, though plaintiff will be thereby precluded from introducing evidence which she might have used in the action against the bank.—*Flanery v. Emigrant Industrial Sav. Bank*, 7 N. Y. S. 2.

2. Laws N. Y. 1882, c. 409, § 259, providing that in all actions against any savings bank to recover a deposit any persons claiming the same fund, and strangers to the action, may be made parties thereto upon defendant's petition, and that, upon payment of such money into court, such bank shall be stricken out as a party to the action, and be relieved of responsibility for such fund, applies to an action against a savings bank for a deposit which had been previously demanded by a third person, whether the latter claims the whole of such deposit or not.—*Progressive Hand-langer Union v. German Sav. Bank*, 7 N. Y. S. 8.

3. Where an action of replevin was brought in January, 1889, and defendant appeared and made a motion in the case, February 4th, and knew at the time that a

non-resident was the real party in interest, a motion by defendant to interplead, and substitute the non-resident as defendant, made in June, was too late.—*United States Land & Investment Co. v. Bussey*, 7 N. Y. S. 495.

4. Where there are two claimants to part of a fund, one who admits that the entire fund is due from him may maintain a bill of interpleader to compel them to ascertain their shares.—*Van Zandt v. Van Zandt*, 7 N. Y. S. 706.

5. In order to maintain a bill of interpleader, plaintiff must bring the amount admitted to be due into court.—*Van Zandt v. Van Zandt*, 7 N. Y. S. 706.

INTOXICATING LIQUORS.

Selling without license — Action for penalty.

In an action for the penalty imposed by Laws N. Y. 1857, c. 628, § 18, (8 Rev. St. N. Y., 8th Ed., p. 2230,) for selling liquors without a license, brought by plaintiffs in the name of the overseer of the poor, under section 80, as amended by Laws N. Y. 1878, c. 820, (8 Rev. St. N. Y., 8th Ed., p. 2234,) which provides that in case of the failure of the overseer, whose duty it is to prosecute such action under section 22 of the act, (Rev. St. N. Y., 8th Ed., p. 2233,) to do so, any other person may prosecute it in the name of the overseers of the poor, a release executed by the overseer to defendant of all such causes of action against him is admissible in evidence, where it does not appear that such release was not based on a full and valuable consideration.—*Bellinger v. Birge*, 7 N. Y. S. 695.

Joinder.

Of causes of action, see *Action*.
parties, see *Parties*, 2, 3.

JUDGMENT.

Appealable, see *Appeal*, 5.
Entry in supplementary proceedings, see *Execution*, 11.
Opening, see *Mortgages*, 10.
— default, see *Appeal*, 18.
Vacation, see *Bail*, 6-14.

By default.

1. On a motion to set aside a judgment by default it was insisted that on the last day for answering, March 26th, the answer addressed to plaintiff's attorney was served as authorized by Code Civil Proc. N. Y. § 797, by being placed in the post-office at Caledonia directed to plaintiff's attorney at Rochester, and affidavits of defendant and his attorney stating that

such was their recollection were filed. The envelope in which the answer was sent was postmarked at Caledonia "March 26." The postmaster at Rochester testified that it could not have been mailed on March 26th, as it appeared by the postmark of his office that it was not received there until March 28th. Plaintiff's attorney made affidavit that early in the morning of March 27th he received mail matter postmarked at Caledonia on March 26th. *Held*, that an order refusing to set the judgment aside would not be disturbed.—*Yates v. Guthrie*, 7 N. Y. S. 177.

2. Section 9 of the Buffalo municipal court act (Laws N. Y. 1880, c. 344) provides that in case defendant fails to answer the complaint, he shall be deemed to have admitted the allegations, and the court, on the filing of the summons and complaint, with proof of due service, shall forthwith enter judgment, without further proof. *Held*, that where defendant fails to answer, but appears and asks an adjournment, the judge is bound to enter judgment for plaintiff.—*Brown v. Niagara Mach. Co.*, 7 N. Y. S. 514.

— Opening and vacating.

3. On motion to vacate a judgment entered on defendant's alleged default in answering plaintiff's amended complaint, where defendant charges that his admission of service of such amended complaint was fraudulently altered by inserting the date, and plaintiff denies this, a reference should be had, to ascertain the fact; and it is erroneous to deny the motion and open the default, on payment of costs, allowing the judgment to stand as security.—*Dovale v. Ackerman*, 7 N. Y. S. 883.

4. Section 16 of the Buffalo municipal court act, (Laws N. Y. 1880, c. 344,) authorizing the court to open defaults on such terms as may be just, where defendant shall fail to appear on the return-day or on any adjourned day, does not authorize a default to be opened where defendant appeared on the return-day and asked an adjournment, but failed to answer.—*Brown v. Niagara Mach. Co.*, 7 N. Y. S. 514.

5. Section 16 of the Buffalo municipal court act provides that when a transcript of a default judgment has been taken from the court, and filed in the office of the clerk of Erie county, the superior court of Buffalo may open the default. The practice is the same as in the municipal court, except that a judge of the superior court may at chambers issue an order to show cause, returnable to a special term, where the application is to be heard and determined. *Held*, that the general term could not entertain the motion.—*Brown v. Niagara Mach. Co.*, 7 N. Y. S. 514.

6. The section also requires defendant to

show to the superior court that no application was made to the municipal court. *Held*, that the moving papers are fatally defective unless they show such fact.—*Brown v. Niagara Mach. Co.*, 7 N. Y. S. 514.

7. Nor is defendant entitled to the relief, under Code Civil Proc. § 8064, providing that a default may be opened for manifest injustice, as it also conditions the relief on defendant's failure to appear.—*Brown v. Niagara Mach. Co.*, 7 N. Y. S. 514.

8. Relief from a judgment entered as on a default to answer, on the ground of an unauthorized appearance by an attorney, can only be had by an application to the court which rendered the judgment to set it aside.—*Gilman v. Tucker*, 7 N. Y. S. 682.

9. The defendant in such judgment, to entitle herself to relief, must show that she has a defense on the merits.—*Gilman v. Tucker*, 7 N. Y. S. 682.

10. A default will not be opened on motion, when the party making the motion has been guilty of great laches therein.—*James v. McCreery*, 7 N. Y. S. 494.

11. Where judgment by default was entered in December, 1886, and notice of application to set it aside was not given till July, 1888, no satisfactory reason excusing the delay being presented, the application was not made with reasonable diligence, and it was properly denied.—*Wygant v. Brown*, 7 N. Y. S. 490.

Res adjudicata.

12. S. sued B. on account, and attached certain land. The attachment was dissolved, and B. sued on the indemnity bond, alleging loss of sale and depreciation in value caused by the attachment. S. answered that the land was purchased for her by B. under an agreement by which the title was assured to S., and credit for the price was to be given to B., and she asked judgment for specific performance. On the trial, evidence of the counter-claim was rejected on the ground that by bringing the action on account, and giving no credit for the price of the land, S. had waived performance of the agreement, and elected to sue on account, and include the consideration for the agreement. B. procured judgment. *Held*, that S. was estopped by the judgment from afterwards suing for specific performance of the contract.—*Shaw v. Broadbent*, 7 N. Y. S. 298.

13. S. sued B. on account, and attached certain land. Afterwards S. was allowed, over the objection of B., to amend her complaint so as to give credit for the price of the land, and to give evidence, also objected to, that B. purchased the land under an agreement by which the title was assured to S., and credit for the price was to be given to B. The referee found that the agreement was made, but the credit, to-

gether with others, overcame the claims of S., and judgment was entered dismissing the complaint. *Held*, that the judgment did not estop B. from contending against a specific performance of the agreement, as the question was not at issue, since the complaint admitted the credits; also because, the judgment being in favor of B., he could not have the finding reviewed by appeal.—*Shaw v. Broadbent*, 7 N. Y. S. 298.

14. A decision that a justice of the district court is not liable in damages to plaintiff for adjourning a case when no verified answer is interposed, is not in conflict with a decision that such unauthorized adjournment is reversible error.—*Merwin v. Rogers*, 7 N. Y. S. 683.

Parties affected.

15. In an action by the assignee of a contract to deliver certain stock, defendant set up a counter-claim, founded on a contract between plaintiff's assignor, defendant, and a foreign corporation. The contract provided for an accounting with respect to certain transactions, and the answer alleged full performance by defendant, and that an accounting had been had, and stated the sum due from the assignor. *Held*, that a decree in an action to which plaintiff was not a party, in a foreign court, where the corporation had its existence, which decree was passed after the assignment to plaintiff, and adjudicated that no accounting had been had on the alleged contract, was not conclusive of defendant's right to assert and prove the accounting and establish his counter-claim.—*Miller v. Ferry*, 7 N. Y. S. 472.

Amendment and correction.

16. Where an action is dismissed on technical grounds, a recital in the judgment that the dismissal was on the merits will be stricken out.—*Riggs v. Chapin*, 7 N. Y. S. 765.

17. Defendant in ejectment alleged that he and plaintiff's grantor had agreed to purchase the land, and that plaintiff's grantor was to take the title; that each should pay part of the purchase money; and that, on repaying to plaintiff's grantor the amount paid by him, defendant should be entitled to a deed. He further alleged that he entered on the land under the agreement, and that he had since the purchase performed labor and services for plaintiff's grantor in full payment of the purchase money paid by the latter. The case was tried solely on the agreement, and no evidence was given as to the state of the account between the parties. The jury were told to find only as to the agreement, since, if that was proven as alleged by defendant, plaintiff's grantor could subsequently bring an action for the purchase money,

wherein the account between the parties could be litigated. *Held*, that a judgment in defendant's favor on "the issues in the action" should be modified by giving defendant judgment only on the issues that were actually tried.—*Taylor v. Taylor*, 7 N. Y. S. 880.

18. Where, in a suit to foreclose a mortgage on the franchise of an under-ground railway company, a judgment is entered which assumes to adjudicate that the mortgagor has performed all the conditions required by the statute granting the franchise, and has acquired the right to appropriate portions of the streets of a city, which has been made a defendant, whereas the complaint makes no claim as to the extent of the rights under the franchise, and prays no judgment that may affect in any manner the right of the city to claim that the franchise has been lost, it is proper, upon motion of such defendant, to amend the judgment by striking from it every adjudication in excess of the relief specifically asked for in the complaint; everything beyond that being outside of the jurisdiction of the court in such an action, under Code Proc. N. Y. § 275, which provides that "the relief granted to the plaintiff, if there be no answer, cannot exceed that which he shall have demanded in his complaint; but in any other case the court may grant him any relief consistent with the case made by the complaint and embraced within the issue."—*Vandemburgh v. City of New York*, 7 N. Y. S. 675.

19. A motion by a city to amend a judgment is not too late, though made 18 years after the judgment was entered, where it was never served on the law officer of the city, though other officers of the city may have had notice of it, and though his attention may have been called to it in other proceedings.—*Vandemburgh v. City of New York*, 7 N. Y. S. 675.

Opening and vacating.

20. A judgment which is entered by a court without jurisdiction will not be vacated at the instance of defendant if he has consented to its entry.—*Anderson v. Carr*, 7 N. Y. S. 281.

21. Where, in compromise of a claim, judgment has been rendered against defendant with his consent, he cannot, in the absence of proof of fraud, have it vacated on the ground that he acted on the erroneous advice of counsel.—*Anderson v. Carr*, 7 N. Y. S. 281.

22. An order canceling a judgment, without notice to the owner, is irregular; but where the parties in interest are afterwards heard on a motion to vacate the order, and it appears that if vacated it would have to be again entered, and it does not appear that any one has been prejudiced by it, the

order should stand.—*Wheeler v. Emmeluth*, 7 N. Y. S. 807.

Limitations.

23. The statutory limitation (Code Civil Proc. N. Y. § 1282) for setting aside a judgment for irregularity has no application to the case of a judgment containing an unauthorized allowance of damages in addition to the amount fixed by the jury.—*Corn Exch. Bank v. Blye*, 7 N. Y. S. 484.

Assignment.

24. An assignment of his judgment by a judgment creditor to his attorney for reasons of convenience, and for his own benefit, cannot prevail against a subsequent settlement by him with his judgment debtor.—*Baker v. Secor*, 7 N. Y. S. 808.

25. Where it is not denied that the claim evidenced by a judgment has been transferred, it is immaterial whether there has been a delivery of the assignment of the judgment to the assignee, or to a third person for his benefit, or whether the assignment rests in parol only.—*Baker v. Secor*, 7 N. Y. S. 808.

Judgment for tort — Assignment to joint tort-feasor.

26. An execution creditor, by unlawfully directing the issuance of an execution against the body of his judgment debtor, becomes a joint tort-feasor with his attorney who unlawfully procures its issuance; and an assignment by plaintiff, the original judgment debtor, to the execution creditor, of a judgment for false imprisonment against the attorney, in consideration of the discharge of the original judgment, discharges the attorney.—*Baker v. Secor*, 7 N. Y. S. 808.

JUDICIAL SALES.

Release of purchaser.

A purchaser at a judicial sale, on the faith of a representation in the terms of sale that a mortgage to which the land was subject would not be due until 18 months thereafter, relying on that interval to effect a sale of the land before the maturity of the mortgage, will be relieved from his purchase where it appears that proceedings for foreclosure were already in progress, and were completed before he received his deed, and he did not hear a statement of the fact of such proceedings alleged to have been made publicly at the time of the sale.—*Bradley v. Leahy*, 7 N. Y. S. 461.

Jurisdiction.

See, also, *Courts*.

In equity, see *Equity*, 1.

To determine right of burial, see *Cemeteries*, 1.

To pass on validity of assignment, see *Assignment*.

JUSTICES OF THE PEACE.

Appeal from, see *Appeal*, 13.

Procedure.

1. Code Civil Proc. N. Y. § 2959, provides that at the time of the return of a summons, or the joinder of issue without process, but at no other time, a justice may adjourn the trial of an action not more than eight days, unless defendant has been arrested; and section 2960 provides that at such time the justice must, on plaintiff's application, adjourn the trial not more than eight days, but not unless on plaintiff's oath, if required by defendant, that it cannot be safely proceeded with for want of some material testimony. On the return-day of a summons, which had been personally served on defendant, the court on its own motion adjourned the trial five days for defendant's failure to appear. On the adjourned day, defendant again failing to appear, and plaintiff's attorney having produced satisfactory evidence of plaintiff's illness, the trial was again adjourned for five days, at the expiration of which judgment was rendered for plaintiff on defendant's failure to appear. *Held*, that the adjournments were regular.—*Rogers v. Edmonds*, 7 N. Y. S. 881.

2. A clerical error in the transcript, which shows the judgment to have been rendered on the return-day of the summons, is not prejudicial, but may be amended.—*Rogers v. Edmonds*, 7 N. Y. S. 881.

Disqualification.

3. Where a justice of the peace, who was also an attorney at law, two days after a summons issued by him, accepted a retainer from the plaintiff to bring another suit for him in the supreme court, the judgment entered by the justice for the plaintiff in the original suit should be set aside, though there probably was no corrupt intent in accepting the retainer.—*Hubbell v. Harbeck*, 7 N. Y. S. 248.

Killing Stock.

See *Railroad Companies*, 15.

Laches.

Of beneficiary of trust fund, see *Trusts*, 9.

LANDLORD AND TENANT.

Liability of landlord.

1. The refusal of the court to charge that the occupation of a part of a demised building by the lessor is not ground for recovery against him for injuries received from another part occupied by the lessee, is not prejudicial to the lessor when the jury has been instructed that he is not liable unless he knew the building to be unsafe at the time of making the lease.—*Timlin v. Standard Oil Co.*, 7 N. Y. S. 158.

2. Both the lessor and the lessee are liable for injuries caused by the fall of the demised building, if it was obviously unsafe at the time of the execution of the lease; and the lessee's liability is not affected by the fact that he did not covenant with the lessor to make substantial repairs.—*Timlin v. Standard Oil Co.*, 7 N. Y. S. 158.

3. When the jury has been so instructed, it is harmless error to refuse to charge that a notice of the dangerous condition of the building, given after the making of the lease, is immaterial.—*Timlin v. Standard Oil Co.*, 7 N. Y. S. 158.

4. An abutting owner who leased premises to a tenant while the sidewalk was safe, and long before it became out of repair, and who did not undertake, by the terms of the lease, to keep the sidewalk in repair, was not liable for injuries caused to a pedestrian by the defective condition of the sidewalk.—*Babbage v. Powers*, 7 N. Y. S. 806.

5. A landlord is not liable for personal injuries sustained by a person visiting his tenant, where it appears that the tenant had assumed the duty of repairing the defect which caused the accident, and that the landlord had paid her for it.—*Sterger v. Van Siclen*, 7 N. Y. S. 805.

Nuisance.

6. Where it appears that a stable was erected and carried on by a tenant so as to constitute a nuisance, with the knowledge and consent of his landlord, and that the latter was informed of the nuisance, and requested to abate it, both are proper parties defendant to the action for damages, and injunction to restrain the nuisance.—*Robinson v. Smith*, 7 N. Y. S. 88.

7. In an action to enjoin a nuisance, both the lessor and lessee of the structure constituting the nuisance are necessary parties.—*O'Sullivan v. New York El. R. Co.*, 7 N. Y. S. 51.

Rights of tenant.

8. Where the enjoyment of an easement appurtenant to property is obstructed, the lessee of the property may sue for damages, he being the real party in interest, in whose name actions are required to be brought by Code Civil Proc. § 449.—*Avery v. New York Cent. & H. R. Co.*, 7 N. Y. S. 841.

9. The lessee of property to which an easement is appurtenant may sue for damages for the obstruction thereof, it being a

nuisance.—*Avery v. New York Cent. & H. R. R. Co.*, 7 N. Y. S. 841.

Leases.

10. By a written contract defendant sold certain land to plaintiff, and agreed to lease the land sold, and other land then owned by plaintiff, which was then cleared, or which defendant might clear, for four years, at a certain annual rental. Defendant also agreed to clear five acres of the land. *Held*, that defendant might clear the five acres at any time during his tenancy, and an action for failure to do so could not be maintained until its termination.—*Gates v. Hendrick*, 7 N. Y. S. 229.

Actions for rent.

11. On a covenant to pay rent for an unfurnished house, the landlord may recover where the tenant, after occupying the premises some time, quits on account of defective plumbing of which the landlord had no knowledge.—*Daly v. Wise*, 7 N. Y. S. 902.

LARCENY.

What constitutes.

Laws N. Y. 1860, c. 508, §§ 83, 84, (Laws N. Y. 1882, c. 410, §§ 1446, 1447.) provide that an attempt to pick pockets in New York city constitutes an attempt to commit grand larceny, though the value of the property taken be less than \$25; and that any one who shall lay hands on the person or clothing of another, with intent to pick his pockets, "under such circumstances as shall not amount to an attempt to rob or to commit grand larceny, shall be deemed guilty of an assault with intent to steal;" and that, in a prosecution under this section, it need not be alleged or proved that any article was intended to be stolen, or its value stated. *Held*, that a person who attempted to pick a lady's pocket in New York city was not guilty of an attempt to commit grand larceny, in the absence of evidence that the lady had any property in her pocket.—*People v. Moran*, 7 N. Y. S. 582.

Lease.

See *Landlord and Tenant*, 10.

LIBEL AND SLANDER.

Reply to new matter, see *Pleading*, 8.

Action for—Bill of particulars.

1. In an action for libel, where the answer does not sufficiently state the facts relied on as a defense, an order may be made requiring defendant to furnish a bill of particulars of the matters he intends to prove on trial.—*Tallmadge v. Press Pub. Co.*, 7 N. Y. S. 895.

Action for—Evidence.

2. In an action for libel, defendant pleaded, in mitigation of damages, that the alleged libelous publications were based on a telegram received from its correspondent, and were published in good faith, and without malice, as items of public news. It appeared that this telegram was based on one received by the correspondent, and the publication charged that plaintiff had been convicted of swindling, while the original telegram simply charged that he had been convicted of violating the laws.

Held, that the correspondent's testimony as to how the discrepancy occurred, and as to the grounds of his belief that the telegram sent by him was true, was admissible to disprove malice, as bearing on plaintiff's right to punitive damages.—*Cameron v. Tribune Ass'n*, 7 N. Y. S. 739.

3. One of the alleged libelous publications charged plaintiff generally with being an "ex-convict," and defendant pleaded justification. On cross-examination of plaintiff as a witness, after he had testified that he had been convicted of violating the liquor law, and served a term of imprisonment therefor, the record of such conviction was admitted in evidence. *Held*, that it was error to charge that the record was to be considered only on the question of plaintiff's credibility, as its object was to show the truth of the charge that he was an "ex-convict," and the question of what was meant by that term was for the jury. In connection with a previous charge that plaintiff had been convicted of swindling.—*Cameron v. Tribune Ass'n*, 7 N. Y. S. 739.

Judgment on pleadings.

4. Defendant, in an action for slander, in calling plaintiff a "perjuring thief," admitted that he made the charge, but alleged that it was true, and that theretofore, in an action between them, plaintiff had willfully testified falsely, by reason of which judgment was rendered in his favor. *Held*, that the finding of the court in said action in favor of plaintiff did not make the question of plaintiff's perjury *res adjudicata*, and judgment could not be given for plaintiff on the answer.—*Burns v. Monell*, 7 N. Y. S. 624.

LICENSE.

Of right of burial, see *Cemeteries*, 2.

Recovery of license fee.

In an action to recover back license fees already paid to the city, the contention that the licenses are void because not signed by the mayor but only by the city clerk is groundless, where it does not appear but that the licenses were as effectual to secure the privileges paid for as if they had been signed by the mayor, and no ob-

jection was made on this ground by the parties taking the licenses.—*Bradley v. City of Rochester*, 7 N. Y. S. 237.

Liens.

See, *Garnishment; Maritime Liens; Mechanics' Liens.*

Of attachment, see *Attachment*, 3.
attorney, see *Attorney and Client*, 4-6.

Life Insurance.

See *Insurance*.

LIMITATION OF ACTIONS.

Retrospective laws, see *Constitutional Law*, 2.

Application of statute.

1. An action against a physician for negligent treatment of a patient is "an action to recover damages for a personal injury resulting from negligence," within Code Civil Proc. N. Y. § 383, subd. 5, providing that such actions must be brought within three years, though the physician was treating the patient under a contract.—*Burrell v. Preston*, 7 N. Y. S. 177.

2. A confirmation, by a court, of an award for damages for property taken to widen a street, is a decree, and, under Code Civil Proc. N. Y. § 376, an action may be brought on it at any time within 20 years.—*Donnelly v. City of Brooklyn*, 7 N. Y. S. 49.

Running of statute.

3. Where an accommodation maker of a note pays the same, or a part thereof, his right of action against the payee accrues at the time of such payment.—*Frank v. Brewer*, 7 N. Y. S. 182.

Disabilities and exceptions.

4. Code Civil Proc. N. Y. § 382, limits an action on a contract or liability, express or implied, other than a judgment or a sealed instrument, to six years. Section 396, subd. 3, provides that a disability may extend the period for commencing an action for not more than one year after it shall cease. A trust-deed provided that the trust should cease on the beneficiary's coming of age. *Held*, that an action by the beneficiary against the trustee's personal representatives for an accounting of rents and profits was within section 382, though the deed was under seal, and, where the action was brought within six years after the beneficiary become of age, he was entitled to an accounting for seven years, though section 468 provides that an action on behalf of an infant shall not be delayed on account of his infancy.—*Garvey v. New York Life Ins. & Trust Co.*, 7 N. Y. S. 818.

5. Code Civil Proc. N. Y. § 401, provides that if, after a cause of action has accrued against a person, he departs from and resides without the state, or remains continuously absent therefrom for the space of one year or more, the time of his absence is not a part of the time limited for the commencement of the action. *Held*, that a debtor who removes from the state before a cause of action against him has been barred by limitation, and who continues to be a non-resident, cannot during that time, by temporary returns to the state, put the suspended statute again in operation.—*First Nat. Bank v. Bissell*, 7 N. Y. S. 58.

Acknowledgment by agent.

6. R. was general agent and manager of defendant's business, representing her in a firm of which she was a member, and in such capacity made payments on a note given by defendant; receiving the money from the firm on her account. *Held*, that the payments were sufficient to take the note out of the statute of limitations.—*McDonald v. McDonald*, 7 N. Y. S. 935.

Practice.

7. Commissioners of estimate and assessment were appointed under an act providing for the acquisition of lands for city purposes, but before completing their proceedings the resolution under which they were acting was repealed. The commissioners presented no claim for their fees and expenses until after action therefor was barred by limitation. Code Civil Proc. N. Y. § 382. They then moved to refer their claim to a referee to take proof preliminary to taxing their costs. *Held* that, as section 418 requires the statute of limitations to be taken advantage of by answer, and the proceeding of the commissioners did not admit of the defense being so presented, the order should be made; but, to avoid the possibility of prejudice to the city's rights, it should recite that it should not affect the right of the city to interpose the defense if the claim should be afterwards sued on.—*In re Extension of Lafayette Place*, 7 N. Y. S. 476.

Lunatic.

See *Insanity*.

Malice.

See *False Imprisonment*, 3, 4.

MANDAMUS.

To appoint one to office, see *Office and Officer*, 2, 3.

Inspectors of elections, see *Elections and Voters*, 2.

To municipal boards and officers.

1. Under Laws N. Y. 1869, c. 855, amended by Laws 1874, c. 260, providing that the town board shall meet on the first Monday of September, to determine what amount, if any, shall be borrowed on the credit of the town, and for what roads or bridges such amount shall be borrowed or appropriated, an adjournment of the board without determining the amount is equivalent to a refusal—which is within their discretion—to borrow any amount, and they cannot be compelled by *mandamus* to meet and come to a formal conclusion.—In re Town Board of Lloyd, 7 N. Y. S. 165.

2. *Mandamus* will lie to correct clerical errors in the assessment rolls of the city of Brooklyn, while yet in the hands of the assessor.—People v. Wilson, 7 N. Y. S. 627.

MARINE INSURANCE.**Conditions of policy.**

1. An American ship was registered at the custom-house at 816 71-96 tons. She was transferred to the Hanoverian flag, and then was registered at 792 tons. *Held*, that a vessel's registered tonnage is that of her home port, and a warranty made after such transfer, not to load above her registered tonnage, was broken by loading her with 901 tons.—Reck v. Phenix Ins. Co., 7 N. Y. S. 492.

2. A warranty not to load a vessel more than her "registered tonnage" is a warranty not to load more tons of weight than the ship could carry, as entered upon the official record as the ship's tonnage.—Reck v. Phenix Ins. Co., 7 N. Y. S. 492.

MARITIME LIENS.**Repairs and supplies.**

1. One engaged in repairing a vessel under contract with the owner, by which the repairer agrees to furnish all the material and labor required, is a builder of the vessel, within the meaning of Laws N. Y. 1862, c. 482, § 1, making any debt "contracted by the master, owner, charterer, builder," etc., of a vessel, "on account of work done or materials * * * furnished * * * towards the building, repairing," etc., of such vessel, a lien thereon.—Kenyon v. Covert, 7 N. Y. S. 84.

Enforcement—Evidence.

2. In an action to enforce a lien for material and labor furnished to the builder of a vessel, evidence by plaintiffs that they furnished such labor and materials at the builder's request is admissible.—Kenyon v. Covert, 7 N. Y. S. 84.

3. After the admission of such evidence, the reception of evidence that the builder

said that plaintiffs' bill was correct, and that the owner would pay it, is not prejudicial to defendants.—Kenyon v. Covert, 7 N. Y. S. 84.

MASTER AND SERVANT.

Who is a servant, see *Corporations*, 11.

Contract of hiring—Discharge of servant.

1. Gross intoxication of the servant while on duty, though produced by drinking liquor for sanitary reasons, warrants the master in discharging him.—Dunkell v. Simons, 7 N. Y. S. 655.

2. The intoxication of a servant while on duty is not condoned by the master's not discharging him on the spot; but the circumstances must show that the delay was owing to the master's forgiveness, and not to any other good reason.—Dunkell v. Simons, 7 N. Y. S. 655.

3. Since a master has the right to fix his own prices on his goods, and to insist that any offer of a smaller price should be submitted to him for determination by his servant, the reasonableness of this order is not a question of fact for the jury; and the servant's disobedience is not excused by the fear that his dignity would be impaired in the eyes of some customers if he should comply with the order.—Dunkell v. Simons, 7 N. Y. S. 655.

4. When a master is sued by his servant for wrongful discharge, and it appears that the contract bound plaintiff to perform his duties to the best interests of defendant, and as economically as possible, and to conform to reasonable rules made by defendant, and there is evidence that before the discharge disputes arose; that plaintiff disobeyed the instructions and refused the requests of defendant,—it is error to instruct the jury to find for plaintiff, as it is a question for their determination whether plaintiff's conduct was such as to justify his discharge.—Lippus v. Columbus Watch Co., 7 N. Y. S. 478.

5. Defendant does not waive his right to go to the jury on the question of reasonable ground, for discharging plaintiff, though he does not request the submission of that issue, when the trial judge has just announced his intention to submit nothing but the question of the amount of plaintiff's recovery.—Lippus v. Columbus Watch Co., 7 N. Y. S. 478.

— Compensation.

6. Where plaintiff agrees to work at a certain salary, and, if a certain proportion of the net profits of the business exceed that sum, he is to be paid such excess, the amount of his salary should be deducted as an expense of the business, in order to determine the net profits in an action for an

alleged excess.—*Buning v. Kittell*, 7 N. Y. S. 486.

7. But interest which, by the partnership contract, was allowed to one of the partners on part of his investment in the business, of which plaintiff knew nothing when he entered into the contract, and to which he objected when informed of it, should not be deducted as an expense.—*Buning v. Kittell*, 7 N. Y. S. 486.

8. Where it was admitted that plaintiff was in defendant's employ from March 1, 1872, to February, 1875, but the referee only allowed compensation from March 1, 1872, to February 1, 1874, the judgment confirming his report must be reversed, and a new trial ordered.—*Wood v. Rockwell*, 7 N. Y. S. 870.

Negligence of master.

9. In an action for personal injuries it appeared that defendant employed plaintiff to assist in taking down old buildings; that defendant personally directed the work; that the walls were in an unsafe condition; that his attention was called to a safe method of doing the work; that he deliberately, and without observing the warning, hazarded the lives of the workmen; that, without warning to the workmen, pieces of wall were torn down and thrown into the cellar; and that the shock of this fall caused the walls, which were loose and not shored up, to fall and injure plaintiff. It was shown that the building could easily have been taken down with safety. *Held*, that the jury were justified in finding that the fall was caused by the manner in which the work was conducted, and not by the negligence of co-employees, and a verdict for plaintiff would be sustained.—*Rickhoff v. Heckman*, 7 N. Y. S. 471.

10. In an action for personal injuries, it appeared that while plaintiff was working along-side certain cars, which were being unloaded of earth and gravel by means of a "plow," the plow fell over the side of the car, and injured him. The plow had been used for five years, without any injury resulting therefrom, and plaintiff failed to show why the plow fell, but defendant's evidence tended to show that it was thrown off by a stone that had lodged between two of the cars, and it appeared that it had frequently fallen before from a similar cause. The plow was pulled by the locomotive, and the whistle was usually blown when it started, but on this occasion it was not. *Held*, that a verdict for plaintiff was warranted.—*De Vau v. Pennsylvania & N. Y. Canal & R. Co.*, 7 N. Y. S. 692.

11. In an action against a railroad company for personal injuries, where it appears that plaintiff's leg was crushed between two cars while he was swinging be-

tween them for the purpose of boarding a train,—there being no other way of boarding it,—as required by the course of his employment, and the cars having no appliances to prevent their coming into immediate contact, the question of defendant's negligence in regard to safe and suitable machinery is for the jury, and its negligence is not excused by the concurring negligence of a fellow-servant.—*Pullutro v. Delaware, L. & W. R. Co.*, 7 N. Y. S. 510.

12. In an action for the alleged negligent killing of an employe of defendant railroad company, who was shoveling snow from its track on a stormy, blustering morning, by backing an engine on him, several witnesses for plaintiff, who were near the place of the accident, testified that they did not hear any whistle blown, and one testified that he was listening for the whistle of an engine, and did not hear it. *Held*, that the question whether or not the whistle was blown was for the jury, though several witnesses for defendant, some of whom were in its employ, testified positively that it was blown.—*Wall v. Delaware, L. & W. R. Co.*, 7 N. Y. S. 709.

13. Plaintiff, while in the employ of defendant, was injured by the fall of a derrick, owing to the breaking of one of the three guys by which it was supported. *Held* that, where the question whether more than three guys were necessary for the support of the derrick was properly submitted to the jury, their verdict for the plaintiff was conclusive that defendant was guilty of negligence in failing to furnish safe appliances.—*Oties v. Cowles Electric Smelting & Aluminum Co.*, 7 N. Y. S. 251.

14. In an action by a servant for personal injuries caused by an alleged defect in the master's machinery, the complaint will be dismissed, in the absence of evidence to show how long the defect has existed.—*Oehme v. Cook*, 7 N. Y. S. 764.

Negligence of fellow-servant.

15. In an action for the killing of an employe of defendant railroad company, by backing an engine on him, plaintiff's evidence showed that the engineer through whose negligence decedent was killed, and who was his fellow-servant, had often previously run engines through defendant's yard, and in and across the streets of the city, without giving notice; that this was known to defendant's train dispatcher and road superintendent; and that his action in this respect was frequent and continuous. *Held*, that the evidence warranted submission to the jury of the question whether defendant knew, or ought to have known, that the engineer was habitually negligent, and was thus negligent in retaining him in its employ.—*Wall v. Delaware, L. & W. R. Co.*, 7 N. Y. S. 709.

Risks of employment.

16. Where a car-coupler has for some time been employed in a railroad yard, it is error to submit to the jury the question whether the danger of having his foot caught in an unlocked guard-rail is so apparent and obvious that he is chargeable with notice of its existence, although he had been at work only three or four days in that part of the yard where the injury occurred. Following *Appel v. Railroad Co.*, 19 N. E. 98.—*Ireland v. Gardner*, 7 N. Y. S. 609.

17. In an action against a railroad company for personal injuries, it appeared that plaintiff's leg was crushed between two cars while he was swinging between them for the purpose of boarding a train. *Held*, that it was a question for the jury whether plaintiff's injury resulted from a risk which he assumed on entering defendant's service, he having no knowledge, so far as appears, of appliances such as were lacking on the cars, and never having seen cars come together as those did.—*Pullutro v. Delaware, L. & W. R. Co.*, 7 N. Y. S. 510.

Contributory negligence.

18. In an action for injuries received by plaintiff while boarding defendant's train, it appeared that plaintiff was employed under the direction of a foreman, and was required to board the train by order from him, which was almost simultaneous with the starting of the train. *Held*, that it was a question for the jury whether he was guilty of contributory negligence in boarding the train while it was in motion.—*Pullutro v. Delaware, L. & W. R. Co.*, 7 N. Y. S. 510.

19. In an action for injuries received by plaintiff, while in the employ of defendant, by the fall of a derrick, it appeared that defendant's foreman directed the men working under the arm of the derrick to get out of the way, but that plaintiff was working on the other side of the derrick, and, when the mast fell, it did not fall towards the arm, but in the direction of plaintiff. *Held*, that a finding that plaintiff was not guilty of contributory negligence was justified.—*Oties v. Cowles Electric Smelting & Aluminum Co.*, 7 N. Y. S. 251.

Measure of Damages.

See *Damages*.

MECHANICS' LIENS.

Enforcement, see *Appeal*, 2.

Construction of statutes.

1. The mechanic's lien law of 1885, (Laws N. Y. 1885, c. 842, § 2,) which provides that if the owner shall, for the purpose of avoid-

ing the provisions of this act, or in advance of the terms of any contract, pay by collusion any money on such contract, and the amount still due shall be insufficient to satisfy the claims, the owners shall be liable to the amount that would have been unpaid had no such payment been made, does not apply, where the owner has made a payment in advance, without collusion.—*Lind v. Braender*, 7 N. Y. S. 664.

Property subject to.

2. Though a person may not be a party to the contract for the building of a house, proof of her knowledge and approbation of the work is sufficient to subject her interest in the land on which it is built to the operation of the builder's lien.—*Hellwig v. Blumenberg*, 7 N. Y. S. 746.

For what obtained.

3. Laws N. Y. 1885, c. 842, § 1, provides that any person who shall perform any labor or service or furnish any materials used in the erection of any house may have a lien for the price and value thereof. *Held*, that a furnace set within a brick structure, and the connecting pipes and appurtenances, are part of the house, and entitle the person furnishing them to a lien for their price.—*Schwartz v. Allen*, 7 N. Y. S. 5.

4. Laws N. Y. 1885, c. 842, § 1, providing that any one who shall perform any labor, or furnish any materials to be used in altering or repairing any "building or building lot, including fences, sidewalks, paving, fountains, fish-ponds, fruit and ornamental trees," shall have a lien, includes a claim for terracing and sodding a building lot.—*Pickett v. Gollner*, 7 N. Y. S. 190.

Who may claim—Material-men.

5. The New York mechanics' lien law (Act 1885, c. 842) provides that if the owner or person in interest shall, for the purpose of avoiding the provisions of the act, or in advance of the terms of any contract, pay by collusion any money, etc., he shall be liable for the amount which would have been unpaid to the contractor, assignee, etc., had no such payment been made. A material-man filed a lien for lumber furnished the contractor. Afterwards the contractor gave to another material-man, who had also furnished lumber, an order on the owner for a sum in excess of that due him for the lumber. The order read: "It being for lumber materials used in construction of same; the amount to be paid of the last payment of \$1,900." *Held*, that the material-man presenting the order could only recover thereon the amount due for lumber actually furnished by him for the building.—*Stevens v. Reynolds*, 7 N. Y. S. 771.

Subcontractors—Extent of right.

6. Under Laws N. Y. 1885, c. 342, § 1, giving a lien to persons doing work on, or furnishing material for, a building, with the consent of the owner, but providing that the owner shall not be liable, by reason of the liens filed, to pay more than the amount agreed on in the contract, and remaining unpaid at the time of filing the lien, a subcontractor need not show the consent of the owner directly to himself; but, in the absence of an agreement by the owner making himself personally liable for the claim of the subcontractor, the latter has a claim against the property no further than the amount unpaid on the contract at the time of filing his lien. — *Riggs v. Chapin*, 7 N. Y. S. 765.

— Abandonment of contract by contractor.

7. Where the owner has entered into a contract, and made payments under it, for work done on his building, and the contractor has abandoned the work before completion, it is competent, in an action by subcontractors to enforce their liens, for the owner to prove how much of the work the contractor left undone, and what it has cost to complete it in the manner provided by the contract. — *Lind v. Braender*, 7 N. Y. S. 664.

Proceedings to perfect.

8. Laws N. Y. 1885, c. 342, § 4, provides for a verification of the notice of lien "to the effect that the statements therein contained are true." Section 25 declares that the lien law is to be liberally construed, and that a substantial compliance with its provisions shall be sufficient. Claimant's verification to the notice of lien was that he knew the contents thereof, and that the same were true, but he did not swear that the "statements" were true. *Held*, that the verification, though not in statutory language, was a substantial compliance with the law. — *Schwartz v. Allen*, 7 N. Y. S. 5.

Enforcement—Parties.

9. Where a person against whose name a mechanic's lien is filed, but who is not the owner of the premises sought to be affected, is made sole defendant to a suit to foreclose such lien, plaintiff will not be allowed to substitute the proper parties either under the mechanic's lien act, providing that a lien shall not be invalid because of a mistake in the name of the owner in the notice of claim, or under Code Civil Proc. N. Y. § 452, authorizing the bringing in of new parties whose presence is necessary to the determination of the controversy between the parties to the action. — *Spence v. Griswold*, 7 N. Y. S. 145.

Merger.

Mortgage liens, see *Mortgages*, 8.

Minor.

See *Guardian and Ward; Infancy*.

Misjoinder.

Of parties, see *Parties*, 2, 3.

Money Had and Received.

See *Assumpsit*, 2.

Monopolies.

See *Contracts*, 4, 5.

MORTGAGES.

Foreclosure, amendment of pleadings *nunc pro tunc*, see *Parties*, 4.

What constitutes—Absolute deed.

1. In an action by the grantor's widow to have an absolute deed declared a mortgage, it appeared that defendant loaned the grantor some money, and that thereafter, for a nominal consideration, he executed the deed in question to defendant. There was no written evidence of the loan. The evidence showed that the loan represented a fair market price for the premises, and the only direct evidence that the deed was to be treated as a mortgage was that of plaintiff, who testified that before the loan defendant told the grantor she would loan him the money on security of the premises, and that when he paid her back he could have a release; and that on another occasion defendant told him that he could have the money on security of the property, but grantor did not signify his assent to those remarks. Plaintiff also stated that her husband and defendant had much business together which was not transacted in her presence, and about which she knew nothing. Another witness made contradictory statements as to the import of a conversation she overheard relative to the subject, and defendant denied making the statements testified to by plaintiff. *Held*, that the deed would not be declared a mortgage. — *Sidway v. Sidway*, 7 N. Y. S. 421.

Execution after assignment of debt.

2. The payee of certain notes indorsed some of them over, and then made an assignment for the benefit of creditors. Afterwards the maker, without knowledge that any of the notes had been transferred, executed a mortgage to the assignee for the benefit of creditors to secure the notes.

Held, that the proceeds of the mortgage should be applied *pro rata* to the notes in the hands of the assignee and indorsees without regard to any preferences contained in the assignment, and it is immaterial that the mortgage was executed in pursuance of a prior agreement that the notes were to be so secured.—*In re Preston*, 7 N. Y. S. 92.

Merger.

8. When the owner of an equity of redemption pays the mortgage debt, and takes an assignment of the mortgage, with the provision that it shall not merge, but remain alive, as a muniment of his title, on his death the mortgage will not be regarded as an existing lien on the premises, and an asset in the hands of his administrator.—*Browne v. Perris*, 7 N. Y. S. 172.

Payment and release.

4. In foreclosure proceedings, the report of a referee as to the amount due on two mortgages stated that sundry payments were made, but that it was not proven in every instance what were the amounts or dates, nor to which of the bonds secured by the mortgages they were applied, but that there was unpaid only \$500. Certain amounts were indorsed on the bonds as paid, and no proof was made by defendants of the payment of any particular sums not indorsed, nor of any facts or circumstances on which a finding could be based. A town assessor testified that one of the mortgagees, who had since died, stated, when examined for assessment, that his mortgage was paid to \$500, or thereabouts, and an affidavit, made by him for the same purpose, stated that he had but one mortgage, on which there was due about \$500. There was other evidence, consisting of admissions of defendants, indicating that much more was due and unpaid. *Held*, that the finding would be set aside, and a new reference ordered.—*Whitman v. Foley*, 7 N. Y. S. 810.

5. The evidence of the declarations of a mortgagee to tax assessors, when examined for assessment, that his mortgage was paid, with the exception of a certain balance, is competent on the question of payment.—*Whitman v. Foley*, 7 N. Y. S. 810.

Foreclosure.

6. In a suit for foreclosure, where both the plaintiff and one of the defendants claim ownership of the mortgage, the defendant who owns the equity of redemption may be granted leave to pay into court the money due on the mortgage, and have the same discharged, such leave being warranted by the general equitable power vested in the court, together with Code Civil Proc. N. Y. § 820, providing that a defendant in an action on a contract

against whom another person makes a demand for the same debt may apply for an order to substitute such person in his place, and discharge defendant from all liability upon his paying into court the amount of the debt, and that the court may in its discretion make such order.—*Van Loan v. Squires*, 7 N. Y. S. 171.

7. On application for leave to sue for part of a mortgage debt after judgment of foreclosure, as required by Code Civil Proc. N. Y. § 1628, the court will, in the exercise of its discretion, consider the equitable rights of defendant, which cannot be pleaded by him in the action at law.—*United States Life Ins. Co. v. Poillon*, 7 N. Y. S. 884.

— Rights of junior mortgagees.

8. During the pendency of foreclosure proceedings on a first mortgage, and before the adjustment of costs, plaintiff, the second mortgagee, tendered the first mortgagee an amount sufficient to cover her mortgage debt and costs, and accompanied his tender by a demand for an assignment of her mortgage. She offered to cancel her mortgage, but refused to execute an assignment. After the tender, plaintiff mingled the money tendered with his other money, and used it as his own. *Held* that, while plaintiff was entitled to an assignment of the first mortgage, the first mortgagee was entitled to interest thereon to the present time; plaintiff's tender being insufficient to stop the running of interest.—*Nelson v. Loder*, 7 N. Y. S. 849.

— Parties.

9. Where plaintiff in a suit for foreclosure assigns the bond and mortgage, his assignee may on motion be substituted as plaintiff.—*Van Loan v. Squires*, 7 N. Y. S. 171.

— Opening decree.

10. Code Civil Proc. N. Y. § 453, provides that when a person not a party to the action has an interest in the subject thereof, or in real property the title to which may in any manner be affected by the judgment, and makes application to the court to be made a party, it must direct him to be brought in by proper amendment. *Held*, that an order opening a decree of foreclosure and allowing a person who has a vested interest in the mortgaged property to become a party to the foreclosure action, but which imposes the conditions that she pay the referee's fees, giving a bond for the costs that may be taxed against her, and, if plaintiff desired it, consenting to refer the issues raised by her answer and try the cause on five days' notice, is erroneous to the extent of such conditions, in the absence of laches.—*Lawton v. Lawton*, 7 N. Y. S. 556.

Motions.

To strike out and to make definite, see *Pleading*, 7.

MUNICIPAL CORPORATIONS.

See, also, *Bridges; Highways; Schools and School-Districts; Towns.*

Fire limits, see *Constitutional Law*, 3.

Grant of licenses, see *License*.

Vacation of street assessment, see *Abatement and Revival*, 1.

Ordinances—Regulation of peddlers.

1. The charter of the city of Rochester, § 40, gives to the common council the power to regulate the vending of vegetables, etc., and to regulate and restrain hawking and peddling in the streets. *Held*, that an ordinance prohibiting the peddling of vegetables without a license was not void, as discriminating in favor of some and against other forms of traffic.—*Bradley v. City of Rochester*, 7 N. Y. S. 237.

—Delegation of authority.

2. The charter of the city of Rochester, § 40, gives to the common council the power to make ordinances to regulate the vending of wood, coal, meats, vegetables, etc., and to prescribe the fees to be paid for a license for their sale, and to regulate and restrain hawking and peddling in the streets. The city passed an ordinance prohibiting the peddling of vegetables, etc., without a license, and authorizing the mayor to license any proper person thus to sell on payment of a license fee. *Held*, that the ordinance was not void as delegating to the mayor authority conferred by the charter on the common council.—*Bradley v. City of Rochester*, 7 N. Y. S. 237.

Officers—Authority.

3. Under Laws N. Y. 1870, c. 291, tit. 3, § 3, subd. 25, authorizing trustees of villages "to construct sewers, culverts, and drains," as amended by Laws 1889, c. 186, authorizing them to "construct culverts and drains," and "to cause all necessary sewers to be built," the expense thereof to be assessed on the village at large, so far as the sewers crossed streets or ran along village property, and the remainder on the lots fronting on the sewers, which should not be constructed except on the petition of a majority of the property owners, village trustees can construct sewers only on the conditions precedent prescribed by the latter statute.—*Bacon v. Nanny*, 7 N. Y. S. 804.

4. Laws N. Y. 1884, c. 410, authorizing the mayor of each city to prescribe civil service rules, and to employ suitable persons to make inquiries and examinations, and prescribe their duties, gives the mayor power to designate a secretary for the civil

service commission appointed by him under the act, and to fix his salary.—*Kip v. City of Buffalo*, 7 N. Y. S. 685.

—Appropriations for salary.

5. The charter of the city of Buffalo, tit. 5, § 1 et seq., provides that the comptroller shall, on or before the 1st day of April in each year, furnish to the council a financial statement for the current year, together with an estimate of the current expenses of each department. Heads of departments are also required to furnish estimates of the amounts required by their respective departments for the current year. The council may amend such estimates, and are required to pass upon them not later than May 1st. The expenditures of each department are required to be kept within the estimates made for it; each office or purpose being debited with the whole sum appropriated, and credited with the salaries and other fixed sums to be paid therefrom, and "the other expenditures" are not to exceed the remainder of the estimate. Contracts for amounts exceeding such remainder shall not bind the city as to the excess. The mayor fixed the salary of the secretary of the civil service commission at \$600 per annum, payable monthly, but the council only appropriated \$50 for the expenses of the commission for the whole year. After paying all fixed expenses of the mayor's department, a balance remained to its credit of less than the amount of salary due the secretary. *Held*, that the latter could recover the \$50 appropriated for the expenses of the commission, and the unexpended balance to the credit of the mayor's fund, but no more.—*Kip v. City of Buffalo*, 7 N. Y. S. 685.

Removal of member of fire department.

6. A telegraph operator of the Brooklyn fire department is a member of the "force for extinguishing fires," and not a clerk, within Laws N. Y. 1880, c. 377, § 7, (City Charter of Brooklyn,) providing that the commissioner may remove clerks under certain conditions, but that no person on the force for extinguishing fires shall be removed without cause, and then only after a public trial by the head of the department.—*People v. Ennis*, 7 N. Y. S. 680.

7. A member of the department of fire and buildings of Brooklyn, who fails to deny the charges against him, and requests a postponement, which is denied, cannot be thereupon dismissed without trial or introduction of testimony.—*People v. Commissioners*, 7 N. Y. S. 439.

Police department—Removal of policemen.

8. Where it is admitted that a member of the police force has been intoxicated, it is

solely within the judgment of the police commissioners whether the excuse offered is such as to relieve him from the penalty of dismissal.—*People v. French*, 7 N. Y. S. 460.

9. On *certiorari* to review the decision of the police commissioners of New York city in dismissing relator from the police force for drunkenness while on duty, the testimony of a roundsman was that he found relator about 9 P. M., under the influence of liquor; that he staggered, and witness took him to the station-house; and that relator was incoherent in his talk, like a man under the influence of liquor. This was corroborated by the testimony of the sergeant, who observed the condition of the relator after he was taken to the station-house. The relator's testimony tended directly to exonerate him from the charge of drunkenness. *Held*, that the action of the commissioners in dismissing relator was proper.—*People v. French*, 7 N. Y. S. 489.

10. Under Laws N. Y. 1887, c. 192, providing that policemen of the New York & Brooklyn Bridge are removable only after written charges preferred, and a public examination thereon, in such manner as the rules and regulations of the trustees may prescribe, but no removal can be had after such hearing, unless by a majority vote of all of said trustees, a rule that the hearing shall be had before the president of the board, who, in case he recommends the dismissal of the person charged with the offense, shall report the evidence to the board, is valid.—*People v. Board of Trustees*, 7 N. Y. S. 806.

11. Relator was charged with absence without leave, which was admitted, and with falsely reporting sick. The report of the police physician, that he had visited relator's residence, and found him out, and could not learn of his sickness, was read without objection, and no denial or explanation of the facts was made. *Held*, that relator could not complain that the facts were not proven by competent evidence.—*People v. Board of Trustees*, 7 N. Y. S. 806.

Police department—Punishment for purposes of discipline.

12. Where a policeman leaves his post and falls asleep, his dereliction gives the police commissioners jurisdiction for purposes of discipline, and the supreme court cannot review their action in regard to the punishment inflicted.—*People v. French*, 7 N. Y. S. 442.

Control of streets.

13. Where the act incorporating a village gives the trustees control of the streets, they may authorize the erection of poles therein for the purpose of lighting the streets; and the fact that a pole erect-

ed in front of plaintiff's premises, without his consent, may also be intended for private purposes, does not entitle him to have it removed, so long as it is reasonably necessary and proper for the public service.—*Johnson v. Thompson-Houston Electric Co.*, 7 N. Y. S. 718.

14. The city of New York, though occupied by the Dutch, was always English territory; and hence the "Bowery," a street alleged to have been dedicated during the Dutch occupancy, is governed by the rules of the common law, and not by the civil law, as to the rights of abutting owners.—*Hine v. New York El. R. Co.*, 7 N. Y. S. 464.

15. An owner of land abutting on the Bowery is entitled to easements of light, air, and access, and may recover for injuries to those rights arising from the construction of an elevated railroad on the street.—*Hine v. New York El. R. Co.*, 7 N. Y. S. 464.

Defective streets.

16. In an action for injuries alleged to have been caused by slipping on ice negligently allowed to remain on an unsafely graded sidewalk, where there is no evidence as to the cause of plaintiff's slipping, a judgment for defendant is proper.—*Slavin v. City of New York*, 7 N. Y. S. 906.

17. In an action for personal injuries caused by a hole in the snow which covered a street of defendant to the depth of from one to two feet, it appeared that the street was one on which there was a great amount of traffic; and that, aside from such hole, the street was in good condition. Plaintiff's evidence showed that the hole had been in the same condition for from five to seven days before the accident, and that it was from four to six feet long, from one and one-half to two feet deep, and thirty inches wide, and ran lengthwise of the street. Defendant's witnesses estimated it as smaller. *Held*, that the question whether defendant was negligent in not discovering and filling the hole before the accident was for the jury.—*Fitzgerald v. City of Troy*, 7 N. Y. S. 108.

18. In an action for personal injuries resulting from the negligent construction and maintenance of a sidewalk, and suffering ice to accumulate thereon, it was shown that the sidewalk at the place of the accident had a greater slant towards the street than it had elsewhere, and a part of it had settled so that water ran towards the end of the walk, where ice frequently accumulated, while the walk was otherwise dry; and it was recognized by residents as a dangerous spot. Nothing was disclosed that should have put plaintiff on his guard as to the danger, and he did not see the ice until he slipped and fell. *Held*, that a ver-

dict for plaintiff was warranted.—*Ayers v. Village of Hammondsport*, 7 N. Y. S. 174.

19. In an action against a city for personal injuries sustained by reason of a defect in a plank sidewalk, it appeared that as plaintiff stepped on one of the planks, which were laid crosswise on stringers, it tipped up, and, catching his other foot, threw him down; that the plank was warped and unnailed, and had been so for some time; that plaintiff passed over the walk every day, going to and from his business; and that one of defendant's deputy street commissioners passed over the walk daily, for months, immediately preceding the accident. *Held* that contributory negligence being a question for the jury, a verdict for plaintiff would not be disturbed.—*Holloway v. City of Lockport*, 7 N. Y. S. 863.

Contributory negligence.

20. In an action for personal injuries caused by a loose plank in a sidewalk, an instruction that, "if the plaintiff was familiar with it, [the place,] and it was out of order, there is stronger probability that he must have known that there were loose planks there, and it became his duty to be careful and prudent, in view of the knowledge which he had," when supplemented by a further instruction that, "if the jury find that the plaintiff was familiar with the walk in question and its condition, and passed over it daily, it was his duty to use more than ordinary care in passing over it on the day that he received the injury complained of, and that it was his duty to be more vigilant, if he knew of the defect, than if he had been ignorant of the fact that it was out of condition."—correctly states the rule of law as to the degree of care necessary for the plaintiff to exercise to escape the imputation of negligence.—*Holloway v. City of Lockport*, 7 N. Y. S. 863.

Defective sewers.

21. In an action for injuries to plaintiff's premises, caused by the discharge thereon of water and filth from an alleged defective sewer, evidence that when the sewer was built it was connected with another sewer, so that the bottom of one was on the same level with that of the other, and that there were six inches of stagnant water and sand in the old sewer; that a surface well had been constructed, which turned more surface water into the sewer in question than its capacity would warrant, and that the surface well had been removed some time before the trial; that there was an obstruction in the sewer which impeded the flow of the water, and caused an accumulation of solid substance, which obstruction had also been removed before the trial; that plaintiff's building, which was connected with the sewer, had been injured; and that

she had repeatedly complained to the city authorities that water was running into her cellar,—is sufficient to warrant the submission to the jury of the question whether the water from the sewer caused the alleged injury to plaintiff's property, and whether the filth came from the sewer.—*Daggett v. City of Cohoes*, 7 N. Y. S. 882.

22. Defendant is liable for the throwing of water and filth on plaintiff's premises, caused by the construction of a surface well which turned a large amount of surface water that had previously run in other directions into the sewer in question, causing its overflow. *Following Siefert v. City of Brooklyn*, 4 N. E. Rep. 821.—*Daggett v. City of Cohoes*, 7 N. Y. S. 882.

23. Notice to defendant's street superintendent and mayor that water was running into plaintiff's cellar, followed by evidence that the superintendent thought that defendant should clean out the cellar, is sufficient to warrant a finding that defendant had notice of the obstructed condition of the sewer from which the water was alleged to have been discharged; the court having charged the jury that defendant need exercise only ordinary care to ascertain the existence of the obstruction.—*Daggett v. City of Cohoes*, 7 N. Y. S. 882.

24. The fact that plaintiff has voluntarily connected her premises with a public sewer of defendant is no bar to her recovery for injuries caused by defendant's negligence in permitting it to be out of repair.—*Daggett v. City of Cohoes*, 7 N. Y. S. 882.

25. Where plaintiff's building has been put out of repair by an obstruction in a sewer, she may prove the decreased value of the property owing to its impaired condition; the injury being permanent, and defendant having objected to plaintiff's offer to prove how much it would cost to restore the building.—*Daggett v. City of Cohoes*, 7 N. Y. S. 882.

Public improvements.

26. Laws N. Y. 1865, c. 381, passed April 12th, provided for the adoption of a general system of sewerage in New York city on a general plan, under the control of a board, and that no sewer should be constructed except on that plan. An act passed April 24, 1865, gave the commissioners of public parks the right to regulate, grade, and improve such streets as they might lay out on a plan to be adopted by them. In 1870 the powers and duties of the board named in the act of April 12, 1865, were conferred on the department of public works. The charter of 1873 provided for a bureau in the latter department having charge of sewers, and another having charge of regulating and grading streets, etc. The consolidation act, §§ 827, 831, gives the commissioner power to re-

wise and frame a plan for sewers, and prohibits the construction of a sewer except on that plan. *Held*, that the department of public works has power to construct sewers, to the exclusion of the department of parks.—In re New York Institution for the Instruction of the Deaf and Dumb, 7 N. Y. S. 860.

27. A resolution of the city council of Auburn for the construction of a sewer is a proceeding authorizing a local improvement, the expense thereof being assessed on the property benefited, and not a public one within Laws N. Y. 1879, c. 53, § 85, as amended by Laws 1885, c. 255, § 5, providing that no resolution authorizing any public improvement shall have any effect unless approved by the mayor within four days after its passage, or, failing of his approval, is repassed by the concurrent vote of eight aldermen.—*Kinsella v. City of Auburn*, 7 N. Y. S. 817.

28. It sufficiently appears that the proceedings of a council, in referring a petition for street improvement, were presented to the mayor for approval, when it is shown that the documents were given to the mayor's clerk, who, in accordance with his custom, was at the office to receive such papers, and that the mayor afterwards attempted to approve them.—*Knell v. City of Buffalo*, 7 N. Y. S. 233.

29. Where it appears that the plans of the proposed improvement were on file when the engineer advertised for proposals, it will also be presumed, in the absence of evidence, that the specifications were also on file, as the law requires.—*Knell v. City of Buffalo*, 7 N. Y. S. 233.

30. After bids for constructing a sewer were opened, and the council had passed a resolution awarding the contract to the lowest bidder, who failed to enter into contract, it was not necessary to advertise again, as the council might, at its next meeting, rescind the former resolution, and award the contract to the next lowest bidder; Laws N. Y. 1879, c. 53, § 111, providing that, the next meeting after proposals are made, they shall be presented to the common council, and be opened and considered; that "the common council may reject any or all of the proposals, if they shall deem it for the interest of the city; and that, if either of said proposals is deemed favorable to the city, the common council may direct the mayor and city clerk to contract with the party whose proposal is accepted."—*Kinsella v. City of Auburn*, 7 N. Y. S. 817.

31. Where the proposals for bids for the construction of a sewer referred to other materials, but not to lumber, a provision in the contract allowing for lumber without consent of the council is unauthorized, and the assessment for its payment is in

that particular excessive.—*Kinsella v. City of Auburn*, 7 N. Y. S. 817.

Assessments.

32. Where the amount of an erroneous assessment for local improvements can be ascertained, the entire assessment is not thereby invalidated, but the court may, in the exercise of its equitable power, correct the error.—*Kinsella v. City of Auburn*, 7 N. Y. S. 817.

33. An assessment for interest for one year on the cost of a local improvement was not erroneous, it being authorized by Laws N. Y. 1885, c. 255, § 27.—*Kinsella v. City of Auburn*, 7 N. Y. S. 817.

34. Where the only omissions in the preliminary steps authorizing street improvement are of matters of form, the law being substantially complied with, and the mayor having approved the action of the council in making the contract, such irregularities will not vitiate an assessment.—*Knell v. City of Buffalo*, 7 N. Y. S. 233.

35. The charter of Buffalo, (title 9, § 18.) as originally passed, provided that no work or improvement, the probable cost whereof exceeded \$500, should be ordered until notice of intention to order it should first be published six times in the official paper. Section 19 prohibited the city from entering into a contract for any work exceeding said sum until a notice had been published in the official paper inviting sealed proposals for the work, or until the assessment should be confirmed. Laws 1878, c. 395, amended section 19 so that, in case a majority of the property owners on the street where the work was to be done petitioned for the improvement, publication of such notice might be dispensed with, and the contract might be let before confirmation of the assessment. Laws 1879, c. 486, excepted from the requirements of section 19, as to publication of notice for proposals and confirmation of assessments, contracts for street sprinkling, but Laws 1885, c. 181, repealed this provision, and left the section as it stood before 1879. *Held*, that a notice of the intention to provide for sprinkling the streets was essential to the validity of an assessment for that purpose, as the amendments mentioned did not affect section 18.—*Tift v. City of Buffalo*, 7 N. Y. S. 633.

36. Under Laws N. Y. 1880, c. 550, § 12, the court cannot reduce an assessment for a sewer, constructed by the department of public works, on the ground that it could be legally constructed only by the department of parks, and that, if constructed by the latter, one-half of the expense only could have been assessed. The department of parks not having ratified or accepted the work, or taken any action in the matter, the property owner cannot claim

benefits which would have arisen had that department legally constructed it; and if it was constructed by the proper authorities, there is no basis for the reduction.—In re New York Institution for the Instruction of the Deaf and Dumb, 7 N. Y. S. 860.

Relief against assessments.

87. Where notice of an intention to provide for sprinkling the streets of a city is made essential to an assessment for that purpose, and proof of publication of the notice need not be attached to the assessment roll, and there is nothing in the roll to indicate a non-compliance with the statute, an assessment, made without such notice having been given, apparently constitutes a lien, and the rule that equity will not relieve against that which is not apparently a lien does not apply.—Tift v. City of Buffalo, 7 N. Y. S. 638.

88. Though an assessment for a public improvement in the city of Buffalo is no lien on land until the roll is delivered to the city treasurer, as provided by the charter, (title 7, § 1,) equity will enjoin its enforcement, if illegal, as a cloud on title may be prevented as well as removed.—Tift v. City of Buffalo, 7 N. Y. S. 638.

89. In an action by one property holder, suing for himself and others similarly interested, to annul an illegal assessment, where no other person becomes a party, it is error to enjoin the collection of an assessment against the property of any other person except plaintiff.—Knell v. City of Buffalo, 7 N. Y. S. 288.

Liabilities—Interest.

40. Interest will begin to run on a claim against a municipal government only from the time of a demand for payment.—Donnelly v. City of Brooklyn, 7 N. Y. S. 49.

Taxation.

41. Under Laws N. Y. 1880, c. 275, § 9, providing that every assessment made shall be presumed valid and regular until the contrary appears, and that its invalidity or irregularity shall not be a defense to any action for its collection, commenced after the expiration of one year from the delivery of the roll, unless an action to test the validity or regularity of such assessment shall have been commenced within the time hereinbefore limited for its commencement, and shall be still pending, or such assessment shall have been adjudged irregular and invalid, an action to vacate an assessment cannot be maintained after the expiration of a year from the delivery of the roll to the treasurer, even though another person, assessed on the same roll, has procured judgment canceling his assessment.—Chilcott v. City of Buffalo, 7 N. Y. S. 638.

42. Under the city charter of Buffalo, tit.

6, §§ 12, 18, providing that when an assessment roll is delivered to the clerk he shall cause a notice thereof to be published, and, unless objections to the roll be filed within 10 days by some person interested therein, it shall be deemed confirmed, failure to file objections as provided is a waiver of any irregularity in the proceedings upon the assessment.—Chilcott v. City of Buffalo, 7 N. Y. S. 638.

Mutual Benefit Insurance.

See *Insurance*, 18, 14.

Name.

Injunction against use of, see *Associations*, 5.

Right of divorced woman to assume maiden name, see *Divorce*, 8.

National Banks.

See *Banks and Banking*.

NEGLIGENCE.

See *Horse and Street Railroads*.

Contributory, see *Bridges; Master and Servant*, 18, 19.

Defective sewers, see *Municipal Corporations*, 21-25.

—streets, see *Municipal Corporations*, 16-19.

Liability for, see *Carriers*, 4; *Contracts*, 8.

Obstruction of highway, see *Highways*, 3, 4.

Of master, see *Master and Servant*, 9-14.

railroad companies, see *Railroad Companies*, 10, 11.

What constitutes, see *Collision*, 1, 2.

What constitutes.

1. In an action for injuries caused by an explosion of naphtha, it appeared that defendant transported naphtha from one point to another by pumping it through pipes. The evidence showed that third persons had caused a break in the pipe by which the naphtha escaped into a sewer, and caused the explosion; that one of defendant's servants attended the pumps and another the receiving tank, the exact time when the pumps should be started having been agreed on; that the latter servant waited over two hours after the time agreed on, but there was no discharge into the tank; and that he did not during that time inform the man at the pumps, though a telephone connecting the two places might have been used. *Held*, that an instruction that if, at a time when the man at the tank should reasonably have been required to give notice that there was no discharge, enough naphtha had escaped into the sewer to cause the explosion, the failure to re-

port was not negligence such as to authorize a verdict for plaintiff, was properly refused, as the jury should determine the negligence from all other facts in evidence as well as from this one.—*Lee v. Vacuum Oil Co.*, 7 N. Y. S. 426.

2. An instruction that if the sole cause of the accident was the breaking of the pipe by third persons, without notice to defendant or any co-operating negligence on the part of defendant, plaintiff could not recover, was properly refused, as plaintiff sought to recover on the ground that defendant was negligent in not discovering the break after it was made.—*Lee v. Vacuum Oil Co.*, 7 N. Y. S. 426.

3. The questions of the negligence of defendant and of the contributory negligence of plaintiff being in issue, and the subject of contradictory testimony, in an action for a personal injury, they were properly submitted to the jury.—*Cleveland v. New Jersey Steam-Boat Co.*, 7 N. Y. S. 28.

What constitutes — Dangerous articles.

4. An ice-chest, with a platform six feet from the ground, to be used in putting in ice, is not a naturally dangerous article; and the manufacturer is not liable, to a person who uses it with consent of the purchaser, for any defect therein.—*Swan v. Jackson*, 7 N. Y. S. 821.

Dangerous premises.

5. In an action for injuries resulting from a fall down the stairway leading from the hall to the cellar in a tenement house owned by defendant, it appeared that plaintiff went to the house on the night in question to deliver the washing of one W., a tenant on the first floor. The hall was not lighted, and when the plaintiff came out of W.'s room she walked through the cellar door, which had been left open, and fell down the steps. The occupants of the house used the cellar in common. W. testified that at defendant's request she furnished a lamp for the hall, and agreed to keep it lighted. It did not appear that the hall or cellar-stair was faulty, or different from the common tenement house plan. *Held*, that the evidence did not show negligence on defendant's part.—*Jucht v. Behrens*, 7 N. Y. S. 195.

6. A verdict of \$5,000 for injuries sustained by reason of a ferry company's negligence is supported by the evidence and the law, where it is shown that plaintiff, a child of 10 years, in passing with her mother and aunt from the waiting-room of the ferry to the boat over the regular passage-way for passengers, stepped into a hole in the bridge, and was seriously injured; and that the iron plate which usually covered the hole had become unfast-

ened, and pushed to one side, a week before the accident, to the knowledge of the company's agents.—*Bartholomew v. Poughkeepsie & H. Ferry Co.*, 7 N. Y. S. 785.

7. It was not error to charge the jury that "the fact that a thousand or ten thousand persons went every day on the ferry and did not get injured would not excuse the company for not providing for the case when this obviously dangerous place was to result in an accident."—*Bartholomew v. Poughkeepsie & H. Ferry Co.*, 7 N. Y. S. 785.

8. Plaintiff, a boy six years old, got on defendant's draw-bridge, when open, by crawling under the gates, and when the bridge was closed his foot was crushed. The gates were 20½ inches from the ground when closed, but were sufficient to protect foot passengers. It did not appear that the gates could have been so arranged as to prevent boys from crawling under them when closed. *Held*, that defendant was not liable for negligence in failing to provide safe gates.—*Maginnis v. City of Brooklyn*, 7 N. Y. S. 194.

Contributory negligence.

9. In an action for personal injuries caused by the overturning of a stage in which plaintiff was riding, through obstructions in the highway, it appeared that on starting out one of the horses balked, and, when induced to go by the driver, the team moved forward at a run, and that plaintiff's wife became alarmed, and wished to get out of the vehicle, but plaintiff replied that the driver could manage his team. There was evidence that the balking horse was not commonly used for carrying passengers. *Held*, that the question of contributory negligence was properly submitted to the jury.—*Chamberlain v. Town of Wheatland*, 7 N. Y. S. 190.

10. Plaintiff's intestate while driving on defendant's street was thrown from his sleigh by reason of a hole in the snow which covered the street. The decedent managed his team with skill and prudence, and his view of the hole was obstructed by teams immediately in front of him. *Held*, that the question of his contributory negligence was for the jury.—*Fitzgerald v. City of Troy*, 7 N. Y. S. 108.

11. In a suit for personal injuries, where the defense is the contributory negligence of plaintiff, the question is one of fact for the jury, unless the negligence is gross and inexcusable.—*Popp v. New York Cent. & H. R. Co.*, 7 N. Y. S. 249.

Harmless error.

12. In an action for injuries caused by an explosion of naphtha, an erroneous instruction that the jury should determine whether defendant maintained a nuisance,

and also any error in a ruling of the court as to whether defendant was guilty of violating the laws regulating the storage and keeping of crude petroleum, were not prejudicial, where the jury found that defendant was guilty of actual negligence so as to entitle plaintiff to recover.—*Lee v. Vacuum Oil Co.*, 7 N. Y. S. 426.

NEGOTIABLE INSTRUMENTS.

Alteration, see *Alteration of Instruments*.
Consideration, evidence, see *Compounding Felony*, 2.

Indorsement and transfer.

1. In an action by a bank on a note, it was in evidence that the manager of the business of one of the indorsers was in possession of the note shortly after its maturity, but the cashier of the bank testified that it had been sent for collection to another person, who delivered it to the bank's attorney. The attorney testified that the indorser was present when the note was delivered to him for collection, and that, no instructions being given as to its ownership, suit was brought in the name of the indorser, but, upon the attorney's learning that the note belonged to the bank, he so informed defendant's attorney and no answer was served, and subsequently this action was brought. *Held*, that there was no evidence that the note was ever in the hands of the indorser as owner after its maturity, or that the rights of the bank were other than those of a purchaser before maturity.—*First Nat. Bank v. Cox*, 7 N. Y. S. 769.

Accommodation paper.

2. In an action on a note indorsed "C., Agt. for" defendant, it appeared that C. was defendant's husband, that he transacted all her business, had full authority to indorse notes for her in her business, and had indorsed notes for the maker of the note in suit. *Held*, that the indorsee of such note is not chargeable with constructive notice that it was an accommodation note which defendant's agent had no authority to indorse.—*Bank of Commerce v. Cohen*, 7 N. Y. S. 186.

Collateral security.

3. The *bona fide* holder for value of a negotiable note, without notice and before maturity, is not bound to inquire whether there is collateral security accompanying it, where it contains no reference to security; and, in a suit by the holder to collect it, evidence of collateral deposited with plaintiffs' assignor to secure its payment is inadmissible.—*Ilslay v. Smedes*, 7 N. Y. S. 671.

NEW TRIAL.

Application.

1. Where the trial judge refuses a motion for new trial, a new trial cannot be granted on affidavits by another judge.—*Reich v. McCrea*, 7 N. Y. S. 600.

2. A new trial will not be granted on motion based only on affidavits which assign as grounds that the decision was not made within the prescribed time, and that defendants have a good defense on the merits, which was summarily disposed of without having been fully and fairly presented to the court.—*Quinlan v. Stratton*, 7 N. Y. S. 786.

Misconduct of referee—Payment of costs.

3. Where a new trial has been granted to plaintiff for misconduct of a referee, partly caused by defendant, on condition that plaintiff shall pay the costs of the reference if finally successful, the condition will be stricken out as unreasonable.—*Clark v. Eldred*, 7 N. Y. S. 95.

Objections to verdict.

4. Where there is testimony to support the verdict, and the jury has been instructed as to the rights of the parties, the motion for a new trial on the minutes is properly denied.—*Hogan v. Carroll*, 7 N. Y. S. 183.

Surprise.

5. The question of a new trial on the ground of surprise is largely within the discretion of the trial court.—*Mulford v. Yager*, 7 N. Y. S. 83.

6. In an action to recover money loaned, defendant claimed that it was given to her by her son. The latter denied that in proceedings supplementary to execution against him he testified that he borrowed the money for his mother as her agent. Plaintiff and two other witnesses said that he did so testify. Defendant was then granted leave to call a witness to sustain the son's testimony, but neglected to subpoena him, and, on his failure to appear, the jury rendered a verdict for plaintiff, to which no objection was made as to the principles on which it was found. *Held*, that a new trial on the ground of surprise and newly-discovered evidence could not be granted.—*Tigue v. Annowski*, 7 N. Y. S. 9.

Newly-discovered evidence.

7. Newly-discovered evidence, which is merely cumulative, and of the same general class as that given on the trial, will not justify the court in granting a new trial.—*Hogan v. Carroll*, 7 N. Y. S. 183.

8. In an action for breach of marriage promise a new trial will not be granted defendant upon affidavits containing admis-

sions alleged to have been made by plaintiff, which were detrimental to her, and unnecessary for her to make, and which she denies having made, as such evidence would not probably affect the result.—*Rich v. Mayer*, 7 N. Y. S. 69.

Non Compos Mentis.

See *Insanity*.

Non-Residents.

Service of summons on, see *Writs*.

Notary Public.

Authority to take acknowledgments, see *Deed*, 8.

NUISANCE.

Action to abate, parties, see *Landlord and Tenant*, 6, 7.

What constitutes.

1. A livery stable, which is so carried on as to cause an offensive odor, and to compel plaintiff to keep all his windows closed on the side of his house nearest the stable, and to render the use of his premises disagreeable and unwholesome, is a nuisance.—*Robinson v. Smith*, 7 N. Y. S. 88.

2. Where an excavation under a sidewalk in a city is made by the owner of the abutting premises, and the excavation is covered with flag-stones, with the consent of the municipal authorities, the owner is not guilty of maintaining a nuisance so long as the space is securely covered.—*Babbage v. Powers*, 7 N. Y. S. 806.

3. Defendant erected a shanty of pine boards so close to plaintiff's building that the intervening space was not sufficient to allow a person to pass through. The shanty contained a small iron stove in which was burned soft coal, and oil cans, waste, and oil lamps were kept in the shanty. *Held* that, while the erection of the shanty and its proper use would be legal, the character of its construction and manner of use presented a question for the jury, to say whether or not such acts were done in such careless and improper manner as to render defendant liable for damages resulting from the shanty catching fire.—*Van Fleet v. New York C. & H. R. R. Co.*, 7 N. Y. S. 686.

4. Defendant was engaged in the business of supplying a gas-light company with naphtha, by pumping it through pipes laid along an abandoned canal and under the streets of a city. The pipe was in good order, and safe, and there was no evidence of leakage from the pipe, or that any gas escaped therefrom. Naphtha was allowed to stand in the pipes when the

pumps were not in use. A New York statute authorizes the constructing and operating, for public use, lines of pipe for conveying petroleum, etc. *Held*, that defendant's pipes did not constitute a nuisance.—*Lee v. Vacuum Oil Co.*, 7 N. Y. S. 426.

5. Plaintiffs, the conduct of whose business requires the use of wires as conductors of electric currents, which are dangerous to human life unless perfectly insulated, are not excused for failure to keep such wires in a perfect and safe condition by the refusal of the board of electrical control to grant permits to repair the same, where they have taken no steps to compel the granting of such permits.—*United States Illuminating Co. v. Grant*, 7 N. Y. S. 788.

Remedies.

6. Under Code Civil Proc. N. Y. §§ 1660-1662, providing that "an action for a nuisance may be maintained in any case where such action might have been maintained under the laws in force immediately before this act takes effect;" that the person who erected the nuisance and the owner of the realty may be joined as defendants; and that the judgment may award plaintiff damages, or direct the removal of the nuisance, or both,—plaintiff may in the same action recover damages sustained by a nuisance, and obtain an injunction requiring its abatement.—*Robinson v. Smith*, 7 N. Y. S. 88.

— Abatement.

7. It being the duty of plaintiffs owning and using electric wires to maintain a proper inspection of such of their apparatus as may become dangerous, and to remedy all defects immediately, they are not entitled to notice of such defects, nor to be heard as to their existence, nor to any delay, in order that they may remedy the same, before the city authorities proceed to abate such a nuisance.—*United States Illuminating Co. v. Grant*, 7 N. Y. S. 788.

8. Uninsulated electric wires constitute a public nuisance, which the commissioner of public works, both as a private citizen and as a public official charged by the duties of his office with the removal of obstructions from the streets, may abate.—*United States Illuminating Co. v. Grant*, 7 N. Y. S. 788.

9. Where a public nuisance exists, a court of equity will not limit its abatement to any particular officer of the municipality, unless exclusive power to act in the matter is plainly conferred on one department.—*United States Illuminating Co. v. Grant*, 7 N. Y. S. 788.

Pleading.

10. A complaint which alleges that defendant's structure is a permanent, unlaw-

ful nuisance, inflicting irreparable damage on plaintiff's property, and which prays for a permanent injunction, and that the damage inflicted may be ascertained and adjudged to plaintiff, does not improperly unite two causes of action.—*O'Sullivan v. New York El. R. Co.*, 7 N. Y. S. 51.

Evidence.

11. Evidence is admissible that after the erection of a stable alleged to constitute a nuisance there were innumerable flies about plaintiff's premises.—*Robinson v. Smith*, 7 N. Y. S. 88.

12. In an action for damages for the maintenance of a stable so as to cause an offensive odor, evidence of the condition of the atmosphere in plaintiff's house down to the time of the trial is admissible.—*Robinson v. Smith*, 7 N. Y. S. 88.

13. Evidence as to the rental value of plaintiff's house, before and after the erection of a stable so carried on as to constitute a nuisance, is admissible.—*Robinson v. Smith*, 7 N. Y. S. 88.

Nunc Pro Tunc Entry.

Amendment, see *Bail*, 1.

OFFICE AND OFFICER.

See, also, *Justices of the Peace; Municipal Corporations*, 3, 4; *Sheriffs and Constables*.

Ministerial and judicial officers, see *Elections and Voters*, 2.

Appointment—Of union soldier.

1. Though Laws N. Y. 1887, c. 464, provide that "honorably discharged Union soldiers * * * shall be preferred for appointment and employment," the appointment of another applicant by a municipal body, after a determination in good faith of his superior fitness as compared with a discharged soldier, is not reviewable.—*People v. Trustees of Saratoga Springs*, 7 N. Y. S. 125.

2. A *mandamus* to appoint a person to an office should not be granted unless coupled with an application to remove the present incumbent.—*People v. Trustees of Saratoga Springs*, 7 N. Y. S. 125.

3. Under Laws N. Y. 1887, c. 464, providing that honorably discharged Union soldiers shall be preferred in municipal appointments, where it appears that though an applicant possessed all the qualifications entitling him to preference required by the statute, and was fully competent to discharge the duties of the office applied for, the mayor refused to appoint him, *mandamus* for the appointment will issue to the mayor.—*People v. Bardin*, 7 N. Y. S. 123.

v. 7 N. Y. S.—65

Officers de facto.

4. The title of a trustee *de facto* cannot be attacked collaterally.—*People v. Board of Trustees*, 7 N. Y. S. 806.

Opinion Evidence.

See *Evidence*, 9.

Orders.

Appealable, see *Appeal*, 5.

Ordinance.

See *Municipal Corporations*, 1, 2.

Parent and Child.

See *Guardian and Ward; Infancy*.

Mother's right to custody, see *Guardian and Ward*, 1.

Parol Evidence.

See *Evidence*, 18-24.

PARTIES.

In foreclosure proceedings, see *Mortgages*, 9.

partition, see *Partition*, 1.

proceeding to enforce mechanics' lien, see *Mechanics' Liens*, 9.

Necessary, see *Assignment for Benefit of Creditors*, 19; *Contracts*, 13.

Party in interest, see *Landlord and Tenant*, 8.

Necessary parties.

1. Where deceased attempted to create a trust by his will, which trust is void, and operates to vest the legal estate to a share of certain premises in the intended beneficiary, she is a necessary party in an action for damages caused by the erection and maintenance of an elevated railroad in front of the premises.—*Hart v. Metropolitan El. R. Co.*, 7 N. Y. S. 753.

Joinder and misjoinder.

2. The report of commissioners appointed to appraise land taken by the right of eminent domain awarded a large sum to the owner, and a small sum to another, as special guardian of the owner. The general term, in affirming the appraisal, made the whole amount payable to the guardian. *Held* that, though the guardian could sue on the award in his own name alone, under Code Civil Proc. N. Y. § 449, authorizing a trustee of an express trust to sue without joining the person for whose benefit the action is prosecuted, yet it was proper, under section 446, providing that all persons interested may be joined as plaintiffs, to join the owner as plaintiff.—

Lent v. New York & M. Ry. Co., 7 N. Y. S. 729.

3. The executors and devisees of the deceased owner of premises cannot join in an action for damages caused by the erection and maintenance of an elevated railroad in front of the premises, as the action is one at law, and the executors sue for loss of rent during testator's life, while the devisees sue for the permanent injury to the freehold.—Hart v. Metropolitan El. R. Co., 7 N. Y. S. 758.

New defendant.

4. An order, made after judgment in an action of foreclosure, inserting the name, as a party defendant, of one who, as receiver, had become owner of the equity of redemption before commencement of the action, in the summons, complaint, *lis pendens*, judgment, notice of sale, and all papers, *nunc pro tunc* as of the dates of such papers, is erroneous, as a new defendant can be brought in by supplemental summons only under Code Civil Proc. N. Y. § 453, unless on his own application.—Voigt v. Schenk, 7 N. Y. S. 864.

PARTITION.

Parties.

1. Plaintiff and her husband separated and continued to live apart, he leaving her in possession of certain land conveyed to them jointly before separation. Subsequently he conveyed an undivided half thereof to defendant, but without plaintiff's joining in or confirming the deed. The interest of plaintiff's husband was afterwards sold under a judgment against him. The purchaser went into possession, and sued defendant for a partition of said premises, without making plaintiff a party to such action. Plaintiff was served with notice of a motion to put defendant in possession in pursuance of judgment, which motion the court sustained over plaintiff's objections. *Held*, that the proceeding of the court in putting defendant in possession was a mere nullity for want of jurisdiction.—O'Connor v. McMahon, 7 N. Y. S. 225.

By whom maintainable.

2. Code Civil Proc. N. Y. § 1587, provides that one claiming as a joint tenant or tenant in common, by being heir of one who died, holding and in possession of land, may sue for partition thereof, though not in possession, and notwithstanding an apparent devise to another. *Held*, where plaintiff claims as heir of his mother, and not of his father, who died in possession of the land in controversy, he is not relieved from the common-law rule that, to maintain partition, plaintiff must be in

actual or constructive possession of the land.—Greene v. Greene, 7 N. Y. S. 80.

PARTNERSHIP.

Action against, see *Appearance*.
When relation exists, see *Trusts*, 7.

Evidence of.

1. In an action for the price of goods sold, it appeared that defendant, in order to compromise plaintiffs' claim against his son, represented to them that he would go into partnership with his son, and that plaintiffs could then sell them goods. Afterwards, goods were ordered by the son. *Held*, that there was no evidence to render defendant liable as his son's partner.—Wolf v. Strahl, 7 N. Y. S. 593.

2. A finding that no partnership existed between plaintiff and defendant is supported by evidence that, though a firm name was used on letter-paper and in correspondence, and a lease of an office was executed to them jointly, this was done at defendant's request, to help him get contracts; that, though plaintiff admitted he was to have an interest in certain contracts obtained by defendant, it was only in the net profits, "for services rendered;" that, when plaintiff applied for an interest in other contracts, defendant told him a separate agreement must be made for each transaction; and that, when plaintiff offered to settle the matter in dispute, after rendering an account for services and expenditures, defendant, in his written reply, made no suggestion of any unsettled partnership accounts between them.—Vernon v. Simmons, 7 N. Y. S. 649.

Power of partner to bind firm.

3. Where one partner acts for a firm in demanding and collecting illegal charges, every member of the firm is liable for the damage.—Lockwood v. Bartlett, 7 N. Y. S. 481.

Dissolution and accounting.

4. In an action for an accounting between partners it appeared that on the termination of the partnership there was a settlement; that there was no fraud; and that the only evidence of mistake was as to a single item. Evidence of outstanding assets and liabilities was excluded, on the objection of both parties that it was competent only on the accounting. *Held*, that the complaint was properly dismissed.—Watts v. Adler, 7 N. Y. S. 564.

5. On dissolution of a partnership, the fact that the retiring partner undertakes to carry on a similar business near by, and to divert the former customers of the firm, is proper to be considered in estimating the amount to be allowed him for the good-

will of the business.—*Rice v. Baggot*, 7 N. Y. S. 518.

6. Where the partners had agreed as to the disposition and control of the property, except as to one item, which, as well as the whole question, had been placed in the power of the court by the evidence, a motion to appoint a receiver to sell the goodwill and lease was properly denied.—*Rice v. Baggot*, 7 N. Y. S. 518.

Firm debts—Assignment of individual assets.

7. A partner can, by a general assignment, devote his individual property to the payment of debts due by the firm.—*Ralph v. Brickell*, 7 N. Y. S. 826.

Liability of retiring partner.

8. At the time of the dissolution of the firm of B. & S., B. executed a note for \$900 to plaintiff in the firm name. There was undisputed evidence that at that time B. & S. owed plaintiff \$715 for services. Plaintiff testified that the note was given in settlement of wages, and for money which he had loaned to B. & S. S. denied that any loan was made to the firm, to him, or in his presence to B., and denied any knowledge of the giving of the note therefor. Plaintiff continued in the employ of B. after the dissolution. It appeared that he received two checks from B. for \$500 each, made by S. to B.'s order. He testified that these were given him for wages due him from B. alone. There was no evidence for what purpose S. gave the checks to B. *Held*, that the evidence was sufficient to support a verdict for plaintiff against B. & S. for the full amount of the note.—*Green v. Shute*, 7 N. Y. S. 645.

Actions.

9. The members of a firm agreed, in their articles of copartnership, that, if a certain partner should die before the expiration of the stipulated term of partnership, his interest should survive to his personal representatives, by whom, with the other partners, the business should be continued. The partner in question, by his will, directed his executors to carry out the partnership agreement. *Held*, that defendant, in an action for a firm debt, could not object that the deceased partner's executors were improperly joined as plaintiffs.—*Woarms v. Bauer*, 7 N. Y. S. 823.

10. An allegation in the complaint that goods were sold to defendants is supported by proof that they were sold to one of defendants while conducting a business in which both were partners; and an allegation as to their copartnership is unnecessary.—*Wolf v. Strahl*, 7 N. Y. S. 593.

11. In an action on a debt contracted by a partnership, which was subsequently dissolved, one of the partners assuming all

the debts of the firm, the retiring partner pleaded the statute of limitations. The court, at the request of defendant, charged the jury that after the dissolution the surviving partner could not bind the other by promise or part payment of the debt. *Held*, that this was not prejudicial error, where the court finally charged that the only question was whether plaintiff brought his action within six years after he had notice of the dissolution.—*Chase v. Vanderwerf*, 7 N. Y. S. 188.

PATENTS FOR INVENTIONS.

Assignment and license.

1. A clause in a written contract read as follows: "And the parties of the first part do hereby sell, assign, and transfer to the said parties of the second part all other patents they may have a right to use, so far as they may be used in the territory named, in the manufacture and sale of harrows without wheels or poles," and "all harrow patents, patents for improvements, and reissue of harrow patents which may be obtained by them by purchase or otherwise, to be used in the manufacture and sale of harrows made without wheels and poles." Rev. St. U. S. § 4898, provides that every patent, or an interest therein, shall be assignable in law by an instrument in writing, and the patentee or his assigns, etc., may in like manner grant and convey an exclusive right under said patent to the whole or any specified part of the United States. *Held*, that the contract was not for an assignment, but for grants of licenses only, since it reserved to the owners the exclusive right to manufacture and sell within the territory named harrows on wheels, and horse-rakes, to be made under the patent, and since an assignment with such reservation was not authorized by statute.—*Tuttle v. La Dow*, 7 N. Y. S. 277.

2. A license to use a patent is not assignable unless expressly so stated.—*Tuttle v. La Dow*, 7 N. Y. S. 277.

Action for infringement.

3. A state court has no jurisdiction to enjoin a person from suing for an infringement of a patent.—*Childs v. Tuttle*, 7 N. Y. S. 59.

PAYMENT.

Of mortgage, see *Mortgages*, 4, 5.

Evidence.

1. In an action to foreclose a mechanic's lien after the death of the owner of the house, defendants alleged payment of the debt by decedent in his life-time, but failed to produce any receipt for payment, though it appeared to have been decedent's

habit to take receipts. *Held* that, the defense being an affirmative one, with the burden of proof on defendants, the failure to produce a receipt, or reasonably account for its absence, was fatal to the defense.—*Schwartz v. Allen*, 7 N. Y. S. 5.

2. The testimony of one who heard a debtor say that he had paid a debt is not rendered admissible to show payment by the death of the debtor.—*Schwartz v. Allen*, 7 N. Y. S. 5.

3. An entry made by a debtor in his own favor is inadmissible to prove payment of the debt, though offered in evidence after his death.—*Schwartz v. Allen*, 7 N. Y. S. 5.

Application.

4. A bill of particulars for goods sold, set out items of the account from May 13, 1887, to June 21, 1887, with items of payments made during that time. In appeared that plaintiffs were a firm to which a third partner was added June 1st without the knowledge of defendant, who thought he was dealing with the old firm. Nothing was said by either plaintiffs or defendant, as to the application of payments made by defendant after June 1st. Plaintiffs applied them on the account from June 1st, and recovered a judgment for balance due on the account from May 18th to June 1st. *Held*, that plaintiffs were entitled to so apply them.—*Henry v. Dietrich*, 7 N. Y. S. 505.

Performance.

Of contracts, see *Contracts*, 9.

Physicians and Surgeons.

Action against, limitation, see *Limitation of Actions*, 1.

Privileged communications, see *Witness*, 1-9.

PLEADING.

See *Injunction*, 8, 9.

Amendment *nunc pro tunc*, see *Parties*, 4.

Bill of particulars, see *Libel and Slander*, 1.

Complaint, see *Contracts*, 12.

In actions against trustees, see *Trusts*, 15.

— for breach of warranty, see *Sale*, 2; particular actions, see *Assumpsit*, 8; *Trover and Conversion*, 2, 3.

Misjoinder of causes of action, see *Nuisance*, 10.

Petition, see *Certiorari*.

Pleading and proof, see *Frauds, Statute of*, 3; *Gifts*, 5.

Statutes, see *Statutes*, 8.

Complaint.

1. The complaint in the first count alleged that plaintiff contracted with defendant to sell and deliver goods for an agreed price, delivery and payment to be post-

poned to a certain date; that on said date defendant refused to pay plaintiff as agreed; that plaintiff demanded his pay, and also demanded of defendant his property, which defendant claimed to have in his possession; and that defendant wrongfully detained the property and converted it to his own use. The second count was for the conversion of other personal property. The third count was for fraud and deceit, by means of which plaintiff was induced to deliver the property described in the first count to defendant. Plaintiff gave evidence of the sale and delivery of the property, the terms and price, and that the same remained unpaid. On defendant's motion the court struck out all parts alleging fraud, and stated that, to save all defendant's rights, he would hold that plaintiff could recover only on a contract of sale. *Held*, that the complaint as amended stated a cause of action for goods sold and delivered.—*Willis v. Morse*, 7 N. Y. S. 304.

Demurrer.

2. Where a compromise by defendant's attorney is set up as a defense to an action, plaintiff, on demurrer, cannot avail himself of the proposition that an attorney cannot compromise without special authority, where the complaint does not allege that the attorney had no authority to make such compromise.—*Lindau v. Royal Ins. Co.*, 7 N. Y. S. 441.

3. Where defendants demur on the ground that the complaint does not state a cause of action, they cannot thereafter object to plaintiff's legal capacity to sue.—*Van Zandt v. Van Zandt*, 7 N. Y. S. 706.

Answer.

4. In an action for the value of specific merchandise sold and delivered, an answer which denies each and every allegation of the complaint, but admits that at the time alleged plaintiff furnished "certain" goods, but not of the value alleged, does not admit the purchase of the goods referred to in the complaint.—*Claffy v. O'Brien*, 7 N. Y. S. 499.

— Frivolous answer.

5. In an action against a corporation as the acceptor of a draft defendant pleaded that it was not a moneyed corporation: that the acceptance was not made in the course of its business, or at its office, and was not sanctioned or authorized by its directors, but was written by defendant's vice-president, at his private office, a place having no connection with defendant or its business, solely on his own account, as an accommodation to the drawer. *Held* that, as the answer puts in issue the question whether the act of the vice-president was a corporate act, though it also

admits that plaintiff is a *bona fide* holder of the draft for value, a motion for judgment on the answer as frivolous will be denied, as such motion admits the averment of the answer.—*Mather v. Union Loan & Trust Co.*, 7 N. Y. S. 218.

6. An answer denying "the said complaint in each and every allegation therein contained" is not frivolous.—*People v. Tunncliffe*, 7 N. Y. S. 91.

Motion to strike out and make more definite.

7. Where a complaint is so framed that there is no difficulty in understanding the claim of plaintiff and the circumstances on which he relies to create the liability alleged, there is no error in denying defendant's motion to strike out and make more definite and certain.—*Winchester v. Browne*, 7 N. Y. S. 550.

Reply.

8. Although an answer pleading truth in justification to an action for libel is "new matter by way of avoidance," within Code Civil Proc. N. Y. § 516, which provides that "where an answer contains new matter, constituting a defense by way of avoidance, the court may, in its discretion, on the defendant's application, direct the plaintiff to reply to the new matter," yet, where such answer consists of a lengthy statement, partly of facts, and partly of evidence of facts, a great deal of it being statements with regard to proceedings in a certain lawsuit, which can easily be proved by the record, a motion to compel plaintiff to reply is properly denied.—*Scofield v. Demorest*, 7 N. Y. S. 882.

Amendment.

9. A complaint in justice's court charged an assault on plaintiff "by defendant and his dog," but the case was tried on the theory that defendant was liable for negligently keeping a vicious dog. *Held*, that on appeal to the county court an amendment of the complaint so as to charge that defendant's dog, being vicious and known to be so by defendant, bit plaintiff, was proper, as the amendment did not change the "claim" actually tried, but simply conformed the complaint to it, within the requirement of Code Civil Proc. N. Y. § 728.—*Argersinger v. Levor*, 7 N. Y. S. 928.

10. An application to amend an answer by setting up a counter-claim, which is not accompanied by any proof that defendant had been misled, and that he would suffer an injury if the application was denied, may be properly refused, in the discretion of the trial court, and such refusal cannot be reviewed on appeal.—*Willis v. Morse*, 7 N. Y. S. 804.

11. Where the complaint alleges a gift *inter vivos*, and evidence is introduced,

without objection, showing a gift *causa mortis*, an amendment of the complaint to conform to the proofs is in furtherance of justice, within Code Civil Proc. N. Y. § 728, and was properly allowed.—*Walsh v. Bowery Sav. Bank*, 7 N. Y. S. 97.

12. It is a proper exercise of the discretionary power of the court to allow plaintiff, before trial, to withdraw her cause of action on the "first" undertaking on appeal, and continue it on the "second" undertaking, both undertakings having been given to secure the same judgment, and the parties thereto being the same in each.—*Clark v. Lichtenberg*, 7 N. Y. S. 900.

13. It is in the discretion of the court to grant leave to amend a complaint on trial.—*Riggs v. Chapin*, 7 N. Y. S. 765.

Bill of particulars.

14. In an action for specific performance of an agreement to certify plaintiff's bonds, and for damages for the non-performance thereof, the allegations of the complaint, as to damage, were that plaintiff had entered into large enterprises from which it would have realized great profit if defendant had performed its contract, and that, by reason of defendant's refusal to perform its contract, plaintiff had suffered great loss. *Held*, that a bill of particulars was properly directed.—*United States Land Investment Co. v. Mercantile Trust Co.*, 7 N. Y. S. 534.

Affidavit of attorney.

15. The affidavit of an attorney of record is sufficient in proof of the necessity for a bill of particulars, he being the judge of whether it is required, and there being no statute or rule of practice requiring proof by the affidavit of the party.—*Sanders v. Soutter*, 7 N. Y. S. 549.

Variance.

16. In an action for personal injuries the complaint stated that, while passing along the sidewalk in front of defendant's premises, plaintiff stepped on a flag-stone placed on the sidewalk, when the stone suddenly gave way under her feet, and she was thereby violently precipitated to the ground. The complaint then stated that the injuries were caused wholly by defendant's negligence, in that he failed to keep the sidewalk in a proper condition, but, on the contrary, permitted it to be and remain in an unsafe and dangerous condition. *Held*, that plaintiff could not recover on the theory that defendant had been guilty of maintaining a nuisance.—*Fisher v. Rankin*, 7 N. Y. S. 837.

17. In an action for \$400, paid defendant for certain stock, the complaint alleged that defendant had agreed to deliver 10 shares of stock in consideration thereof, which he refused to do; but plaintiff testi-

fied that he had agreed to pay \$50 a share for the stock, and that defendant had asked him when he would pay the balance. There was no evidence of a tender of the balance of the price, or of a new agreement to reduce the price, and there were no circumstances excusing tender. *Held*, that the variance was fatal.—*Delany v. Van Derveer*, 7 N. Y. S. 132.

18. In an action for goods sold and delivered, plaintiffs were not bound by the demand of the complaint nor the statement in the bill of particulars, where no suggestion of variance between the evidence and the statement was raised.—*Henry v. Dietrich*, 7 N. Y. S. 505.

19. Where the complaint avers that defendant M. contracted to build a house for defendant C., and plaintiff subcontracted with M. to do the work, plaintiff cannot prove a contract between himself and C.—*Riggs v. Chapin*, 7 N. Y. S. 765.

Waiver of objections.

20. Under Code Civil Proc. N. Y. § 499, an objection that plaintiff has no legal capacity to sue must be pleaded either by demurrer or answer.—*Jemerson v. Kennedy*, 7 N. Y. S. 296.

PLEDGE.

Of insurance policy, *see Insurance*, 1.

What constitutes.

1. Plaintiff, being indebted to defendants, assigned all his interest in certain patents to them, by an instrument in which defendants agreed to furnish funds and pay a certain debt. Defendants reserved the right to "terminate" the agreement, and it was provided that they should "retain their interest and claims herein till they shall be fully paid their said indebtedness up to such time as they shall terminate this agreement, but they shall, upon payment to them of their said indebtedness, reassign their said interest in said inventions" to plaintiff. *Held*, that the assignment was intended as collateral security for plaintiff's indebtedness.—*Barry v. Coville*, 7 N. Y. S. 36.

Rights of pledgeor.

2. Plaintiff assigned to defendants his interest in certain patents as collateral security for a debt owing them, by an instrument in which defendants reserved the right to "terminate" the agreement, and which provided that they should "retain their interest and claims herein" till they should be fully paid their debt, "up to such time as they shall terminate this agreement, but they shall" upon payment of the debt "reassign their said interest in said inventions" to plaintiff. *Held*, that on the termination of the agreement by de-

fendants plaintiff was entitled to an accounting; and, upon paying or tendering the amount due to defendants, they should reassign to plaintiff.—*Barry v. Coville*, 7 N. Y. S. 36.

Police Department.

See Municipal Corporations, 8-11.

Police Power.

See Constitutional Law, 5.

POWERS.

Testamentary powers.

1. Testator devised his residuary estate to his executrix, with power to sell, convert into money, and invest the proceeds, which were to be divided into as many parts as he should leave children or descendants of children. One equal share was to be divided between the descendants of any of testator's children who might die before him, and one share was to be invested for the benefit of each child of testator, and the income paid to her for life. At the death of each child her issue was to receive her share, and if she left no issue the share so invested for her benefit was to be paid to testator's surviving children. His dwelling was excepted from this general power of sale, and the executrix was directed to permit testator's unmarried daughters to occupy it as a home, rent free, during the lives of H. and K., two of his daughters, or so long as any of his daughters should remain unmarried. If a daughter should marry, she might no longer occupy the premises without the consent of her unmarried sisters. At the death of H. and K. or the marriage of all the daughters the house was to be sold, and the proceeds divided among testator's children or their descendants. At his death testator left five daughters unmarried. *Held*, that until the death of H. and K. or the marriage of all the daughters the executrix had no power to sell the dwelling-house.—*Kilpatrick v. Burrow*, 7 N. Y. S. 543.

2. Testator's daughters were not absolutely entitled to the proceeds of the sale of the dwelling, but the descendants of any one who might die before H. or K., or before the marriage of all the daughters, would be interested therein, and conveyances by them and by the executrix herself would not vest the grantee with a perfect title.—*Kilpatrick v. Burrow*, 7 N. Y. S. 542.

3. Where a will gives the executrix "power and authority to sell, dispose of, and convey all and any portion of" testator's estate, a deed executed by the executrix will convey a good title, and the fact that there has been no advertisement for

claims or accounting is immaterial.—*Wait v. Cerqua*, 7 N. Y. S. 110.

PRACTICE IN CIVIL CASES.

See, also, *Appeal*; *Certiorari*; *Deposition*; *Judgment*; *New Trial*; *Parties*; *Pleading*; *Reference*; *Trial*; *Venus in Civil Cases*; *Writs*.

Dismissal for want of prosecution.

1. Where it appears from plaintiff's affidavits, on a motion to dismiss a complaint for want of prosecution, that the delays were partially caused by defendant, and were connived at by her or her counsel, and that defendant had showed no disposition to press the case for trial, and plaintiff offers to place the case on the day calendar or short-cause calendar immediately for trial, the complaint should not be dismissed, but plaintiff should be compelled to stipulate to try the case at the next term, and to pay costs of the motion.—*Heymer v. Arthur*, 7 N. Y. S. 437.

Stipulations.

2. Correspondence between counsel as to the manner in which costs shall be decreed, containing propositions not accepted, will not, though the propositions are afterwards orally agreed to, constitute a valid stipulation "in writing," as required by rule of court.—*In re Keeler's Will*, 7 N. Y. S. 199.

Examination of party before trial.

3. In an action by a stockholder against a corporation for false representations, where plaintiff's affidavit avers that out of certain documents in possession of the company or its officers he will be able to deduce proof of the falsity of the representations to be used at the trial, etc., an order will be granted him under Code Civil Proc. N. Y. §§ 870-873, for the examination before trial of the officers, and the inspection of such books and papers, of the corporation, but the examination will be confined to official matters and acts of the company in connection with the books and documents produced.—*Blocker v. Guild*, 7 N. Y. S. 651.

4. An application by defendant to examine plaintiff, in an action for libel, before trial, under Code Civil Proc. N. Y. §§ 870, 872, relating to taking depositions of parties before trial, and the contents of the affidavit therefor, which states that the answer intended to be made is the general denial, that the facts set forth in the alleged libel are true, and that it is necessary to examine plaintiff concerning these facts, without averring that they are not within defendant's knowledge, or readily attainable by him, is insufficient.—*Bandmann v. Jones*, 7 N. Y. S. 577.

5. A complaint alleged that plaintiffs were induced to convey property for a certain price to J., the wife of one of the defendants, who were real-estate agents, by means of misrepresentations that they could thereby sell it more advantageously, and that defendants shortly afterwards sold it for a larger price; and plaintiffs sued for the difference. *Held*, that an order for the examination of defendants before trial, granted on an affidavit stating that their testimony was desired for use on the trial, to show that J. was not a *bona fide* purchaser, but acted for defendants; that defendants received offers for the property which they did not communicate to plaintiffs; that they failed to take proper steps to sell the property; and that the sale for the larger price was made to a certain person, and for defendant's benefit,—was erroneous, where no reason was suggested for supposing that defendants could not be had as witnesses on the trial, as the statement did not show that the prosecution of the action depended on the examination of defendants before trial.—*Williams v. Folsom*, 7 N. Y. S. 568.

6. An order requiring a plaintiff to submit to an examination as a witness in an action, before trial, will not be granted on an affidavit of defendant which does not show the necessity of obtaining such evidence by an examination of plaintiff prior to trial, nor that it is designed to obtain such evidence for use on trial.—*Spero v. West-Side Bank*, 7 N. Y. S. 546.

7. An order will not be granted, at plaintiff's instance, under Code Civil Proc. N. Y. § 873, for the examination before trial of an adverse party who is a natural person, where the issue between them is simply one of veracity and credibility, where no peculiar circumstances appear to make the case different from ordinary cases of the same character, where it is not alleged that any documentary evidence is in the possession of such adverse party, and it is not shown that such oral evidence as he may give cannot be just as well given at the trial.—*Blocker v. Guild*, 7 N. Y. S. 651.

8. When a copy of an order for examination of defendant before trial has not been served on him but on his attorney, the order will not be vacated, since he cannot be compelled to attend or be punished for non-attendance, but his examination may be taken if he does appear.—*Brokaw v. Culver*, 7 N. Y. S. 167.

Preferences.

See *Assignment for Benefit of Creditors*, 8-11.

Presumption.

On appeal, see *Appeal*, 21.

PRINCIPAL AND AGENT.

Authority of insurance agent, see *Insurance*, 8.

Ratification.

1. Defendant and her husband executed a mortgage on her land to secure a debt owed by him. Without her knowledge he procured a loan from plaintiff for the purpose of discharging the mortgage, and agreed that she should give plaintiff a mortgage on the same land to secure the loan. The husband paid the mortgage, and took a release, of which she remained ignorant until the release was recorded, when she paid the record fee, and took the release from the clerk's office. *Held*, that she did not, by accepting the benefit of the release, so ratify her husband's unauthorized promise that equity would compel her to execute a mortgage to plaintiff. —*Dort v. Nicken*, 7 N. Y. S. 285.

Liability of principal to agent.

2. In an action to recover commission on sales it appeared that plaintiff's decedent was an agent of defendant, selling on commission; that the commissions were fixed by a written proposition from defendant, as follows: 10 per cent. on contracts up to \$999; 8 per cent. from \$1,000 to \$1,999; 7 per cent. from \$2,000 to \$2,999; 6 per cent. from \$3,000 to \$3,999; 5 per cent. on amounts of \$4,000 and over,—to which was added, "Large contracts will not stand as large commissions as small ones, and are generally taken at about the same expense per contract;" and that prior thereto the commissions had been 8 per cent. on the gross amount of the sale. *Held*, that commissions on sales should be computed at one rate on the entire amount of each sale. —*Ashley v. Wrought Iron Bridge Co.*, 7 N. Y. S. 861.

Principal and Surety.

Surety's liability, see *Bail*, 2.

Privileged Communication.

See *Witness*, 1-9.

PRIZE-FIGHTING.**What constitutes offense.**

A conviction under Pen. Code N. Y. § 458, for encouraging a prize-fight, is unwarranted when the contest was intended only as an advertisement for one of the participants, to secure notoriety, and thus a better salary as an exhibition boxer, and no prize was to be gained by the successful person. —*People v. Floss*, 7 N. Y. S. 504.

Promissory Notes.

See *Negotiable Instruments*.

Public Improvements.

See *Municipal Corporations*, 26-81

Public Policy.

See *Contracts*, 4, 5.

Punitive Damages.

When allowable, see *Breach of Marriage Promise*, 7, 8.

QUIETING TITLE.**When action lies.**

1. After a judgment canceling a deed of land, which is defectively acknowledged and not attested, is vacated, the deed becomes a cloud on the title of a purchaser at foreclosure under a mortgage previously given him by the grantor, which the purchaser may maintain an action to remove. —*Mutual Life Ins. Co. v. Corey*, 7 N. Y. S. 989.

2. An action to remove a cloud from title may be brought at any time during the existence of the cloud. —*Mutual Life Ins. Co. v. Corey*, 7 N. Y. S. 989.

3. Where, by mutual mistake, a deed contains a covenant against the erection of buildings of a certain character on the land conveyed, within 40 feet of the front, it creates a cloud on the title, the right to remove which is a continuing one, not barred by the statute of limitations. —*Jackson v. Kinsey*, 7 N. Y. S. 808.

4. In an action to determine the right to land, when plaintiff fails to prove possession or title, his complaint should be dismissed, and a general verdict should not be found in favor of defendant, unless he has established his own title. —*Benson v. Townsend*, 7 N. Y. S. 162.

RAILROAD COMPANIES.

See, also, *Carriers; Horse and Street Railroads*.

Action to compel construction of farm crossing.

1. The fact that defendant constructed a crossing at a remote and inconvenient point is no reason why it should not be required to build one where it is most convenient and useful. Although the right to locate a crossing is with the defendant, the interest and convenience of the owners are to be considered. —*Buffalo Stone & Cement Co. v. Delaware, L. & W. R. Co.*, 7 N. Y. S. 604.

2. The fact that the lands of another railroad intervene between the lands of defendant and those of plaintiff on one side does not prevent plaintiff from being within the statute as "proprietor of lands adjoining such railroad."—*Buffalo Stone & Cement Co. v. Delaware, L. & W. R. Co.*, 7 N. Y. S. 604.

3. The fact that defendant is a foreign corporation does not exempt it from the obligation to erect farm crossings imposed under the laws of New York.—*Buffalo Stone & Cement Co. v. Delaware, L. & W. R. Co.*, 7 N. Y. S. 604.

4. The proceedings taken by defendant to condemn the land, and damages paid to the owner for the right to cross, do not preclude plaintiff from suing to compel the construction of a crossing, and the compensation for damages does not include or provide for the inconveniences suffered from failure to build the crossing.—*Buffalo Stone & Cement Co. v. Delaware, L. & W. R. Co.*, 7 N. Y. S. 604.

5. Defendant was not absolved from liability to build the crossing by the fact that the person who owned the farm at the time the railroad was built had sold it to plaintiff, as the duty to construct the crossing was not owing to the owner as an individual, but to him as the owner of the farm benefited by the crossing, and no release of the obligation to build the crossing had been executed.—*Buffalo Stone & Cement Co. v. Delaware, L. & W. R. Co.*, 7 N. Y. S. 604.

6. In an action to compel defendant to construct a farm crossing over its tracks, it appeared that defendant's tracks traversed plaintiff's farm along-side the tracks of another company which had previously constructed a crossing at the point desired by plaintiff. At this point defendant's tracks were 18 feet above grade, on a solid embankment, and in order to get across defendant's tracks it was necessary for plaintiff to pass between the two railroads a distance of 550 feet, to a crossing erected by defendant at the point where its tracks entered the farm. *Held*, that evidence of the value of the farm, and the cost of hauling by reason of the location of the crossing by defendant, was competent as bearing on the question whether the court should exercise its equity power, and order a crossing, or give such damages as plaintiff had sustained by reason of failure to place a crossing at a suitable and convenient point, in case defendant's erecting such crossing should be disproportionate to the value of the property.—*Buffalo Stone & Cement Co. v. Delaware, L. & W. R. Co.*, 7 N. Y. S. 604.

7. As the evidence showed that plaintiff could not get to the crossing as located by defendant without passing 550 feet over

the lands of defendant or the other railroad, a finding that he was "completely cut off from all connection with the easterly portion of his farm" without trespassing on the lands of another was proper.—*Buffalo Stone & Cement Co. v. Delaware, L. & W. R. Co.*, 7 N. Y. S. 604.

8. Several witnesses testified to the fact that defendant's tracks were 18 feet above the level of the tracks of the other road at the point where the latter road had erected the crossing, and that defendant's tracks were on an embankment about 18 feet high. *Held*, that the evidence sustained the finding by the court that it is impossible for a team and wagon to cross defendant's tracks at this old farm road as the defendant's embankment now is, and that said old farm road had been used as an outlet to said farm for many years.—*Buffalo Stone & Cement Co. v. Delaware, L. & W. R. Co.*, 7 N. Y. S. 604.

Duties of lessee.

9. Defendant was the lessee of the railroad under a lease which provided that it should use and operate the railroad, and "do and perform the acts and things which the [lessor,] as owner of the property and franchises, * * * would be bound by law to do and perform had this indenture not been made." *Held*, that the duty of the lessor to construct a farm crossing became the duty of defendant, as lessee, and the latter could be compelled by a farm owner to build the crossing.—*Buffalo Stone & Cement Co. v. Delaware, L. & W. R. Co.*, 7 N. Y. S. 604.

Negligence—Accidents at crossings.

10. The fact that the street crossing defendant's tracks had been discontinued by the commissioners of highways, on condition that defendant should open another road, did not relieve defendant from the statutory duty of giving warning on the approach of trains, so long as the new road was not prepared for travel.—*Rodrian v. New York, N. H. & H. R. Co.*, 7 N. Y. S. 811.

11. In an action against a railroad company for the negligent killing of plaintiff's intestate, there was evidence that deceased was walking slowly along a rough road towards the crossing; that at the time there was the noise of another train to attract her attention; that the view in the direction from which the train that struck her was approaching was obstructed; that defendant neither rang the bell nor blew the whistle until within about 50 feet of the crossing; and that the train was an express, and behind time, and was running about 30 miles an hour. There was no evidence that deceased looked both ways before crossing the track. *Held*, that the questions of negligence and contributory negligence were properly submitted to the

jury.—*Rodrian v. New York, N. H. & H. R. Co.*, 7 N. Y. S. 811.

Negligence—Injuries to persons on track.

12. In an action for injuries to a person on a railroad track, there was evidence that several of defendant's tracks crossed the road where the accident occurred; that plaintiff stood and waited for a west-bound train to pass, and then, in crossing the tracks, was struck by an east-bound train; that, before crossing, plaintiff looked both ways, and saw no train approaching. The evidence as to ringing the bell and blowing the whistle of the east-bound train was conflicting. The track could be seen for a long distance, looking west. The west-bound train made considerable noise. There was a head-light on the east-bound train, but there was a switch-engine with a head-light standing near, and various other lights at different points along the tracks. The night was dark and hazy. *Held*, that the questions of negligence and contributory negligence were properly submitted to the jury.—*Beckwith v. New York Cent. & H. R. R. Co.*, 7 N. Y. S. 719.

18. In an action for the negligent killing of plaintiff's intestate by a locomotive, there was evidence that decedent was 18 years old; that he was with his older brother; that his brother looked both ways before attempting to cross the track; that, not seeing or hearing the approaching train, he told the decedent to come on, and they hurried across. *Held*, that the question of contributory negligence on decedent's part was properly submitted to the jury.—*Beckwith v. New York Cent. & H. R. R. Co.*, 7 N. Y. S. 721.

14. In an action against a railroad company for the killing of plaintiff's intestate, caused by defendant's alleged negligence in not having a head-light on its locomotive, a verdict in plaintiff's favor on conflicting evidence will not be disturbed where the question respecting the light was submitted to the jury in the following language: "Was it because there was no head-light that he did not discover the train, and thus avoid the accident? If you are satisfied of that, then the defendant was negligent; and if the plaintiff was free from negligence the defendant is liable."—*Daniels v. Staten Island Rapid Transit R. Co.*, 7 N. Y. S. 725.

—Stock-killing cases.

15. Under 2 Rev. St. N. Y. (7th Ed.) p. 1604, § 2, providing that railroad companies shall maintain fences with openings, bars, or gates, at farm crossings, "for the use of the proprietors of the land," where a gate is so maintained by a railroad company it is the duty of the owner of the

land to close the gate after using it.—*Diamond Brick Co. v. New York Cent. & H. R. Co.*, 7 N. Y. S. 863.

Ratification.

Of attorney's acts, see *Attorney and Client*, 1.

RECEIVERS.

Execution sale of property held by, see *Execution*, 2.

In supplementary proceedings, see *Execution*, 7-10.

Right to deposits, see *Banks and Banking*, 1.

Individual liability.

1. Where a receiver of a corporation employed plaintiff to take charge of the company's property, and pay such sums as were necessary for its protection, and there was no express agreement that plaintiff should exonerate the receiver and look alone to the trust-estate for his compensation, the receiver is individually liable for plaintiff's services and disbursements.—*Rogers v. Wendell*, 7 N. Y. S. 781.

Actions by.

2. Where the receiver of an insurance company applies for and obtains an order to bring suit on a guaranty given by another company that it would fulfill all contracts entered into by the former company, he cannot maintain such suit on the ground of the misappropriation of assets of the company by defendant.—*Pierson v. Cronk*, 7 N. Y. S. 573.

Removal—Accounting to successor.

3. A receiver who, by failure to properly discharge the duties of his office, has become liable to account for the loss resulting from his neglect, and has been removed, is accountable to his successor, to whom the entire estate has passed, and not to the creditors.—*Clapp v. Clapp*, 7 N. Y. S. 495.

Recognizance.

See *Bail*.

Reconvention.

See *Set-Off and Counter-Claim*.

Recording.

Order confirming award in condemnation proceeding, see *Eminent Domain*, 2.

REFERENCE.

When reference authorized.

1. In an action for goods sold and delivered, plaintiffs' bill of particulars contained 51 items, some of them comprising several deliveries, all of which would have

to be proved on trial by their books, as they were put in issue by the answer. *Held*, that an order of reference was properly granted, under Code Civil Proc. § 1013, authorizing a reference in cases involving a long account.—*Canda v. Robbins*, 7 N. Y. S. 895.

2. An order of reference is proper where it appears that the trial of the issues will require the examination of a long account, that it will not require the decision of any difficult questions of law, and that an "account" between the parties, in the proper acceptance of the term, is directly involved.—*Degener v. Underwood*, 7 N. Y. S. 681.

3. The statement by defendants that they intend to amend their answer is no ground for refusing an order of reference.—*Degener v. Underwood*, 7 N. Y. S. 681.

Compulsory reference.

4. An action against the clerk of a county to recover money paid him upon false and fraudulent claims for services and money expended for the county, founded on Code Civil Proc. c. 16, tit. 1, art. 4, allowing an action in the name of the people for the misappropriation of public property, is an action sounding in tort, and hence the court is not authorized to compel a reference.—*People v. Wood*, 7 N. Y. S. 712.

5. Though it may be necessary to establish the damage sustained by resort to defendant's bills, they do not constitute an account between the parties.—*People v. Wood*, 7 N. Y. S. 712.

Objections to appointment of referee.

6. On motion to appoint a referee in place of a deceased referee, whose appointment has been affirmed on appeal, objections to the merits of the original application cannot be considered.—*In re Plumb*, 7 N. Y. S. 493.

Vacating order of reference.

7. The amendment of the answer and incorporation of a counter-claim is no ground for vacating an order of reference.—*Degener v. Underwood*, 7 N. Y. S. 681.

Report.

8. Where there is no irregularity and no collusion or fraud charged, and there is evidence to sustain the referee's report, judgment should be rendered thereon.—*Ryerson v. Ryerson*, 7 N. Y. S. 726.

Findings.

9. Refusal of a referee to make findings asked for is not error where it appears that the evidence bearing on such findings was conflicting, or that they were not material, or would not have benefited the party asking for them.—*Robinson v. Smith*, 7 N. Y. S. 88.

10. Where there is evidence to sustain a referee's findings, and there are no exceptions to his findings, or requests to find differently on the evidence, a judgment entered on the report of the referee will not be disturbed on appeal.—*Opdyke v. Whiting*, 7 N. Y. S. 178.

Filing and delivery.

11. Under Code Civil Proc. N. Y. § 1019, providing that a referee's report must be either filed with the clerk, or delivered to the attorney for one of the parties within 60 days after the cause is finally submitted, otherwise either party may, before it is filed or delivered, serve a notice on the attorney for the adverse party that he elects to end the reference; and in such case the action must thenceforth proceed as if the reference had not been directed,—a referee does not lose jurisdiction, though his report is not delivered until three years after final submission, there having been no notice given by either party of an election to end the reference.—*Lampman v. Smith*, 7 N. Y. S. 922.

Application for judgment on report.

12. On application to the special term for judgment on report of a referee appointed by consent to hear and determine the issues in an action for dissolution of a marriage, it is error to set aside the report, and to direct the issues to be tried at circuit, but the court should either grant or deny the application only where there is no charge of misconduct on the part of the referee, and no application to vacate the order of reference, or for the referee's removal.—*Ryerson v. Ryerson*, 7 N. Y. S. 726.

Recommittal of report.

13. Code Civil Proc. N. Y. § 1023, providing that before a referee has rendered a decision he may make findings of fact or rulings on questions of law, thereby prohibiting him from making them afterwards, applies only to issues arising on pleadings, and not to special proceedings; and a surrogate may send back a referee's report on the accounting of an administrator for further findings on material questions of fact which the evidence tends to support, and on which the report is silent, though no requests to find were submitted before the report.—*In re Bayer's Estate*, 7 N. Y. S. 566.

Reformation.

See *Equity*, 4, 5.

Rehearing.

See *Appeal*, 16, 17; *Demurrage*.

Release and Discharge.

See *Payment*.

Of mortgage, see *Mortgages*, 4, 5.

REPLEVIN.**Jurisdiction.**

1. Under Code Civil Proc. N. Y. § 2933, providing that "where the summons [in replevin in a justice's court] has been personally served upon the defendant, or where he appears, the justice must proceed to hear and determine the action, although the plaintiff has not required the chattel to be replevied," a justice has jurisdiction of an action to recover the chattel, though there has been no requisition. —*Guyon v. Rooney*, 7 N. Y. S. 811.

Judgment.

2. In replevin for bonds, where the verdict awards possession to plaintiff, and fixes their value, including damages, at a certain sum, a judgment that plaintiff have delivery of the bonds, or, in default, the sum named in the verdict, and adding a distinct amount as damages for detention, is, in respect to this addition, unauthorized. —*Corn Exch. Bank v. Blye*, 7 N. Y. S. 484.

8. Where, in replevin for bonds, a judgment for plaintiff contains an unauthorized allowance of damages in addition to the amount fixed by the jury, the mode of correction of such error is by motion; and an appeal from the judgment, bringing in question only the plaintiff's right to the possession of the bonds, and in which appeal the right to the further damages was not considered, is not conclusive against defendant's right to have the additional allowance stricken from the judgment on motion. —*Corn Exch. Bank v. Blye*, 7 N. Y. S. 484.

Reply.

See *Pleading*, 8.

Res Adjudicata.

See *Judgment*, 12-14.

Rescission.

Of contract of sale, see *Sale*, 8-9.

Residence.

What constitutes, see *Attachment*, 1, 2.

Resulting Trusts.

See *Trusts*, 4.

Risks or Employment.

See *Master and Servant*, 16, 17.

Roads.

See *Highways*.

ROBBERY.**What constitutes.**

1. Under Pen. Code N. Y. § 224, providing that "robbery is the unlawful taking of personal property from the person, or in the presence, of another, against his will, by means of force or violence, or fear of injury, immediate or future," fear is a possible, but not necessary, element of the crime; and where property is taken by force or violence, in the presence of the captain of a vessel, a verdict of guilty, on trial for robbery, is warranted, notwithstanding evidence that the captain, when commanded under cover of a pistol to go below deck, threw the robber overboard, whereupon his accomplice jumped into a row-boat along-side, and it drew away. —*People v. Glynn*, 7 N. Y. S. 555.

2. Though the property was taken without force or violence, yet where the evidence shows that it was in the boat, and carried from the presence of the captain by means of the force and violence used by its occupants, the crime is complete though the captain was ignorant that the property was in the boat. —*People v. Glynn*, 7 N. Y. S. 555.

Evidence.

8. By Pen. Code N. Y. §§ 228, 229, "all robbery accomplished by force or violence, or by fear of immediate injury, to the person," is robbery in the first or second degree. By section 280 all other robbery is in the third degree. *Held*, that a verdict of guilty of robbery in the third degree was not warranted by evidence which showed that the robbery, if any, was by force and violence. —*People v. Massett*, 7 N. Y. S. 839.

SALE.

See, also, *Judicial Sales*.

Action for purchase with intent to defraud, see *Fraud*, 2-4.

Under execution, see *Execution*, 2.

What constitutes—Tender.

1. Where plaintiff agreed to deliver certain vehicles to defendant "at his stable," defendant to pay a certain amount, deposited with his attorney, "when the plaintiff has complied with the foregoing condition," tender of delivery at the place specified is a condition precedent, and a tender of the vehicles in front of the office of defendant's attorney is not sufficient. —*Hepke v. Schmalholz*, 7 N. Y. S. 87.

Warranty—Pleading.

2. A complaint alleged that defendant fraudulently represented a horse to be

sound; that plaintiff, relying on said warranty and representations, purchased said horse, paying defendant therefor; that at the time of said warranty and sale said horse was unsound, and was worth \$250 less than defendant represented and warranted, and was known by defendant so to be. Defendant moved for nonsuit for that plaintiff had failed to prove a warranty. *Held*, that the word "fraudulently," as used in the complaint, did not change the *gravamen* of the action, which was one for breach of contract, and not for tort.—*Bosworth v. Higgins*, 7 N. Y. S. 210.

Rescission.

3. In an action for about \$2,000 worth of goods alleged to have been obtained by a firm from plaintiffs on credit, by false representations, it appeared that the representations were made about 18 months before the sale, and that during that time the firm had bought of plaintiffs and paid for many goods. A short time after the sale of the goods sued for the firm assigned, and a statement of their financial condition showed a deficiency of about \$7,000, exclusive of a debt due one of the partners. This partner had about \$11,000 applicable to the firm debts. He died before trial, and the other partner testified that the goods were bought with an intention of paying for them. The evidence as to the representations was conflicting, and it was not shown that they were untrue when made. The firm was then doing a good business. *Held*, that the evidence showed no intent by the firm not to pay for the goods at the time of their purchase, and a judgment for defendant was warranted.—*Coffin v. Hollister*, 7 N. Y. S. 784.

4. Evidence of false statements made by one of the partners after the sale, as to the firm's financial condition, is immaterial.—*Coffin v. Hollister*, 7 N. Y. S. 784.

5. Debts due by the firm to one of the partners cannot be considered in examining its financial condition.—*Coffin v. Hollister*, 7 N. Y. S. 784.

6. In an action for the price of goods sold, an attachment was issued on an affidavit which alleged that the sale was made in reliance on defendant's representations as to his financial condition; which representations were false, and must have been known by defendant to be false when he made them. The attachment was issued on the ground that defendant had made an assignment in fraud of his creditors. Plaintiffs afterwards discontinued this action, and brought replevin for the goods. *Held*, that plaintiffs' right to maintain replevin depended solely on whether they knew, when they sued for the price of the goods, that defendant had purchased the same with a fraudulent intent; and an instruc-

tion which went beyond this, and made plaintiffs' right to depend partly on their knowledge of their legal right to rescind the sale, and partly on the fact whether plaintiffs were aware of their remedy by replevin, was erroneous.—*Bach v. Tuch*, 7 N. Y. S. 611.

7. In replevin against an assignee for the benefit of creditors for goods alleged to have been obtained by the assignor from plaintiffs through false representations, it appeared that plaintiffs had theretofore sued the assignor for the price of the goods, and levied an attachment thereon. It also appeared that before the attachment suit plaintiffs had made affidavit that the assignor's said statements were untrue. *Held*, that the evidence justified a finding that plaintiffs knew the falsity of said statements at the commencement of the attachment suit, and therefore had elected to proceed on the contract.—*Myers v. Taber*, 7 N. Y. S. 857.

8. In an action against an assignee for benefit of creditors to recover goods sold to his assignors, on the ground that the assignors bought the goods with intent to defraud, the testimony of the assignor that he did not buy with such intent is admissible.—*Morris v. Wells*, 7 N. Y. S. 61.

9. The rule that one seeking to recover goods from a fraudulent purchaser must return or tender the money paid therefor is not applicable to an action for the recovery of the goods from a third person, who is not a *bona fide* purchaser for value.—*Dolle v. Rhinehart*, 7 N. Y. S. 781.

Resale.

10. Plaintiff contracted to deliver 25 bales of hops to defendants at 17 cents a pound. Defendants refused 16 bales as unmerchantable. Plaintiff sold the 16 bales for 8 cents a pound, and sued for the difference. If any notice of intent to resell the hops was given to defendants, it was after the resale and payment therefor, under an agreement to deliver the hops to the purchaser unless defendants would pay 15 cents for them. *Held*, that the sale was sufficiently complete to render the notice unavailing to charge defendants.—*Case v. Simonds*, 7 N. Y. S. 258.

11. Where the hops were rejected November 7th, and the resale was December 26th, and the notice, if given at all, was at about that time, it was too late.—*Case v. Simonds*, 7 N. Y. S. 258.

Action for price.

12. In an action for the value of gunpowder consigned to defendants, they contended that it had been consigned to one W., and not to them. Plaintiff testified that the contract of the sale was directly with defendants, and that he had sent it to W. for defendants, and by their directions.

Plaintiff introduced a letter to him from one of defendants, stating that he had never had an invoice of the powder sent to "Weed Mines," and that if plaintiff would send him a statement he would render him an account. "Weed Mines" was the place where W. had his storage magazine. *Held*, that the evidence showed that the contract for the powder was with defendants, and that it was sent to W. for them, and by their directions.—*Howe v. Morehouse*, 7 N. Y. S. 938.

13. Plaintiffs entered into contract to sell defendant bananas to be shipped on defendant's steamer from the West Indies, with the provision that they should not be cut until the steamer arrived. When the steamer arrived the fruit had been cut several days, but it was accepted by the captain of the steamer, and taken to New York, where it was sold by defendant at a loss, on account of its damaged condition. *Held*, that defendant was liable for the price of the fruit, less the amount of damages sustained by reason of its being cut before the arrival of the steamer.—*Lacelles v. Miller*, 7 N. Y. S. 447.

14. Plaintiffs delivered a pair of horses to defendant's coachman, with a notice that they would cost \$200 more than a former pair, which message was given to defendant, who kept and used the horses from that time. She told her coachman plaintiffs would have to see her son, who did all her business; but the message was not given to plaintiffs. *Held*, defendant was liable for the \$200.—*Doerr v. Woolsey*, 7 N. Y. S. 662.

Action for price—Evidence.

15. Where by a memorandum for the sale of lumber it was to be shipped in three lots, in an action for the price of the third lot of lumber, the defense being a breach of the contract by plaintiffs, evidence relating to the former shipments was admissible, as a necessary part of the history of the transaction, and as showing the interpretation given to the contract by defendants, and also as showing performance by plaintiffs up to the alleged refusal of defendants to perform their part.—*Hurd v. Bovee*, 7 N. Y. S. 241.

16. In an action for the price of barley sold "at market price" it appeared that defendant told plaintiff that by the "market price" he meant "just what the paper quotes," whereupon plaintiff bought the commercial paper of the day before, the issue of the day of the sale not containing any quotations of barley. *Held*, that the paper was admissible to show the price for which the barley was sold.—*Gilbert v. Manning*, 7 N. Y. S. 220.

Buyers' remedies.

17. A bill of sale was of "five hundred

(500) to six hundred (600) tons kaint in bulk, * * * delivered ex vessel in New York harbor. Shipment to be made from a German port by sailing vessels." During the voyage the kaint was damaged by the seas. *Held*, that the purchasers were entitled to recover from the seller the difference between the contract price and the market price of the kaint when received.—*Tinsley v. Weidinger*, 7 N. Y. S. 280.

18. Retention by the purchasers of goods shipped to them under a contract for the sale of all the goods of a certain description then owned by the seller, but which contains no warranty of quality, without offering to return the goods or notifying the seller, after inspection, that part of the goods do not answer the description contained in the contract, constitutes a waiver of their right to damages on that ground.—*Shaw v. Lighthouse*, 7 N. Y. S. 271.

Conditional sale.

19. If personal property is sold and delivered under an agreement that the title shall not pass until the negotiable notes given for the purchase money are fully paid, the seller can, on default in payment, recover in trover the value of the goods from the assignee for the benefit of creditors of the purchaser, without first tendering the unpaid notes; as to deny him a recovery without such tender would be to virtually confine him to the security of the property, when, by the contract, he is also entitled to rely on the purchaser's promise to pay.—*Brewer v. Ford*, 7 N. Y. S. 244.

Savings Banks.

See *Banks and Banking*, 6-9.

Actions against, see *Interpleader*, 2.

SCHOOLS AND SCHOOL-DISTRICTS.

Contracts — Authority of school board.

Under Laws N. Y. 1856, c. 129, creating the defendant board of education, the board had power "to contract with and employ all teachers in the school under their charge, and also a janitor and librarian, and at their pleasure to remove them." By a resolution of the board plaintiff was appointed janitor, "to hold that position during the pleasure of the board at an annual salary," etc. These terms were embodied in a contract which plaintiff signed. *Held*, that the board had power to remove the janitor at their pleasure, which power became a term of the contract with plaintiff; and his removal before the end of the year gave plaintiff no cause of action.—

Weidman v. Board of Education, 7 N. Y. S. 309.

SEDUCTION.

Civil action—Evidence.

1. In an action for seduction of plaintiff's minor daughter, evidence that defendant by fraud obtained plaintiff's consent to take away the daughter; that he then seduced her; and that, after she was informed that he could not marry her, she took poison, said she did not want to live, and died four days after having left home,—is sufficient to submit to the jury the question whether plaintiff was damaged by the seduction, as it authorizes an inference that the daughter was ill, and unable to render service at the time she took poison, and that this condition was caused by the seduction.—*Lawyer v. Fritcher*, 7 N. Y. S. 909.

2. Where defendant, in an action for the seduction of plaintiff's minor daughter, alleges that plaintiff consented to his taking the daughter away, evidence of circumstances at that time and preceding it is admissible to show that such consent was obtained by fraud; it being, in that case, no defense.—*Lawyer v. Fritcher*, 7 N. Y. S. 909.

Servant.

See *Master and Servant*.

Service of Process.

See *Writs*.

On foreign corporation, see *Corporations*, 14.

SET-OFF AND COUNTER-CLAIM.

Pleading by amendment, see *Pleading*, 10.

When allowed.

1. An undertaking executed to obtain the arrest of the maker of a note for false representations is a statutory indemnity in the nature of a penalty, and not a contract, and in an action thereon by the assignee of the maker of the note the obligors cannot counter-claim the note assigned to them by the promisee.—*Furber v. McCarthy*, 7 N. Y. S. 613.

2. In an action for rent defendant may set up a counter-claim for conversion of certain articles alleged to have been taken from the premises by plaintiff and wrongfully applied on the rent claimed, as the two causes arise out of the same transaction, within the meaning of Code Civil Proc. N. Y. § 501, defining counter-claims.—*Littman v. Coulter*, 7 N. Y. S. 1.

Pleading.

3. In an action for rent, the answer admitted the rent due, but set up as a counter-claim that, notwithstanding a covenant for quiet enjoyment in the lease, plaintiff brought suit against defendant for the forfeiture of the lease, without probable cause; that defendant recovered judgment; and that by reason of the action defendant was greatly damaged in his business. *Held*, that such counter-claim was demurrable, because it alleged neither a breach of the covenant, nor a malicious prosecution, and also because it sounded in tort, and did not arise out of plaintiff's cause of action.—*Rhineland v. Martin*, 7 N. Y. S. 154.

Settlement.

See *Payment*.

Of case, see *Appeal*, 6-11.

Sewers and Drains.

Defective, see *Municipal Corporations*, 21-25.

SHERIFFS AND CONSTABLES.

Failure to execute process—Evidence.

In an action against a sheriff for neglecting to arrest a judgment debtor on an execution against his person, evidence of directions given by plaintiff to a former sheriff as to another execution against the debtor, on the same judgment, is inadmissible.—*Mitchell v. Baucus*, 7 N. Y. S. 91.

Shipping.

See *Collision*; *Maritime Liens*; *Marine Insurance*.

Slander.

See *Libel and Slander*.

Societies.

See *Associations*.

SPECIFIC PERFORMANCE.

Contracts enforceable.

1. A contract to buy a lease of premises known as "75 Fourth Avenue" cannot be enforced where it appears that one wall of the building in question is not on the demised premises, as the vendor's title is to that extent defective.—*Drake v. Shields*, 7 N. Y. S. 209.

2. Specific performance of a contract to convey land will be granted where it appears that plaintiff was the sole purchaser,

and was the party to whom the deed was to be made; that time was not of the essence of the contract, and that the time for completing it had several times been postponed, and payments received thereafter; that plaintiff was in possession, and had made valuable improvements; that no notice had been given him that defendant intended to terminate the contract; and that a conveyance to a third person was without consideration, and with notice of plaintiff's claim.—*Cordes v. Kenney*, 7 N. Y. S. 849.

Contracts enforceable — Part performance.

8. In an action for specific performance of a parol contract for sale of land, one S., who had been agent for defendant C. for 20 years, wrote to him in March that he had seen the land in question, as directed, and paid the tax on it; that plaintiff wished to buy it, and desired to know the price. Defendant replied: "My price is \$250. Please tend that business for me." S. testified that three days later he took the letter to plaintiff's house, who agreed to take the land, and he so wrote defendant C., but got no reply. Plaintiff took immediate possession of the land, built and repaired fences, grubbed, cut, and burned underbrush, etc., up to May, when defendant W., who had subsequently got a deed of the land, forcibly ousted her, and retained possession. Defendant C. said he had refused to sell to W.'s agent, as plaintiff was going to have the land. *Held*, that the evidence sustained a finding that plaintiff took possession from defendant's lawful agent, and exercised sufficient acts of ownership and performance under the contract to take it out of the statute of frauds.—*Van Epps v. Clock*, 7 N. Y. S. 21.

Spirituous Liquors.

See *Intoxicating Liquors*.

STATUTES.

Construction, see *Mechanics' Liens*, 1.
Titles, see *Constitutional Law*, 1.

Repeal.

1. The subject-matter of Act N. Y. April 24, 1865, relating to the commissioners of parks, having been dealt with by Laws 1874, c. 604, provisions of the former not contained in the latter will be presumed to have been intentionally omitted.—In re New York Institution for the Instruction of the Deaf and Dumb, 7 N. Y. S. 860.

2. As Laws N. Y. 1885, c. 188, contains a clause repealing several statutes, without mentioning Laws 1884, c. 202, and as the legislature declared the act of 1885 to be

supplemental to and in aid of the act of 1884, it is clear that the legislative intent was that the act of 1885 should not repeal that of 1884.—*People v. Harris*, 7 N. Y. S. 773.

Pleading statutes.

8. In an action for the alleged negligent killing of plaintiff's intestate, which occurred in New Jersey, the complaint alleged "that the laws of the state of New Jersey are similar to those of the state of New York, and give to the personal representatives of a deceased person a right of action in such cases, the same as provided for by the laws of this state." *Held*, that this was only an averment of plaintiff's conclusion that the statutes of the two states were similar, and therefore that her complaint did not state facts sufficient to constitute a cause of action, within the requirements of Code Civil Proc. N. Y. § 481.—*Fagan v. Strong*, 7 N. Y. S. 919.

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Stock.

Live-stock, killing by locomotive, see *Rail-road Companies*, 15.

Street.

See *Municipal Corporations*.

Summons.

Service on non-residents, see *Writs*.

Supersedeas.

Of execution against the person, see *Execution*, 14-17.

Supplementary Proceedings.

See *Execution*, 8.

TAXATION.

See, also, *Municipal Corporations*, 41, 42.

Correction of errors in assessment rolls, see *Mandamus*, 2.

Inheritance and legacy tax, see *Descent and Distribution*, 1-6.

Of costs, see *Costs*, 10.

In general.

1. The legislature has the power to levy taxes, and to apportion the burden among the property holders, and may refer to a void assessment for the purpose of fixing the amount of the tax, and the property on which it is levied.—*In re Flower*, 7 N. Y. S. 866.

2. The legislature, in ratifying and re-levying, by Laws N. Y. 1886, c. 656, the void tax assessed in 1880, in Long Island City, had the power to levy interest on the same from the date of the void assessment.—*People v. Bleckwenn*, 7 N. Y. S. 914.

Taxable property.

3. Rents not due on leases for years are not taxable as personal property.—*People v. McComber*, 7 N. Y. S. 71.

4. Debts, securities, and obligations are taxable, though they are not due.—*People v. McComber*, 7 N. Y. S. 71.

5. The fact that the owner of personalty changed it into real estate, and then executed leases for years thereon in order to avoid taxation on personal property, does not affect the assessment, which must be governed by the legal position of the property at the time thereof.—*People v. McComber*, 7 N. Y. S. 71.

Assessment.

6. Laws N. Y. 1880, c. 542, § 8, as amended by Laws 1881, c. 861, provides that if a corporation, during any year, makes dividends amounting to 6 per cent. or more on the par of its capital, then it is to pay a tax of one-quarter mill on the capital stock for each 1 per cent. of dividends; but if there are no dividends, or the dividends are less than 6 per cent., then the tax shall be at the rate of 1½ mills on each dollar of the value of the stock. *Held*, that it was the clear intention of the statute, where the dividend was less than 6 per cent. on the par value of the stock, that the tax should be 1½ mills on the actual value of the stock, though the aggregate tax would be greater than a tax computed on a dividend of 6 per cent.—*People v. Delaware & H. Canal Co.*, 7 N. Y. S. 890.

7. An assessment is presumed to be correct only until the contrary is shown.—*People v. McComber*, 7 N. Y. S. 71.

Review.

8. Laws N. Y. 1880, c. 200, provides that the supreme court may allow *certiorari* on the petition of any person or corporation assessed and claiming to be aggrieved to review an assessment, when the petition shall set forth that the assessment is illegal, or is erroneous by reason of overvaluation, or is unequal, etc.; and, if it shall

appear that the assessment is illegal or erroneous, the court may order it to be stricken from the roll, or order a reassessment of the property, or correct such assessment in whole or in part, and testimony may be taken if necessary to the proper disposition of the matter. Under this statute a *certiorari* was granted on petition alleging illegality of assessment upon the grounds of exemption from taxation, and also of unequal valuation. *Held*, that it was improper to grant a motion by defendant to modify the writ so as to prevent the relator from raising any other question than that of exemption, on defendant's affidavits that no question was raised before them but that of exemption, where an affidavit of a clerk in the office of relator's attorney stated that he had also objected to the assessment by reason of overvaluation, as the question was one affecting the merits.—*People v. Assessors, etc., of Sharon*, 7 N. Y. S. 101.

Q. A tax assessment may be reviewed on affidavit, though an examination is also allowed.—*People v. McComber*, 7 N. Y. S. 71.

10. Laws N. Y. 1880, c. 269, § 6, provides that "costs shall not be allowed against assessors or other officers whose proceedings may be reviewed under this act unless it shall appear to the court that they acted with gross negligence, in bad faith, or with malice." *Held*, that where it did not appear that assessors, in making up the assessment roll, acted otherwise than in good faith, costs on review could not be taxed against them.—*People v. McComber*, 7 N. Y. S. 71.

Sale for non-payment.

11. Rochester City Charter, § 94, provides that land may be sold summarily when charged with taxes that have been due for a certain time. Section 91 directs a warrant for the collection of personal property taxes, when no personal property is found by the collector holding the warrant, to be returned unsatisfied, and Laws N. Y. 1867, c. 361, and Laws 1842, c. 318, provide for special proceedings in such cases. *Held*, that land cannot be sold summarily in the city of Rochester for personal property taxes.—*Wilcox v. City of Rochester*, 7 N. Y. S. 187.

Taxation of Costs.

See *Costs*, 10.

Tenant.

See *Landlord and Tenant*.

TENDER.

Sufficiency, see *Mortgages*, 3.
Effect.

1. Code Civil Proc. N. Y. §§ 781-784, provide that, in actions for money only, de-

fendant may, before trial, tender plaintiff the amount he conceives to be due him, with costs, but the tender shall not avail unless the money is accepted, or paid into court; and that where plaintiff proceeds in the action after tender, and recovers no more than the sum tendered, he shall pay costs from date of tender, and, where he recovers a greater sum, the amount paid into court shall be deducted therefrom. Before trial of an action for damages, defendant made a tender to plaintiff, which being refused, the money was by defendant paid into court. On a verdict being found for plaintiff, both parties asked an order for the money. *Held*, that it was properly awarded to plaintiff, though she had no knowledge of its payment into court after she declined the tender.—*Taylor v. Brooklyn El. R. Co.*, 7 N. Y. S. 625.

2. The statutes and Code of New York make no distinction between tender on award and tender in an action on contract.—*Taylor v. Brooklyn El. R. Co.*, 7 N. Y. S. 625.

Testamentary Capacity.

See *Wills*, 1-4.

Testamentary Powers.

See *Powers*.

Torts.

See *Assault and Battery; Collision; Deceit; Fraud; Libel and Slander; Negligence; Nuisance; Replevin; Trespass; Trover and Conversion*.

Measure of damages, see *Damages*, 2.

TOWNS.

See, also, *Highways; Schools and School Districts*.

Mandamus to town board, see *Mandamus*, 1.

Action by officers.

On the death of an overseer of the poor pending an action brought by him as such, his duly appointed and qualified successor has the same control over such action as he would have had, without being substituted as plaintiff.—*Bellinger v. Birge*, 7 N. Y. S. 695.

TRADE-MARKS.

Injunction.

1. Defendant, in the preparation and sale of a medicine, imitated exactly the name of the medicine, the description of it, the directions for its use, and the design of the wrappers used by plaintiff. The inner wrapper of plaintiff's medicine described it as "prepared by Dr." M., who had originally prepared it, and sold out his

interest to plaintiff, but the outer wrapper described it as prepared by plaintiff. M. had either assumed or acquired from his business the title of "Doctor." *Held*, that the statements as to its preparation were not a fraud on the public, and constituted no defense in a suit by plaintiff to enjoin such use by defendant.—*D. Ransom, Son & Co. v. Ball*, 7 N. Y. S. 288.

2. The use of the word "Magnetic" in the title, M.'s "Universal Magnetic Balm," where there was no pretense that the liquid possessed any magnetic qualities, does not show any fraudulent intent to deceive the public which would deprive plaintiff of its right to an injunction.—*D. Ransom, Son & Co. v. Ball*, 7 N. Y. S. 288.

TRESPASS.

Evidence.

In an action for trespass for cutting timber on plaintiff's land, one witness testified that he had pointed out to plaintiff the place where he cut the timber, and another testified that he had pointed out to plaintiff the place whence he drew the timber. Plaintiff himself testified that the places so pointed out were on his land. The first witness also testified that in cutting the timber he did not cross the line separating defendant's land from plaintiff's, and defendant testified that after the timber was cut it was drawn to plaintiff's land for more convenient removal. *Held*, that a verdict for plaintiff was contrary to the evidence.—*Wedge v. Spencer*, 7 N. Y. S. 173.

TRIAL.

See, also, *Appeal; Certiorari; Judgment; New Trial; Witness.*

Objections to evidence, see *Account Stated*, 2.

Conduct of trial — Physical examination.

1. In an action for personal injuries, plaintiff's counsel could properly refuse to submit plaintiff to an examination of physicians, as proposed by defendant.—*McSwyny v. Broadway & S. A. R. Co.*, 7 N. Y. S. 458.

Objections to evidence.

2. An objection to the testimony of a witness as to a statement made to him by another witness, because the latter was not asked if he had made such a statement, is properly overruled where the questions asked both witnesses were directed to the same subject-matter.—*Voltz v. Wilson*, 7 N. Y. S. 176.

Instructions.

3. On issues of fact, where the testimony is conflicting, it is not error for the court to refuse to take the case from the

jury because witnesses on one side largely outnumber those giving contradictory testimony on the other; nor is it error to refuse to instruct the jury that credit should not be given to plaintiff's testimony because it in some respects contradicts testimony given by him at a former trial,—these being circumstances affecting the weight of evidence and credibility of witnesses, and proper matters for the consideration of the jury.—*Cleveland v. New Jersey Steam-Boat Co.*, 7 N. Y. S. 28.

4. A refusal to charge as requested is not error, where the court has already substantially charged the same proposition.—*Anderson v. John Hancock Mut. Life Ins. Co.*, 7 N. Y. S. 601.

5. The refusal of a request to submit a single question of fact to a jury is not erroneous, unless a finding of that fact in the party's favor would conclusively determine his right to a verdict.—*Benson v. Townsend*, 7 N. Y. S. 162.

6. Where defendant's request to submit a question to the jury has been granted, and on another ground he asks a direction of a verdict, he waives the right of submission, and consents to the decision of law and fact by the court.—*Green v. Shute*, 7 N. Y. S. 646.

7. When a party asks the direction of the verdict in his favor, and on a denial requests the submission of only one fact to the jury, he submits the determination of all other facts involved to the court.—*Benson v. Townsend*, 7 N. Y. S. 162.

8. Where both parties request the direction of a verdict, neither can afterwards object that there were questions of fact which should have been submitted to the jury.—*Green v. Shute*, 7 N. Y. S. 645.

9. Where each party has requested a direction of a verdict in his favor, neither can complain after judgment that a direction was improper, though there was a disputed question of fact which either might have required to be submitted to the jury.—*Green v. Shute*, 7 N. Y. S. 69.

— Exceptions.

10. After the cause was given to the jury a recess was taken, and plaintiff's counsel retired to prepare his exceptions to the charge, but before he returned, and before the expiration of the recess, the jury had come into court, rendered their verdict, and been discharged. *Held*, that the exceptions were properly disallowed.—*Banker v. Fisher*, 7 N. Y. S. 732.

Verdict.

11. In a civil action tried before a justice of the peace, after the jury had retired the justice entered their room, and said to them: "It takes a good deal of time and expense to try these lawsuits, and it seems as though you ought to agree." One juror said they

stood two to four, and the justice replied: "You are so near together that you had better agree." A verdict was soon after returned. *Held* that, however honest the motives of the justice, his interference with the deliberations of the jury was unwarrantable, and the judgment must be reversed.—*Valentine v. Kelly*, 7 N. Y. S. 184.

12. In an action for wrongful detention of plaintiff's goods, the fact that the jury disagree as to one defendant does not affect their verdict against the others, and is not prejudicial to the latter, though the complaint alleges a conspiracy between all of the defendants.—*Lockwood v. Bartlett*, 7 N. Y. S. 481.

13. Though the findings on feigned issues, submitted to the jury, if adopted, would entitle plaintiff to the relief demanded, the judge who presided at the trial may, on trial at special term, disregard such findings and find for defendant.—*Sidway v. Sidway*, 7 N. Y. S. 421.

14. A finding of fact that "defendant, by false and fraudulent representations of law and fact, induced the plaintiffs to execute" a deed, states a mere conclusion of law, and is not sufficient to justify a judgment setting the deed aside.—*Smith v. Smith*, 7 N. Y. S. 198.

Verdict—Inconsistent findings.

15. Plaintiff assigned to defendants, his creditors, his interest in certain patents, by an instrument in which defendants agreed to furnish funds and pay a certain debt. The latter reserved the right to terminate the agreement, and it was provided that they should "retain their interest and claims herein till they shall be fully paid" their debt "up to such time as they shall terminate this agreement, but they shall upon payment" of the debt due them "reassign their interest in said inventions." *Held*, that a finding that no fraud was practiced towards plaintiff in regard to such assignment was not inconsistent with a finding that defendants held it as collateral security.—*Barry v. Coville*, 7 N. Y. S. 86.

Trial by court.

16. Where the court, under Code Civil Proc. N. Y. § 1028, providing that it must determine the facts of the case which are submitted to it by either party, has found that certain conveyances are not fraudulent, it is not required to determine the truth of facts tending to show fraud.—*Mulford v. Yager*, 7 N. Y. S. 88.

TROVER AND CONVERSION.

What constitutes.

1. In an action for conversion of goods, in which plaintiffs claimed a special prop-

erty as factors, plaintiffs admitted that they had notified their consignors that they had sold the goods, but showed that their consignors refused to ratify the sale. But it appeared that plaintiffs persisted in claiming that the sale was *bona fide* and irrevocable; that the sale was a formal one, an account of it appearing on plaintiffs' books; that they permitted their vendee to sell and deliver the goods; that defendants, in good faith, bought the goods of plaintiffs' vendee, and paid him for them; and though plaintiffs attempted to show that the sale was rescinded as between them and their vendee, no actual rescission was shown. Plaintiffs did not request submission to the jury. *Held*, that the trial court properly directed a verdict for defendants, as it did not appear that plaintiffs had not parted with their special property, and the fact that their vendee made false reports to them after his sale to defendants was immaterial.—*Lane v. Rosenberg*, 7 N. Y. S. 906.

Pleading.

2. A complaint which avers that defendant unlawfully converted and disposed of certain bonds to his own use, shows such a conversion that no allegation of demand is necessary.—*Saratoga Gas & Electric Light Co. v. Hazard*, 7 N. Y. S. 844.

3. The complaint need not allege authentication of the bonds, as it would be a matter of defense to show that they were not in a condition to be of value.—*Saratoga Gas & Electric Light Co. v. Hazard*, 7 N. Y. S. 844.

TRUSTS.

Actions by trustees, see *Parties*, 2.
Resulting trusts, see *Equity*, 2.

Express trusts.

1. There was evidence that plaintiff's husband, since deceased, had the management of her money, and had invested part of it in stock certificates; that the certificates had been originally made out in his name, as trustee for plaintiff, and her name afterwards erased, leaving one of the certificates in her husband's name individually, and the other in his name as trustee. The rules of the companies being such that certificates of stock could not be issued in trust without inconvenience; that the dividends had been deposited to plaintiff's credit; that after her husband's death the certificates were found in his vault, in an envelope, with other certificates belonging to plaintiff; that on the envelope was indorsed plaintiff's name, in her husband's handwriting, and a further indorsement signed by him, setting forth the contents of the envelope, including the certificates in question, and directing his executor to

transfer them to plaintiff. *Held*, that the evidence established that the certificates were held in trust for plaintiff by her husband.—*Guion v. Williams*, 7 N. Y. S. 786.

2. C. delivered to A. a sum of money, taking the latter's acknowledgment, which stipulated that the money was to be invested for the benefit of C.'s daughter H., and the interest thereof paid to her for the support of herself and children when C. should decide that she needed it. *Held* not a declaration of trust, such as to prevent C. from thereafter collecting and using the money; as, to constitute a trust, the language used must be clear and unequivocal.—*In re Crise's Estate*, 7 N. Y. S. 202.

3. An assignment of personalty to a creditor as security, and a subsequent assignment to other creditors of the surplus that may arise, do not make the first assignee a trustee for the other creditors; nor does the transaction create a trust.—*Boessneck v. Cohn*, 7 N. Y. S. 620.

Resulting trusts.

4. Under Rev. St. N. Y. (7th Ed.) p. 2181, § 51, which provides that where a grant for a valuable consideration shall be made to one person, and the consideration shall be paid by another, no use or trust shall result in favor of the person by whom such payment shall be made, no trust will result in favor of a person who contributes the money with which a lease is purchased for a third person.—*Denning v. Kane*, 7 N. Y. S. 704.

Removal of trustee.

5. Where a trustee fails to charge herself with rents received, and evinces such carelessness as proves her an unsafe guardian of others' property, and her testimony discloses an intention, persisted in until discovery, to conceal from the interested parties her reception of, and intention to appropriate, such rents, she will be removed as trustee, and it need not be found that she is dishonest or improvident.—*In re Smith's Estate*, 7 N. Y. S. 827.

Liabilities of trustees.

6. Where one has been dealing with a firm managed by three trustees, whose names are printed on the letter-heads of the firm, he having received letters written thereon, and subsequently he receives, during several years, some 20 letters from the same firm, written on letter-heads containing the name of only one trustee, the change in the letter-head is notice sufficient to put him on inquiry as to a change in the management of the business of the firm.—*Noyes v. Turnbull*, 7 N. Y. S. 114.

7. The trustees of an estate, though they continue the business, involving additional liabilities, do not sustain the copartnership

relation; and a retiring trustee is not liable for purchases in the course of the business, made after his retirement, by the other trustees, though the purchases be from one with whom the trustees had previously dealt, and who had no notice of the discharge of the trustee.—*Noyes v. Turnbull*, 7 N. Y. S. 114.

8. A judgment entered in the name of two testamentary trustees, after the death of one and resignation of the other, vests without assignment in their successor, who can enforce it by any proceeding open to a judgment creditor.—*Stokes v. Amerman*, 7 N. Y. S. 788.

Beneficiaries—Laches.

9. Where H. alleged that certain funds were held by C. at his death in trust for herself and children, and it appeared that C. had himself appropriated the money, the failure of H. and her children, who were beneficiaries under C.'s will, to file their claim against the executors in a settlement to which they were cited as parties, would estop them from afterwards claiming the money.—*In re Crise's Estate*, 7 N. Y. S. 202.

Accounting.

10. An assignment to defendant was of all sums payable to the assignor for certain work under a contract, and the declaration of trust executed by defendant provided that the assignment was to pay "all liens, claims, debts, and demands growing out of said work, and existing against" the assignor "by reason of said work." *Held*, that this referred to work to be done until the completion of the contract, as well as to work already done, and covered moneys furnished for such work after as well as before the declaration of trust.—*Pendergast v. Greenfield*, 7 N. Y. S. 829.

11. When defendant neither denies the averment of an agreed account, nor alleges any mistake, he is entitled to no credits other than are contained therein.—*Pendergast v. Greenfield*, 7 N. Y. S. 829.

12. Where the record title of land is in one who holds as trustee merely, and his personal representatives pay off a mortgage on the land in ignorance of the trust-deed, and to protect the property, the amount of such payment is properly deducted from the amount of rents and profits due the beneficiary.—*Garvey v. New York Life Ins. & Trust Co.*, 7 N. Y. S. 818.

13. Where a payment by the testamentary trustee has been directed by a decree, it is error to charge him compound interest on the sum due.—*In re Lawrence's Estate*, 7 N. Y. S. 832.

14. Where the interest of a trust fund is payable as income to a life beneficiary, and the securities in which the fund has been invested are sold at a profit, it is error to

credit the profit to the income account, as it is a gain to the principal, to which it should be added, to go eventually to the one entitled to receive the *corpus*.—In re Lawrence's Estate, 7 N. Y. S. 832.

Pleading and practice.

15. An action on a declaration of trust, whereby defendant acknowledged that an assignment to him was "in trust only" to pay certain claims against his assignor, brought by one of such claimants for an accounting and for the application of trust funds to trust purposes, is properly and necessarily in equity, and is not on an account stated, so as to entitle defendant to a jury trial, though the complaint alleges that from time to time accounts were had between the parties concerning the trust fund, and that at a certain time an account was stated between them showing a certain amount due by defendant, under his trust, as this is simply an allegation as to the amount agreed upon by the parties as applicable to the trust purposes.—Pendergast v. Greenfield, 7 N. Y. S. 829.

Undue Influence.

See *Wills*, 5-7.

USURY.

Effect.

Usury exacted by an agent in effecting a loan will not invalidate an obligation given to secure the loan, unless the lender knew of and assented thereto.—Bliven v. Lydecker, 7 N. Y. S. 867.

Variance.

See *Pleading*, 16-19.

VENDOR AND VENDEE.

See, also, *Deed*; *Fraudulent Conveyances*; *Judicial Sales*; *Sale*; *Specific Performance*. Rights of vendee, see *Judicial Sales*.

The contract.

1. Plaintiff contracted to sell to defendant land over which ran the tracks of a railroad company. He gave to defendant a sealed instrument by which he agreed within 30 days either to have the tracks removed or to procure from the railroad company the execution of a lease to it, authorizing the lessor (plaintiff) to obtain possession within 80 days, and to indemnify defendant from all loss by the encroachments of the track, including loss of profits in any future transaction. The price was partly paid, and a mortgage given for the residue. Defendant instructed plaintiff's attorney to satisfy his

own attorney as to the form of the lease. Plaintiff failed to procure the lease or remove the tracks for 10 months, when defendant's attorney wrote to plaintiff's attorney, suggesting that the proposition for a lease be not submitted to the company till he could hear from defendant whether he would take a lease at a substantial rent. Before this letter defendant contracted to sell the land to one who refused the title on account of the encroachment of the tracks. *Held*, that defendant did not waive the element of time in the sealed contract, and could set off his loss by failure to sell the land, in a suit by plaintiff to foreclose the mortgage.—Horton v. Childs, 7 N. Y. S. 570.

2. Though persons went to live on testator's land under an arrangement whereby they were to have the same at his death, the arrangement being recognized by the testator during his life-time, and in his will disposing of the land, the title to the land remained in him until his death.—In re Rider's Estate, 7 N. Y. S. 872.

Rights of vendor.

3. F. agreed to purchase land, and deposited \$500, to be returned if the title failed. He afterwards assigned the contract, and all rights thereunder, to one who assigned all interest in the land and the \$500 to plaintiff. F. assigned to defendants his interest in the \$500, and the first assignee of the contract having refused the title, defendants took it, and the vendor allowed them the credit of \$500. *Held*, that plaintiff could not recover the \$500 of defendants, as it has not been paid to them, but only allowed as a credit; and if the vendor has not paid the money, and plaintiff is entitled to it, he can recover it directly from him.—Wolf v. Flatow, 7 N. Y. S. 416.

Defective title.

4. One who has contracted to purchase vacant lots with a frontage of 75 feet is not entitled to be discharged from such contract because of his vendor's failure of title to 14 inches frontage, to which, it appears, no especial value attaches, but only to an abatement in the price.—Kelly v. Brower, 7 N. Y. S. 752.

Bona fide purchasers.

5. Plaintiff took possession of land under a parol contract with S., the agent of the owner, C., for its purchase, built fences on the land, and cut down and burned underbrush. Defendant, who subsequently purchased the land, testified that he saw what was being done by plaintiff, and that plaintiff's husband had told him that she was negotiating with C. for the land. S. testified that he told the agent of defendant about the negotiations of plaintiff, and that he had written to C. *Held*,

that defendant was not a *bona fide* purchaser.—*Van Epps v. Clock*, 7 N. Y. S. 21.

6. Where a grantor in a deed conveys the absolute title, and the grantee conveys to a third party for a valuable consideration, the latter acquires a complete title, though the original grantor had reserved a right of redemption of which the vendee had no knowledge, and on the bankruptcy of the original grantor his assignee obtains no title as against the vendee.—*Wilson v. Parshall*, 7 N. Y. S. 479.

7. The rights of a person in possession of land under a parol contract for a sale thereof are not prejudiced or diminished by a compulsory surrender of possession to a subsequent purchaser with notice of the contract and claim of ownership.—*Van Epps v. Clock*, 7 N. Y. S. 21.

VENUE IN CIVIL CASES.

Change of venue.

1. Where, in an action for an alleged breach of warranty in the sale of horses, brought in a county distant from that where the sale took place, it appears that defendants have a greater number of material and necessary witnesses than plaintiff, and that they reside at the place where the horses were purchased, and where they had been handled and observed for more than a year before the sale, it is improper to refuse defendant's motion for a change of venue to that place, though the court, as a condition of the denial, exacts a stipulation that defendants might examine their witnesses at such place before a referee.—*Belding v. Ladd*, 7 N. Y. S. 879.

2. In an action for assault and battery, where defendant alleges that he was assaulted by, and did not assault, plaintiff, and asks for a change of venue for convenience of witnesses, the fact that no person other than he and plaintiff were present at the time of the alleged assault is no objection to his right to the change, as the witnesses may be material to show defendant's condition after the alleged assault.—*Banks v. Bensky*, 7 N. Y. S. 518.

3. An order for change of venue to the county where the cause of action arose will not be disturbed where the affidavits show with reasonable certainty that the convenience of a majority of the witnesses who will be sworn will be thus suited.—*Lyon v. Davis*, 7 N. Y. S. 564.

Verdict.

Evidence to support, see *Criminal Law*, 4.

Voters.

See *Elections and Voters*, 1, 2.

Waiver.

Of objections, see *Appeal*, 35.

WAREHOUSEMEN.

Unlawful issuance of receipt.

Under Laws N. Y. 1858, c. 826, as amended by Laws 1866, c. 440, making warehousemen liable for damages for issuing a receipt for any article unless actually received in their store, defendant, who issued his receipts for a number of barrels, described as containing "Portland Cement," and undertook to deliver same on return of the receipts, is not liable on the delivery of the article received by him unless it is shown not to be "Portland Cement."—*Dean v. Driggs*, 7 N. Y. S. 449.

Warranty.

In sale of goods, see *Sale*, 2.

Ways.

See *Highways*.

WILLS.

See, also, *Executors and Administrators*.

Charitable bequests, see *Charities*, 1-6.

Testamentary capacity.

1. On petition to revoke the probate of a will, petitioner's evidence showed that decedent signed the instrument; declared, on its being read to her, that it was her will; and requested her brother and brother-in-law to become witnesses. The will was executed while decedent was suffering from a painful malady, which in a few hours caused her death, but was signed plainly and legibly. Decedent prefixed "Mrs." to her name, which appeared to be an unusual thing for her to do. Her husband was made sole legatee. It appeared that decedent had, during the night before, several times expressed an opinion that she was about to die, and desired to make her will, and gave directions as to her funeral, etc. She knew the draughtsman of the will when he came into her room, told him that she wanted to leave everything to her husband, and said, "Yes," on his reading it to her, and asking if it was right. Witnesses testified that, on being told not to forget her child, decedent said that she wanted her husband, with whom she lived on affectionate terms, to have everything, and that he would care for the child. On signing the paper, she asked that the blinds be raised so that she could see where she was writing. She said that she wanted to have matters "in black and white," so that there would be no trouble

when she was gone. *Held*, that decedent was mentally competent.—In re Walther's Will, 7 N. Y. S. 417.

2. The facts that testatrix, who by will left her property to charitable institutions, was of advanced age, unable to read or write, of a capricious disposition, and that she had stated an intention of leaving everything to her relatives, it being shown that she was excitable, and easily took offense at her relatives, do not suffice to establish the incompetency of testatrix, where it appears that she understood the contents of her will, and designed it to be her testamentary act.—In re Voorhis' Will, 7 N. Y. S. 596.

3. Where the mental capacity of the testator is the question in the contest of a will, and the testimony of subscribing witnesses and others, apparently disinterested, who had opportunities for observing the condition of testator's mind, show that at the time of making her will she was rational, and it appears that the disposition made of the property was the natural result of her surroundings, and in accordance with her intentions previously and repeatedly announced, the will must be admitted to probate.—In re Comstock's Estate, 7 N. Y. S. 334.

4. The evidence showed that testator, though so sick that he died the next day, was able to direct the preparation and comply with the usual forms in the execution of his will. The will was not an unnatural one. There was no evidence at all that testator was not of disposing mind, except the opinion of physicians, who were not present at the time the will was executed, based on their observations before that time. *Held*, that the will was properly admitted to probate.—In re Connor's Will, 7 N. Y. S. 855.*

Undue influence.

5. On the issue as to whether a will was procured by undue influence the jury were instructed that "if, under all the circumstances of the case, they find that this will was unnatural in its provisions, and inconsistent with the duties and obligations of the testator to the different members of his family, it imposes upon the proponents the duty of giving some reasonable explanation of its unnatural character, or at least of showing that it was not the result of mental defect, obliquity, or perversion." *Held* correct.—In re Budlong, 7 N. Y. S. 289.

6. Where a testator's love for his wife and her children by a former marriage was strong, it is no evidence of undue influence on their part that by his will he made ample provision for their support.—In re Thorne's Estate, 7 N. Y. S. 196.

7. On the issue whether a will was pro-

cured by undue influence, declarations made by the proponents, who were charged with exerting the influence, which declarations demonstrated the attitude of proponents towards the contestant in respect to the subject-matter at issue, and the intent with which each performed the acts attributed to him, some of them being letters showing a disposition to influence testator, are admissible, and a conspiracy need not first be established.—In re Budlong, 7 N. Y. S. 289.

Validity—Signing.

8. A will was subscribed by testatrix in the presence of one of the attesting witnesses, and was declared by her in the presence of both of them to be her last will and testament. The two witnesses subscribed it as such at her request. Testatrix's signature was plainly visible to the attesting witnesses on the face of the will. *Held*, a sufficient compliance with 2 Rev. St. N. Y. p. 68, § 40, requiring the subscription to be made by testator in the presence of each of the attesting witnesses, or to be acknowledged by him to have been so made to each of them, and that there shall be at least two attesting witnesses, each of whom shall sign, etc.—In re Look, 7 N. Y. S. 298.

— Partial intestacy.

9. Where a testator bequeaths one-fourth of his residuary estate to his executor for purposes to be made known by a letter written by the testator, said letter to form a part of the will, and the letter cannot be found, the will is valid except as to the one-fourth, as to which testator is intestate.—In re Frey's Will, 7 N. Y. S. 390.

Proof of execution.

10. In support of a will leaving all testatrix's property to charitable institutions, to the exclusion of her nieces, who were her nearest relatives, it was proved by her attorney that the instrument in question was the one which he had drawn up as her will, at her request, and according to her instructions, and read to her; and the two subscribing witnesses testified that testatrix had signed the instrument in their presence, and that they had signed the same as witnesses, on being told it was decedent's will, and requested to sign it, either by decedent herself or by her attorney, in her presence; and it was also proven that decedent had told an acquaintance that she had left her property to charitable institutions. *Held*, that the proper execution of the will was established.—In re Voorhis' Will, 7 N. Y. S. 596.

Revocation.

11. The fact that testatrix, who had made a will leaving everything to charitable institutions, before her death became

dissatisfied with it, and had another will drawn up, leaving everything to her relatives, intending to execute it, but before the time assigned for the execution became unconscious, and remained so until her death, is not a sufficient revocation of the first will, under 8 Rev. St. N. Y. (6th Ed.) p. 68, § 40, which provides that, to constitute a revocation of a previous will, there must be some other will in writing, or some other writing declaring the revocation, etc., or that the instrument has been burned, torn, canceled, etc.—In *re Voorhis' Will*, 7 N. Y. S. 596.

Probate and contest.

12. Where a will is on its face properly executed and attested, and one of the subscribing witnesses, whose memory of other circumstances connected therewith is defective, states that she was not asked to sign the will, and the other subscribing witness, who also drew the will, and a third person who was present at its execution, testify positively to the contrary, and there is nothing to show fraud, the will should be admitted to probate.—In *re Frey's Will*, 7 N. Y. S. 380.

13. On application to probate a will which gave testatrix's husband all her personal property absolutely, and the use of her realty for life, to be divided among her relatives *per capita* at his death, there was evidence that testatrix was on bad terms with her husband's relatives, and desired to cut them off, and that she did not wish her husband to know that she was executing a will; and that the will was intrusted to a subscribing witness to be by him kept in secrecy for a year after testatrix's death. Though this witness was of bad character, another subscribing witness and the lawyer who drew the will testified, and their testimony was undisputed. The estate consisted only of about \$2,500 worth of realty and a little personalty. Neither of the subscribing witnesses nor the draughtsman derived any benefit under the will, and did not know of testatrix's death at the time thereof. *Held*, that the will was not shown to be a forgery, and should be admitted to probate, though a former will had been probated before it was produced, which was a year after testatrix's death; the evidence showing that the proponent did not know of its existence until then.—In *re Daily's Will*, 7 N. Y. S. 259.

14. Though under Code Civil Proc. N. Y. § 2614 et seq., providing that an executor, devisee, or any other person interested in the estate of the alleged testator, may present a petition for probate of a will, and providing also for the citing of husband, wife, and other persons, but not an executor, the executor is not a necessary

party to the probate of a will; yet where the parties are cited and appear, on a petition filed by the executor, he cannot discontinue the proceedings without the consent of all, especially after he has appeared and examined witnesses.—In *re Lasak's Estate*, 7 N. Y. S. 2.

15. A decree admitting a will to probate on default of contestant will not be vacated on contestant's application, where there is no allegation of testamentary incapacity of decedent, and the ground of contest is simply that the widow and children were insufficiently provided for by the will.—In *re Gillies' Will*, 7 N. Y. S. 909.

Costs.

16. When a contest of a will is apparently made in good faith and on substantial grounds, and, owing to a misunderstanding of counsel as to a stipulation for a compromise, the contestants do not appear at the trial, and a verdict is rendered against them without opposition, the court will, in the exercise of the discretion conferred in such cases by Code Civil Proc. N. Y. § 2558, direct the proponent's costs to be paid out of the estate, and not by the contestants personally.—In *re Keeler's Will*, 7 N. Y. S. 192.

17. Since Code Civil Proc. N. Y. § 2558, provides that costs shall not be allowed out of the estate of a decedent to an unsuccessful contestant of a will, a stipulation by the parties that costs shall be so awarded will not be enforced, as the court is without jurisdiction to so decree, and consent of parties cannot confer jurisdiction.—In *re Keeler's Will*, 7 N. Y. S. 199.

Construction.

18. Testator devised property to H., "to hold for the benefit of his children, if he so elects." H., at the time the will was made, and at testator's death, had children. The will was signed by H. as a witness, and it was probated on his testimony. Rev. St. N. Y. (8th Ed.) p. 2549, § 50, provides that if one to whom any beneficial devise is made shall be a subscribing witness to the will, and the will cannot be proved without his testimony, the devise shall be void, and he shall be competent to prove the will. *Held*, that the words "if he so elects" applied only to the office of trustee given to H., and that the will created a trust for the benefit of H.'s children, leaving it optional with H. to accept or refuse the trust, and that, as he had no beneficial interest, the devise was not rendered void by the fact that he testified to the execution of the will, this construction being adopted to carry out the testator's intention to provide for H.'s children, and to prevent intestacy as to the property devised.—*Barnard v. Barnard*, 7 N. Y. S. 275.

19. Under a will giving certain specific

legacies, with a residuary clause giving all the residue of testator's property to his daughter, property bequeathed to a son for life, with remainder to the son's surviving children, passes, under the residuary clause, on the son's death without issue after the daughter's death.—*In re Mapes' Estate*, 7 N. Y. S. 873

Construction—Nature of estate.

20. Testator bequeathed all his estate to his wife for life, with the "right to use as she may choose, except that I give and bequeath to our adopted daughter, J., the sum of \$1,600, for her to have and to use her natural life, the same to pass to her children after her decease, provided they live to the age of twenty-one years, if they should die before that age, then, at the death of said J., this legacy shall revert to the estate." Testator's next of kin were nieces and nephews. *Held*, that the widow took the property with power to dispose of it, except the legacy to the adopted daughter.—*Rood v. Watson*, 7 N. Y. S. 212.

21. Testatrix gave her husband all her property on condition that he execute to testatrix's daughter, E., a bond and mortgage of certain of the property, "to secure the payment of \$2,000 to my said daughter, should my said husband marry again. * * * It is my will that if my beloved husband remain single he shall enjoy the benefit of the property given, devised, and bequeathed as above for and during his natural life, and from and immediately after his decease I devise and bequeath the said property to my beloved daughter, E., and her heirs forever." *Held*, that the husband had a life-estate in all the property on condition that, in case he remarried, he execute the mortgage for the payment of \$2,000 to the daughter.—*Greenhalgh v. Marggraf*, 7 N. Y. S. 728.

22. Testatrix bequeathed to plaintiff, her daughter, certain personal property, and of the residue of her property, consisting of a farm and personalty, she gave one-half to plaintiff, if she should remain unmarried, and the other half in equal shares to the other two children, but in case of plaintiff's marriage it should be equally divided between the three children. The third clause of the will was as follows: "If my daughter K. [plaintiff] should marry, and die without children, or die previous to her brother and sister, then the property given or bequeathed her shall revert to her brother B. and her sister C., or their heirs, and to share alike." Later in the will testatrix provided: "By this I intend that the bequest to K., circumstanced as above stated, shall pass," etc. The fourth clause provided that these bequests were conditioned on the support of testatrix's hus-

band by "my three children conjointly," and appointed K. executrix. *Held*, that plaintiff, having married, took a base or conditional fee in the undivided one-third of the real estate, and of the personalty mentioned in the third clause, defeasible by her death without issue, before the death of her brother or sister.—*Beck v. Ennis*, 7 N. Y. S. 264.

23. The Revised Statutes of New York abolished the distinction between executory devises and contingent remainders, and included both under estates in expectancy, which included future estates. These were defined as limited to commence in possession at a future day, and were classified as vested and contingent; the latter being limited to or upon some uncertain person or event. A will, after making various provisions, contained the following clause: "Thirty-Fifth. I request my said executors and trustees to obtain * * * an act of incorporation of an institution to be known as the 'Tilden Trust,' with capacity to establish and maintain a free library and reading-room, * * * and to promote such scientific and educational objects as my said executors and trustees may more particularly designate. * * * In case said institution shall be incorporated in a form and manner satisfactory to my said executors and trustees," within two lives in being, "I hereby authorize my said executors and trustees to organize the said corporation, designate the first trustees thereof, and to convey to, or apply to the use of, the same, the rest, residue, and remainder of all my real and personal estate not specifically disposed of, * * * or so much thereof as they may deem expedient," subject to the special trusts therein created. "But in case such institution shall not be so incorporated" within the times mentioned, "or if my said executors and trustees shall deem it inexpedient to convey said" residue, "or any part thereof, or to apply the same, or any part thereof, to the said institution, I authorize" them to apply it, "after making good the said special trusts herein directed to be constituted, * * * to such charitable, educational, and scientific purposes as in the judgment of my said executors and trustees will render the rest, residue, and remainder of my property most widely and substantially beneficial to the interests of mankind." *Held*, that this clause was not an executory devise, as the beneficiary took nothing by virtue of the will itself, but only by the acts of the trustees, who had power to determine whether it should be benefited at all or not, and as the portion it was to take was uncertain; but that it created a trust, or conferred on the executors and trustees a power in trust.—*Tilden v. Green*, 7 N. Y. S. 382.

Perpetuities.

24. Testator, by his will, made his three executors trustees to create and maintain a benevolent institute, directing them to vest in it all his property not otherwise disposed of, and to apply to the legislature for a charter of incorporation; "and, in case said charter shall not be obtained within the life of the longest liver of my executors," then over to the city of New York, to be strictly devoted to the charitable uses declared in the will. *Held*, that both the primary and substituted gifts were void because limited on three lives, in violation of the statute against perpetuities.—In re Wood's Estate, 7 N. Y. S. 886.

25. Testator devoted part of his estate to the creation and maintenance of a musical college, for which he directed his three executors to apply to the legislature for a charter; and, in case of the death of the longest lived of the three before the charter should be granted, he gave the fund in trust to the city of New York for certain purposes. *Held*, that the bequest was void, under the law forbidding perpetuities.—People v. Simonson, 7 N. Y. S. 861.

26. A testator, after making various bequests, appointed three of his sons executors of his will and trustees of his estate, and declared: "I direct that my said trustees shall take and hold my said property and estate * * * for a period of six years from and after my decease, the estate being chargeable with the foregoing bequests and legacies. * * * After the payment of said legacies, said property and estate shall be managed for the benefit of my said three sons, * * * who shall annually render to each other" a statement of the rents and profits, and of all transactions relating to such estate; and "at the expiration of the said six years the rest and residue of my estate, real and personal, * * * shall belong to my said sons, * * * share and share alike." There was also a clause forbidding partition of the estate "so devised and bequeathed to my three sons in trust, as aforesaid, until the expiration of six years;" and providing that, "in case either of said three sons" shall attempt to partition or divide the land, he shall forfeit all claim to the estate. The last clause of the will authorized the "said three sons" to mortgage the real estate in order to pay the legacies. *Held*, that it was not testator's intention to vest the title in his sons as trustees, thus suspending the power of alienation in violation of the law against perpetuities, (1 Rev. St. N. Y. p. 723, § 15;) but he intended them to be tenants in common of the estate, and absolute owners thereof, subject to the charge of the payment of legacies.—Greene v. Greene, 7 N. Y. S. 80, 284.

Rights of devisees and legatees.

27. A testator, after giving certain property to his wife, gave his farm and the rest of his personal property to his children, providing that all advancements made to his children, as shown by his books, should be charged up against their several interests in division of the estate. Two years after the will was made, the testator entered on his books against the accounts of three of his children a memorandum of a settlement in full of advancements made to them. *Held*, that no advancements were chargeable to either of them on the division of the property, but they took their shares without deduction.—Webster v. Gray, 7 N. Y. S. 266.

28. Testatrix in her will provided as follows: "After all my lawful debts are paid and discharged, I give and bequeath to Mary F. Emerson * * * my house and lot in the village of Dundee, if I am possessed of one at my death; or, if I am not possessed of one, I order my executor * * * to pay to the said Mary F. Emerson \$2,000, on condition," etc. After sundry money bequests, the will continued: "I order that in case my estate exceeds the amount of the above bequests to each individual, then my executor must pay to the above persons the excess in the proportion as the amounts of the bequests are to the whole amount," etc. *Held*, that Mary F. Emerson was a residuary legatee, and entitled to share with the other beneficiaries in any moneys remaining undistributed after the payment of the particular legacies.—In re Hoover's Estate, 7 N. Y. S. 288.

29. Testator bequeathed to his wife, during her life, \$40,000, "including the proceeds of any and all insurance policies on my life, payable to her or otherwise." He directed the sum to be invested, and the income paid to her. After giving her the homestead and certain personalty, he proceeded: "The foregoing bequests and devises * * * are in lieu of dower, but, if the use and income thereof shall be insufficient for her reasonable support, * * * my executors shall pay any deficiency from any other property." Later, the will directed that the executors hold in reserve at least \$10,000 during the life of the wife, and pay her such part as might be needed for her comfortable support, and that the residue of the income be paid to the residuary legatee. The will then proceeded: "I direct that the principal of such fund in reserve shall, after the death of my wife," become a part of the residuary legacy. He then gave "all the rest, residue, and remainder of my property in three equal shares," etc. The wife was made one of the executors. Testator had three policies of life insurance, amounting to \$10,000,

payable to his wife, and another, of \$5,000, payable to his executors. *Held*, that the "fund in reserve" was the additional \$10,000, and not the \$40,000, and that the widow, by electing to stand by the will, did not relinquish her right to the \$10,000 insurance money, as being money bequeathed by the testator, which was not his own.—*In re Hayden's Estate*, 7 N. Y. S. 818.

80. A testator bequeathed to his wife, for life, one-third of the use and income of his land, without alluding to taxes and other expenses, and directed his executors to lease the remaining two-thirds, and out of the rents "to pay all taxes, expenses, and repairs, and all other charges thereon," and to divide the residue between his children, for life, "and, after their death, I do devise and bequeath the same to their heirs, in fee, forever." *Held*, that the widow was entitled to one-third of the rents and profits, undiminished by taxes or other expenses.—*Starr v. Starr*, 7 N. Y. S. 580.

81. Where a will directs the investment of a sum sufficient to produce a certain annuity, which the executors are to pay to testator's widow, a release executed by the widow to part of the executors, from all claim on them either as executors or individuals on account of the annuity, past or future, does not operate to reduce the annuity, but only to discharge the released executors from liability.—*Cocks v. Haviland*, 7 N. Y. S. 871.

82. Rev. St. N. Y. p. 749, § 4, (8 Rev. St., 7th Ed., p. 2305) providing that, whenever any real estate subject to a mortgage executed by a testator shall pass to a devisee, the latter shall satisfy the mortgage out of his own property, in the absence of a contrary express direction in the will, does not apply to a mortgage executed by a testator to indemnify the mortgagee from liability for accommodation indorsements to be made by him; and a note on which the mortgagee becomes indorser, and which the mortgage is assigned to secure, is payable out of the testator's personality.—*Cochrane v. Hawver*, 7 N. Y. S. 907.

Rights of devisees and legatees— Charge on specific devise.

83. A general legacy is not charged on land devised specifically by a former clause of the will, simply from the fact that the devisee is also made executor and legatee of the residuum of the estate (which consists entirely of personality) after all claims against the estate are paid.—*Smith v. Atherton*, 7 N. Y. S. 300.

84. The fact that a devisee of land was also appointed executor, and accepted the trust, did not make him personally liable for a legacy, nor create a charge on the devised land, as he was not directed person-

ally or as executor to pay the legacy, which was simply given to the legatees generally, with no direction to any one to pay it.—*Smith v. Atherton*, 7 N. Y. S. 300.

Action to construe will.

85. Under Code Civil Proc. N. Y. § 1808, which provides that an action may be maintained to determine the validity, construction, or effect of a testamentary disposition, the sister and heir at law of a testator, who is not a beneficiary, but who contests the validity of a devise, cannot sue in equity for a construction of the will.—*Ruppel v. Schlegel*, 7 N. Y. S. 986.

WITNESS.

See, also, *Deposition; Evidence.*

Fees, see *Costs*, 11.

Privileged communications—Attorneys.

1. In an action by the grantor's widow to have an absolute deed declared a mortgage, though the testimony of the grantor's counsel, that the grantor told him that he had a great deal of money from defendant, and requested him to prepare the deed, may be a disclosure of a privileged communication, its admission is not prejudicial to plaintiff.—*Sidway v. Sidway*, 7 N. Y. S. 421.

2. A notary is not incompetent to testify as to where an acknowledgment of a deed was taken, though he was also employed by the grantor as attorney to draw the deed, as such testimony does not disclose professional communications, within the prohibition of Code Civil Proc. N. Y. § 885.—*Mutual Life Ins. Co. v. Corey*, 7 N. Y. S. 989.

8. Compelling defendant, in an action for breach of marriage promise, to testify whether he gave to his counsel all the letters received from plaintiff, is not prohibited by Code Civil Proc. N. Y. § 885, which prescribes that the attorney "shall not be allowed to disclose a communication made by his client to him, or his advice given thereon, in the course of his professional employment."—*Chellis v. Chapman*, 7 N. Y. S. 78.

4. Under Code Civil Proc. N. Y. § 886, allowing a person to waive the right of having his communications with his counsel kept secret, a party may call his counsel to testify to conversations between them.—*Smith v. Crego*, 7 N. Y. S. 86.

5. A communication to his counsel by one party, in the presence of the other, is not privileged.—*Smith v. Crego*, 7 N. Y. S. 86.

6. Under Code Civil Proc. N. Y. § 885, prohibiting attorneys from testifying as to communications by clients in the course of

business, an attorney cannot testify as to any act or word of his client on the subject of his will or its execution.—In re O'Neil's Estate, 7 N. Y. S. 197.

7. The testimony of an attorney that he drew a deed in controversy, and counseled plaintiff in regard to the subject-matter thereof, is inadmissible, except so far as it relates to the fact that he drew the deed.—Barry v. Coville, 7 N. Y. S. 36.

—Physicians.

8. Code Civil Proc. N. Y. § 884, which declares that a physician shall not be allowed to disclose information which he has acquired while attending a patient in a professional capacity, applies where the physician is called as a witness in proceedings for the probate of a will.—In re Connor's Will, 7 N. Y. S. 855.*

9. An attending physician can testify as to the declarations of a patient as to making a will, and his advice on that subject.—In re O'Neil's Estate, 7 N. Y. S. 197.*

Transactions with decedents.

10. Code Civil Proc. N. Y. § 829, provides that on the trial of an action a party or person interested in the event shall not be examined as a witness in his own behalf or interest, against a person deriving his title or interest from, through, or under a decedent, by assignment or otherwise, concerning a personal transaction or communication between the witness and decedent. In an action to enforce specific performance of an oral agreement with a decedent to convey land against decedent's grantee, it appeared that decedent was plaintiff's father, and that, in the presence of his wife, and plaintiff and his wife, the latter two being seated together, he had turned to them and said: "My son, I give you the farm. I want you to go on it and live. You may have all you make of it. Fix it up, and when I die it shall be yours; but I will keep the title while I live, that you may neither burden or lose it during my life-time;" that plaintiff assented thereto; and that his wife said nothing, because the father disliked her, and she feared that he would change the arrangement if she spoke. *Held*, that plaintiff's wife was a party to the transaction, though not named in the agreement, as the arrangement was a family affair, and the farm was intended to be a home for plaintiff and his family.—Erwin v. Erwin, 7 N. Y. S. 365.

11. Plaintiff's wife, in such case, is interested in the event of the action, within section 829, because of her inchoate right of dower in the land, which would attach on recovery of a judgment by plaintiff.—Erwin v. Erwin, 7 N. Y. S. 365.

12. In an action by the grantor's widow to have an absolute deed declared a mort-

gage, defendant's evidence as to a conversation between herself and the grantor with reference to the transaction, which conversation was testified to by plaintiff, was admissible under the exception of Code Civil Proc. N. Y. § 829, providing that a party interested in an action shall not be examined as a witness in his own behalf against a person deriving his interest or title from a deceased person, concerning a transaction or communication between the witness and the deceased person, except where the person so deriving interest or title is examined in his own behalf.—Sidway v. Sidway, 7 N. Y. S. 421.

13. Under Code Civil Proc. N. Y. § 829, providing that a party shall not be examined as a witness in his own behalf concerning a personal transaction or communication between the witness and a deceased person, except where the testimony of the deceased person is given in evidence concerning the same transaction or communication, a cross-examination of the defendant concerning the meaning of statements contained in a letter written by him to one of the plaintiffs, who has since died, does not render defendant competent to testify to a conversation between him and the plaintiff, preceding the writing of the letter, and which caused it to be written.—Weston v. Reich, 7 N. Y. S. 784.

14. The husband of the contestant of a will having testified for her on the trial before the surrogate, and contestant having died thereafter, this testimony of the husband, though he became interested in the result of the action by his wife's death, may be read on the trial at the circuit, under Code Civil Proc. § 830, providing that where a party has died since the trial of an action, decedent's testimony, or that "of any person who is rendered incompetent by the provisions of the last section, taken or read in evidence at the former trial," may be given in evidence at a new trial.—In re Budlong, 7 N. Y. S. 289.

15. Testimony of the widow of a testator as to the contents of letters written by her to a contestant of the will at the instance of the testator is not testimony as to transactions with decedents, forbidden by Code Civil Proc. N. Y. § 829.—In re Budlong, 7 N. Y. S. 289.

16. Although a question does not appear to be obnoxious to Code Civil Proc. N. Y. § 829, providing that a party shall not be examined as to transactions had with a decedent, yet it is properly excluded when a previous answer to substantially the same question is incompetent.—Sallade v. Gerlach, 7 N. Y. S. 181.

Examination.

17. In an action for injuries received by plaintiff by being thrown from defendant's

car, where the driver had testified for defendant that he was taking his car down as he usually did, plaintiff was properly allowed to ask him if he usually walked his horses across J. street, and also to cross-examine him on his schedule time.—*Murray v. Brooklyn City R. Co.*, 7 N. Y. S. 900.

18. Where defendant has testified that when he was about to erect a stable alleged to constitute a nuisance plaintiff said it was "all right," plaintiff may be allowed to answer a direct question, and state that he did not say it.—*Robinson v. Smith*, 7 N. Y. S. 88.

Credibility.

19. Where a witness testifies as to a former statement, "I might have sworn to it," the party calling him cannot ask, "If you did so swear, was it true?" as the effect of such question is to discredit his own witness.—*Morris v. Wells*, 7 N. Y. S. 61.

20. Plaintiff may contradict the statement of a witness for defendant, even though such statement is made on plaintiff's cross-examination of the witness.—*Darragh v. Ross*, 7 N. Y. S. 864.

21. Defendant may be asked on his cross-examination to explain statements in his testimony contradicting his answer to the

complaint.—*Chellis v. Chapman*, 7 N. Y. S. 78.

WRITS.

See, also, *Arrest; Attachment; Certiorari; Execution; Garnishment; Habeas Corpus; Injunction; Mandamus; Replevin.*

Supplemental summons, see *Parties*, 4.

Service on non-residents.

1. Under Code Civil Proc. N. Y. § 435, providing that an order for the service of a summons on a defendant residing within the state may be made on satisfactory proof that proper and diligent effort has been made to serve the summons on the defendant, and that the place of his sojourn cannot be ascertained, or that, if he is within the state, he avoids service, so that personal service cannot be made, such substituted service cannot be had on a defendant who is absent as a theatrical manager, and whose location at any time can be ascertained, and who is attending to his business without any attempt to avoid service.—*Ottman v. Daly*, 7 N. Y. S. 897.

2. It can make no difference that if such service is not allowed the statute of limitations will run against the action.—*Ottman v. Daly*, 7 N. Y. S. 897.

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Illustration: The case of *Brewer v. First* is in N. Y. Supp. vol. 7, page 244. It can be cited as from Hun's the citation opposite "244" (Supplement page column) in this table, i. e., "54 Hun, 116."

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89	"	8	215	372	"	634	549	"	310	644	"
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91	"	*633	219	376	"	635	551	"	636	645	"
92	"	*633	220	377	"	637	553	"	637	645	"
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* Reported as Memorandum, without opinion, in Hun's Reports; given in full in the Supplement.

* Reported as Memorandum in New York Superior Court Reports; given in full in the Supplement.

* Reported in Surrogates' Reports.

b Not reported in New York Superior Court Reports.

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